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IMMEDIATE RELIEF SUBMISSIONS OF THE INTERESTED PARTY NISHNAWBE ASKI NATION (NAN)

May 19, 2016

Litigation with a conscience.

Docket: 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

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

-and-

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

IMMEDIATE RELIEF SUBMISSIONS OF THE INTERESTED PARTY NISHNAWBE ASKI NATION (NAN)

May 19, 2016

Falconers LLP
Barristers-at-law
10 Alcorn Ave., Suite 204
Toronto, Ontario
M4V 3A9

Julian N. Falconer (L.S.U.C No. 29465R)
Akosua Matthews (L.S.U.C. No. 65621V)
Anthony Morgan (L.S.U.C. No. 64163F)

Tel: (416) 964-0495
Fax: (416) 929-8179

Lawyers for the Interested Party
Nishnawbe Aski Nation (NAN)

TO: **CANADIAN HUMAN RIGHTS TRIBUNAL**
Attn: Dragisa Adzic, Registry Officer
160 Elgin Street, 11th Floor
Ottawa, ON K1A 1J4
Email: dragisa.adzic@tribunal.gc.ca

AND TO: **Anne Levesque, Sébastien Grammond,**
David P. Taylor, & Sarah Clarke
JURISTES POWER | POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4
Phone: (613) 702-5568
Fax: 1 (888) 404-2227
Email: dtaylor@juristespower.ca

Counsel for the Complainant,
First Nations Child and Family Caring Society of Canada

AND TO: **David C. Nahwegahbow**
NAHWEGAHBOW, CORBIERE
Genoodmagejig/Barristers & Solicitors
5884 Rama Road, Suite 109
Rama, ON L3V 6H6
Email: dndaystar@nncfirm.ca

Stuart Wuttke
ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
Phone: (613) 241-6789
Fax: (613) 241-5808
Email: swuttke@afn.ca

Co-Counsel for the Complainant, Assembly of First Nations

AND TO: **Jonathan Tarlton, Melissa Chan, Patricia MacPhee,**
Terry McCormick and Ainslie Harvey
Atlantic Regional Office, JUSTICE CANADA
Duke Tower, 5251 Duke Street, Suite 1400
Halifax, NS B3J 1P3
Phone: (902) 426-5959
Fax: (902) 426-8796
Email: Jonathan.Tarlton@justice.gc.ca, melissa.chan@justice.gc.ca,
patricia.macphee@justice.gc.ca, Terry.McCormick@justice.gc.ca,
ainslie.harvey@justice.gc.ca

Counsel for the Respondent, the Attorney General of Canada

AND TO: **Daniel Poulin and Samar Musallam**
Litigation Services Division
CANADIAN HUMAN RIGHTS COMMISSION
344 Slater Street, 9th Floor
Ottawa, ON K1A 1E1
Phone: (613) 947-6399
Fax: (613) 943-3089
Email: daniel.poulin@chrc-ccdp.gc.ca, samar.musallam@chrc-ccdp.gc.ca

Counsel for the Canadian Human Rights Commission

AND TO: **Maggie Wente**
Olthius, Kleer, Townshend LLP
250 University Avenue, 8th Floor
Toronto, ON
M5H 3E5
Phone: (416) 981-9330
Fax: (416) 981-9350
Email: MWente@oktlaw.com

Counsel for the Interested Party, the Chiefs of Ontario

AND TO: **Justin Safayeni**
STOCKWOODS LLP BARRISTERS
TD North Tower
77 King Street West, Suite 4130
P.O. Box 140
Toronto-Dominion Centre
Toronto, ON M5K 1H1
Phone: (416) 593-3494
Fax: (416) 593-9345
Email: justins@stockwoods.ca

Counsel for the Interested Party, Amnesty International

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INTRODUCTION

"This is the season for change. The time is now."[1]

1. This case is about remedying child welfare discrimination against First Nations children and youth living on reserve. The impact of this discrimination, however, is not uniform.

2. First Nations children and youth living in northern and remote communities have experienced discrimination in unique and particular ways that are connected to their distance from Canadian urban centres. As such, to effectively address this discrimination, this honourable Tribunal must first and foremost recognize that the remedies it orders must be adequately reflective and responsive to the circumstances of First Nations children and youth living in northern and remote communities. The submissions provided herein are offered by Nishnawbe Aski Nation ("NAN") for the purpose of informing the Tribunal on how this can be accomplished through its orders for immediate relief.

3. The sincere hope and expectation of NAN is that with the benefit of these submissions, the Tribunal will avoid taking a one-size-fits-all approach to remedying the discrimination it has found regarding the delivery of child welfare services to 163,000 Aboriginal children. The Tribunal must guard against inadvertently perpetuating child welfare discrimination against children and youth living in northern and remote communities by ordering ineffective remedies in the form of a blanket solution to a nuanced problem.

4. NAN respectfully submits that there is no prospect of fashioning truly effective remedies, immediate or otherwise, without a full appreciation of the conditions experienced by all of

[1] Please refer to the Tribunal's May 5, 2016 Ruling, 2016 CHRT 11, at para 41.

those whom the Tribunal seeks to protect. The Tribunal clearly appreciates this issue, as evidenced by the Tribunal's observations that "NAN's direct affiliation with remote communities experiencing these issues will ensure their interests inform any remedy issued by the Panel and will assist in crafting an effective and meaningful response to these issues."[2]

5. The dilemma posed by addressing inequities in respect of northern remote communities can be best understood against the backdrop of remedies already being considered in these proceedings. Quite fairly, the Caring Society, with the support of the Chiefs of Ontario ("COO"), the Assembly of First Nations ("AFN") and the Canadian Human Rights Commission ("the Commission"), has proposed that Canada pay $5 million in prevention services. This $5 million in prevention services is to be divided amongst the First Nations Child and Family Services ("FNCFS") agencies in Ontario, in proportion to the population of First Nations children residing on reserve.

6. At first blush, this form of immediate relief should be welcomed. While accepting the good intentions of all involved, this remedy risks perpetuating inequities for northern remote children, as the combination of dramatically higher costs of living and travel, combined with lower population numbers, means that the proposed remedy would look very different for northern remote children. This "northern remoteness reality", if not fully understood and accommodated, risks undermining the good work of all involved.

7. Quite clearly, one size does not fit all. For this reason, NAN respectfully proposes applying a "Northern Remoteness Framework" to the remedies phase of these proceedings. Underlying this framework is the premise that an effective remedy can only be based on a

[2] Please refer to the Tribunal's May 5, 2016 ruling, 2016 CHRT 11, at para 10.

comprehensive data set that accounts for the various remoteness factors, and which also accounts for the cost of service delivery in northern and remote communities.

8. These submissions include arguments supporting the Tribunal's jurisdiction to make the orders for immediate relief that NAN proposes. More specifically, it will be argued that the Tribunal has jurisdiction to make these orders pursuant to sections 16(1), 16(3), and 53(2)(a)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 ("CHRA"). This argument will be more thoroughly developed in PART IV of these submissions.

9. The Tribunal has issued a call to action, stating: "**This is the season for change. The time is now**."[3] NAN as a newly added interested party, has crafted the following immediate relief submissions, inspired both by the opportunity for change and the Tribunal's clear intention to order effective remedies.

PART I: APPLYING A NORTHERN REMOTENESS FRAMEWORK

10. NAN submits that it is necessary to develop and apply an overarching principle that can inform the crafting of short-term and long-term remedies for the discrimination against children from NAN communities. The sheer expanse of land and the significant distances between each community affects all aspects of life for remote northern communities. As a consequence, all forms of service delivery - child welfare services being no exception - are more expensive, time-consuming and logistically challenging to deliver.

[3] Please refer to the Tribunal's May 5, 2016 Ruling, 2016 CHRT 11, at para 41.

11. As the Parties are aware, NAN is a Political Territorial Organization ("PTO") which represents the socioeconomic and political interests of its 49 First Nation communities. Of the 49 First Nations, 34 are remote fly-in communities, accessible only by air or winter ice road. NAN's territory encompasses a total estimated population of 45,000 people, both on and off reserve. NAN territory encompasses James Bay Treaty 9 territory and Ontario's portion of Treaty 5. The total land mass of NAN territory covers two-thirds of Ontario and spans an area of 210,000 square miles west to the Manitoba border, east to the Quebec border and north to the 51st parallel of the coast of James and Hudson's bays. This area exceeds the size of many countries (for example, Spain).

12. In NAN's motion record for leave to intervene, the affidavit of Bobby Narcisse, sworn in his capacity as NAN's Director of Social Services, succinctly summarized the realities of northern remoteness. Mr. Narcisse's affidavit listed a series of challenges, particular to child welfare service delivery, which are either unique to remote communities and/or are challenges that are exacerbated by the isolation of NAN communities. Specifically, Mr. Narcisse identified: transportation; staff recruitment and retention; access to suitable housing; lack of other social services; geography and socio-demographic characteristics; high cost of food; health problems; high cost of heat and hydro; economic poverty; growing suicide epidemic; and, funding disparities as several factors affecting NAN communities.[4]

13. The conditions identified by Mr. Narcisse are consistent with the findings of a recent study by the Canadian Center for Policy Alternatives, which found that:

[4] Please refer to "NAN's Motion to Intervene Record", the Affidavit of Bobby Narcisse, dated March 18, 2016, found at Tab 3, pages 10-13.

> In actuality, poverty can be exacerbated by other conditions, creating additional barriers for children trying to achieve their full potential. On reserve, these barriers include chronic underfunding of schools and child welfare services, crowded housing, and undrinkable water, to name just a few of many examples.[5]

14. NAN sought leave to intervene to bring an important voice to the table: a voice which will speak to the unique considerations of life in the remote north based on the experience of NAN's member communities. On the simple premise that unique problems require unique remedies, NAN's submissions are informed by a particular lens: a 'Northern Remoteness Framework'.

15. Applying a Northern Remoteness Framework is an important counterweight to the unfortunately common thinking that those who do not reside in urban centres are unseen and unheard. This '**out of city, out of mind'** mentality creates a blind-spot where even the well-meaning and well-intentioned can propose and implement policies that perpetuate the already significant inequities experienced by people who live in the remote north. The goal of applying a Northern Remoteness Framework is to assist the Tribunal with ensuring that any ordered remedies are informed by the very stark realities of northern remoteness.

16. While NAN will consistently refer to the concept of a 'Northern Remoteness Framework' throughout these and future submissions, we pause here to note that members of First Nations communities living in the remote north have reservations about the term 'remote'. This term has often become a proxy for those that are forgotten and sidelined. It is important to remember that the expansive geography of NAN's territory is home, above all else. 'Remoteness' is really a proxy for 'distance between communities'. In that sense, those

[5] NAN Book of Authorities, Canadian Centre for Policy Alternatives May 2016 Report, titled "Shameful Neglect: Indigenous Child Poverty in Canada", at Tab 1, at page 6 ["CCPA Report on Indigenous Child Poverty"]

living in Ottawa or Toronto are as remote from NAN Communities as NAN Communities are to Ottawa and Toronto. We are all 'remote' from each other. These present proceedings afford us all an opportunity to shrink the expanse of not only geography, but also the inequitable range of child welfare services between regions.

PART II: IMMEDIATE RELIEF

A. Overview of Proceedings

17. On January 26, 2016, this Honourable Tribunal issued the *First Nations Child and Family Caring Society v. Canada* decision ("*The Caring Society* decision")[6] in which it found that the Respondent Aboriginal Affairs and Northern Development Canada racially discriminated against 163,000 First Nations children by grossly underfunding child and family services on reserves. In Ontario, child and family services are provided through the Ontario *1965 Agreement.*[7]

18. The Tribunal deferred questions of remedies until it heard further from the Parties. Submissions on immediate relief were filed in the period from February through April 2016.

19. On April 26, 2016, the Tribunal issued its second ruling, deciding on a number of immediate relief items.[8] The Tribunal declined to order immediate relief in respect of the Ontario *1965 Agreement* due to Nishnawbe Aski Nation's ("NAN") March 18, 2016, motion seeking leave to intervene as an interested party.[9] The Tribunal indicated that it would address immediate

[6] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2.
[7] Please refer to the Memorandum of Agreement Respecting Welfare Programs for Indians, filed in evidence at CHRC BOD, Ex. HR-11, Tab 214. ["*1965 Agreement*, CHRC BOD, Ex. HR-11, Tab 214"]
[8] Please refer to the Tribunal's April 26, 2016 Ruling, 2016 CHRT 10.
[9] Please refer to the Tribunal's April 26, 2016 Ruling, 2016 CHRT 10, at paras 26-29.

relief items with respect to the *1965 Agreement* upon receiving further submissions from the Parties.

20. On May 5, 2016, the Tribunal issued its third Ruling, granting NAN's motion to intervene as an interested party to the proceedings. The Tribunal noted that allowing a new party at this late stage in the proceedings is "rare"; however, the Tribunal identified several unique factors regarding NAN's participation:[10]

> [10] The NAN's direct affiliation with remote communities experiencing these issues will ensure their interests inform any remedy issued by the Panel and will assist in crafting an effective and meaningful response to these issues. In the same vein, the NAN's involvement in developing an Aboriginal child and youth strategy with the Government of Ontario may assist the Panel in crafting effective and meaningful orders to address other findings it made regarding the *1965 Agreement* …
>
> [11] Given these findings in the Decision and the Panel's order to reform the *1965 Agreement* to reflect those findings, it is clear that the NAN has an interest in these proceedings and, more importantly, that it can potentially provide a meaningful contribution and assistance in determining the remaining remedial issues in this case.[11]

21. The Tribunal recognized the importance of hearing further on the unique considerations which affect remote northern communities and the parties have generously accommodated NAN by providing courtesy copies of submissions and materials in the last several weeks.

22. As already noted, the Parties, aside from NAN, have made immediate relief submissions in respect of the *1965 Agreement* in Ontario. In summary, those particular immediate relief items are:

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[10] Please refer to the Tribunal's May 5, 2016 Ruling, 2016 CHRT 11, at para 13.
[11] Please refer to the Tribunal's May 5, 2016 Ruling, 2016 CHRT 11, at paras. 10-11.

i. That the Tribunal order Canada to update the schedules of the *1965 Agreement* to reflect the current version of the *Child and Family Services Act* (Ontario) and ensure funding for the full range of statutory services, including band representatives, children's mental health, and prevention services; and,

ii. That the Tribunal order Canada to pay an amount of $5 million, adjusted for the rate of inflation from 2012, to be divided amongst the First Nations Child and Family Services ("FNCFS") agencies in Ontario in proportion to the population of First Nations children residing on reserve, in order to provide prevention services; and,

iii. That the Tribunal order Canada to fund Ontario First Nations to have Band Representatives, effective the commencement of the fiscal year 2016-2017. Further that this funding should not be taken from the $5 million in funds proposed for prevention services.

23. NAN's submissions below will provide greater detail, building on the above immediate relief items. However, a summary of NAN's position is as follows:

i. NAN agrees with updating the schedules of the *1965 Agreement,* and has further identified immediate relief items under the *1965 Agreement* for services such as supports for children with special needs, medical travel costs, and family healing services;

ii. NAN agrees with an order for immediate funding for prevention services. NAN's position, however, is that any ordered funding should be allocated pursuant to a 'Remoteness Quotient' (described in detail below);

iii. NAN agrees with the order to fund Band Representatives. To date, no Party has identified a particular funding allotment for Band Representatives. NAN's position, similar to the above, is that any funding allocations should be informed by a Remoteness Quotient.

24. Although the proceedings to date are still at the 'immediate relief' stage, the Parties have already identified one long-term relief item in respect of the *1965 Agreement*. The Parties have called for an Ontario Special Study, which would be conducted by experts (within nine months to one year), to review the *1965 Agreement*. The aim of this study would be to review the adequacy of the *1965 Agreement* in achieving: 1) comparability of services; 2) culturally appropriate services that account for historical disadvantage; and 3) ensuring the best interests of the child are paramount. The results of the study will inform the negotiation process for the next phase of remedies.

25. NAN agrees with the proposed Ontario Special Study. NAN adds that the study should be properly funded and that such funding should again be informed by the Remoteness Quotient. Additionally, NAN takes the position that the Ontario Special Study should specifically include a component that thoroughly reviews and addresses the effects of the *1965 Agreement* on northern remote communities. To avoid the perpetuation of inequities between regions that currently exists, this regional approach is necessary. Lastly, the Ontario Special Study should include a comprehensive data collection component. At the conclusion

of the Ontario Special Study, this data should be made readily available on a public accessible platform. In NAN's experience, the paucity of publicly available data has, and continues to be, a hindrance to First Nations and PTOs in virtually all social services matters. The Ontario Special Study should not create additional 'access to information' barriers.

B. Remoteness Quotient

i. *The Data Gap*

26. The Tribunal has ruled that Canada has been racially discriminating against 163,000 First Nations children by not providing enough funding for child and family services on reserves.

27. Crafting an effective remedy requires an understanding of both the problem and the impact of any proposed solution. The basis of an effective remedy is one that is based on current and fulsome data.

28. In the proceedings to date, there has been a recognition of the fact that there is often either significant gaps in the available data, or a complete lack of data. In the Auditor General's 2008 report on the FNFCS Program, the Auditor General stated:

> Given the program's impact on the lives of on-reserve First Nations children and families, we expected that INAC would define and collect appropriate information to manage and account for the program.[12]

29. The Auditor General goes on to note that:

> while INAC has defined some of its information needs, they relate mostly to its funding responsibilities. The information that INAC requires from First Nations and provinces is focused on the volume of services to children in care, such as days of care, and the costs of services provided to these children. This information is tied directly to actual payments to provinces and First Nations agencies and supports program budgeting and funding allocation to regions.

[12] Please refer to the 2008 Office of the Auditor General's Report, already filed in evidence at CHRC BOD, Ex. HR-03, Tab 11, at section 4.83, page 27. ["OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11"]

> 4.85 **We found that INAC collects very limited information on the actual services funded through its funding formula.** It does not have information on the volume of activities carried out by the First Nations agencies, such as the number of contacts with child welfare services, the number of assessments, or the major reasons why children come into care. **This information would be important in assessing the need for child welfare services in a particular First Nations community and providing guidance to determine the funding needed**. It could also help in monitoring how the funding provided was used and what difference it made in the lives of on-reserve First Nations children and their communities.
>
> 4.86 We found that INAC has little information on the outcomes of its funding on the safety, protection, or well-being of children living on reserves. As a result, it is unaware of whether or to what extent its program makes a positive difference in the lives of the children it funds.
>
> 4.87 In our view, **the information INAC collects falls far short** of the child welfare program and policy requirements. The Department is aware of the limits of the information it possesses, and it has identified some of the additional information it needs. These are steps in the right direction. However, a lot of work remains to clearly identify performance indicators and the necessary information, and to obtain the cooperation of the provinces and First Nations in collecting this information and ensuring its quality.[13] [emphasis added]

30. The Auditor General went on to recommend that INAC implement a "Smart Reporting" exercise intended to collect "meaningful, relevant, and timely performance data, while ensuring the reduction of reporting requirements on First Nations."[14]

31. The findings in the Auditor General's 2008 report neatly summarize a reality that First Nations and PTOs know from front-line experience. In virtually all aspects of social services delivery, the necessary data to make informed policy decisions is either missing or there are significant data gaps.

32. These data gaps are particularly concerning in the current proceedings. The Tribunal has made a significant finding of discrimination and is now proceeding with ordering remedies;

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[13] Please refer to the OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11, at sections 4.85-4.87, pages 27-29.
[14] Please refer to the OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11, at page 29.

however, virtually all remedies or potential remedies have a data component. The concern is that by proceeding with ordering remedies in the absence of the appropriate data, the resulting remedy will likely be ineffective.

33. Implementing ineffective remedies raises a much larger concern: the victims of the recognized discrimination are in danger of having an ineffective remedy compound the original discrimination, through no fault of their own. It is no answer to discrimination to provide an ineffective remedy. Effective remedies are built on comprehensive data.

34. By way of an example, an immediate relief item in respect of the *1965 Agreement* has already been identified by the Parties: specifically, that Canada pay $5 million in prevention services to be divided amongst the FNCFS agencies in Ontario in proportion to the population of First Nations children residing on reserve. This apportionment by population is not reflective of the northern remoteness reality where a dollar is worth less in the north. The cost of living in remote northern communities is considerably higher than in communities with year-round road access to urban centers. An effective remedy can only be based on a comprehensive data set that accounts for the various remoteness factors, and which also accounts for the cost of service delivery in northern and remote communities.

35. NAN has received information that there are preliminary discussions amongst the Parties regarding a forthcoming update to the Canadian Incidence Study of Child Abuse and Neglect ("CIS"). NAN is supportive of this initiative and will participate in future discussions amongst the Parties regarding updates to the CIS.

36. NAN further adds that any ordered remedies by the Tribunal regarding data collection should specifically include and review remoteness factors, such that any ordered remedies are effective in the context of remote and northern communities.

ii. *Remoteness Quotient*

37. In its January ruling, the Tribunal identified the compounding inequities caused by the failure to properly understand and account for the impact of remoteness on child welfare service delivery both nationally and in Ontario.

38. Nationally, the Tribunal referenced the *Wen:De Report* which identified that the remoteness factor in Directive 20-1 was "considered by 90% of the agencies canvassed to be too small to compensate for the actual costs of remoteness."[15] The Tribunal went on to state that "[a]s noted by the reports on the FNCFS Program, given the funding under Directive 20-1 and the EPFA is largely based on population levels, small and remote agencies are also disproportionately affected by AANDC's funding formulas."[16]

39. In British Columbia:

> small agencies are the norm, not the exception, including many that serve rural and isolated communities. Their challenges include added costs for travel, accessing the communities they serve and getting and retaining staff…[17]

40. In Saskatchewan and Nova Scotia, the Tribunal noted that:

> [o]ne third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner.[18]

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[15] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 181.
[16] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 313.
[17] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 313.
[18] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 291.

41. In Ontario, the Tribunal noted that:

> [p]roviding child welfare services in remote and isolated Northern Ontario communities was also identified….as a challenge for CASs. Those challenges include the added time and expense to travel to the communities they serve, where some communities do not have year round road access and where flying-in can be the only option for accessing a community.[19]

42. Notwithstanding that the Tribunal has identified and articulated many of the particular effects of remoteness on child welfare service delivery, no remedy has been proposed which responds to the unique considerations faced by remote northern communities. As an example, the already proposed immediate relief remedy that Canada pay $5 million for prevention services, divided in proportion to the population of First Nations children residing on reserves, is an example of a well-intentioned "big-tent" approach which actually perpetuates the inequities faced by remote northern communities.

43. The simple fact is that a dollar goes a lot further in First Nation communities with year-round road access to urban centers than it does in remote, northern fly-in communities. In the case of NAN First Nations, **34 of the 49 communities are accessible only by air or winter ice road**. *Formal equality* at first blush can result in *inequity* in effect. The result is that First Nations children in remote, northern communities receive *fewer services* because the value of a dollar is significantly reduced by the realities of service delivery in the remote north.

44. What is required is a *mechanism* by which the remote northern realities can be assessed, quantified, and applied to all remedies affecting remote communities. We call this

[19] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 231.

mechanism a 'Remoteness Quotient'. This Remoteness Quotient is the centrepiece of the Remote Northern Framework.

45. A Remoteness Quotient is not a new idea. The concept – sometimes referred to as a remoteness index or remoteness factor – is applied in the context of mining, electricity infrastructure, and healthcare. The concept, at its most basic level, involves the determination of a set of variables and a classification of communities according to those variables. The resulting classifications provide a proxy figure or value which should, if done properly, correspond to the relative degree of remoteness for each subject community.

46. We pause here to note that the concept of a remoteness factor briefly arose in the Tribunal's January 26, 2016, ruling wherein the Tribunal was summarizing an administrative allocation that FNFCS Agencies are eligible to receive. The corresponding formula includes a non-delineated "average remoteness factor".[20] There is no further detail on how such an "average remoteness factor" is determined, or whether such a factor applies to costs other than administrative expenses. It is unclear whether remoteness factors are specifically applied in Ontario under the *1965 Agreement*.

47. The Government of Canada's website provides a 'Band Support Program Policy' document regarding Band Support Funding ("BSF Policy").[21] The BSF Policy indicates that Band Support Funding is based on a nationally applied formula comprised of seven components. One component is a remoteness and environmental index. In Appendix 4 of the BSF Policy, Bands are categorized according to a variety of combinations of remoteness and

[20] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 126.
[21] NAN Book of Authorities, Band Support Funding Program Policy, at Tab 2. ["BSF Policy"]

environmental classifications and placed into four zones. The higher the zone, the more remote the community.[22] The BSF Policy on the Government of Canada's website is current as of January 15, 2016;[23] however, *the funding formula itself* was developed in 1983 and was last revised in 2005.[24] It is unclear if a similar funding formula involving remoteness indices is used in the context of child and welfare services under the *1965 Agreement* and whether such remoteness indices are applied to all or a portion of child welfare services. In any event, the formula in the BSF Policy is now well over a decade old and may be inapplicable or inappropriate in the context of child welfare services.

48. NAN has conducted a preliminary search into how remoteness factors are considered in other contexts. Newfoundland and Labrador's Statistics Agency has a February 2014 paper titled *Accessibility-Remoteness (A-R) Index Summary Paper* ("A-R Paper").[25] The A-R Index classifies communities within the province according to accessibility to government and community services. The A-R Paper notes that "[c]lassification of accessibility is a geographical approach that is defined in terms of road distance between an origin community and a set of services."[26] The A-R Paper goes on to list the following variables which were identified through consultations with numerous government departments.[27]

49. We note that the Commission filed a very helpful report by David Barnes and Vijay Shankar, titled, *Northern Remoteness: Study and Analysis of Child Welfare Funding Model Implications on Two First Nations Agencies Tikinagan Child and Family Services and*

[22] NAN Book of Authorities, BSF Policy, at Tab 2, pages 12-22.
[23] NAN Book of Authorities, BSF Policy, at Tab 2, page 25.
[24] NAN Book of Authorities, BSF Policy, at Tab 2, page 12.
[25] NAN Book of Authorities, Accessibility-Remoteness (A-R) Index Summary Paper: Newfoundland & Labrador Statistics Agency, February 2014, at Tab 3, page 2. ["A-R Paper"]
[26] NAN Book of Authorities, A-R Paper, at Tab 3, page 2.
[27] NAN Book of Authorities, A-R Paper, at Tab 3, pages 4-5.

Payukotayno: James Bay and Hudson Bay Family Services ("the Barnes report").[28] The Barnes report reviews the services gaps in the two agencies that operate in NAN communities: Tikinagan and Payukotayno. The Barnes report is particularly helpful as Tikinagan and Payukotayno are child welfare agencies which deliver services to NAN communities. The Barnes report begins by recounting a devastating overview of the northern remoteness realities in NAN communities:

> Nothing could have prepared the consultants for the impact of what was experienced in visiting the first community. In twenty-five years of Child Welfare service, this consultant had never witnessed such appalling conditions. The physical state of the office would not have met any standards that exist in the south. Windows were broken and in some cases boarded up, offices were cramped and overcrowded. This experience was to be repeated in other communities as well. The isolation factor for the staff in these communities was very real. Since you must fly into these communities, or travel over ice roads in the winter, you are totally dependent on weather conditions. It is not unusual for workers to be stranded for several days due to changing weather conditions. In addition, the risk of flying into communities or travelling over ice roads in all types of weather poses a physical safety risk for all staff involved in delivering service. In many communities there are not [sp] adequate facilities to support staff who may have to spend several days before the weather clears before they can return to their home base.
>
> ... **it is imperative that the agencies that were studied in this review, continue to be seen as unique in dealing with the challenges they face in carrying out the child welfare mandate**.[29] [emphasis added]

50. The proposed solution in the Barnes report was a remoteness funding model based on a remoteness factor which reflects the high costs of living and the extraordinary costs of providing services in remote northern communities. This funding model would take into account the following factors: the cost of living; demographics of northern communities

[28] Please refer to the 'Northern Remoteness Study and Analysis of Child Welfare Funding Model Implications on Two First Nations Agencies: Tikinagan Child and Family Services and Payukotayno: James Bay and Hudson Bay Family Services, found at Tab 219 of the Commission's materials. The report was entered into evidence on September 4, 2013 and assigned Exhibit # HR-011-219-094 and production number CHRC640. ["the Barnes Report"].

[29] Please refer to Barnes Report, CHRC BOD, Ex. HR-011-219-094, Tab 219, at Part 1, 'Overview', pages 3-4.

where children and youth form a significantly higher percentage of the population than the rest of Canada; the high rates of child deaths; and, high youth suicide rates.[30]

51. At the end of the Barnes report, there is a summary of both Tikinagan and Payukotayno's comments on how applying a remoteness factor would impact the level of service delivery for each agency. Tikinagan noted that a funding model informed by a remoteness factor would allow the agency to: hire additional staff; provide additional training for staff; allow more frequent contact with families; and, improve the agency's ability to monitor and assist with obtaining higher compliance ratings – among other things.[31] In the case of Payukotayno, the agency reported that under a remoteness factor funding model, the agency could: increase timely service delivery; attract and train workers who reside in the community; increase capacity for prevention programs; lower the caseload to staff ratio; and, increase the agency's ability to meet its clients' personal needs and expenses (i.e. clothing, travel for medical treatment, etc.).[32]

52. The Barnes report provides a good example of what NAN's proposed Remoteness Quotient could look like, and what a Remoteness Quotient could accomplish; however, the Barnes Report is the only study and analysis of northern remoteness, specifically in Ontario, that we were able to locate on this issue thus far. The Barnes report identified several data gaps for many NAN communities where the requisite data was simply unavailable. Further, the Barnes report was authored in 2006 and is outdated, though it provides a useful example of what a Remoteness Quotient could look like.

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[30] Please refer to Barnes Report, CHRC BOD, Ex. HR-011-219-094, Tab 219, at Part II, pages 2-13.
[31] Please refer to Barnes Report, CHRC BOD, Ex. HR-011-219-094, Tab 219, at Part II, pages 15-22.
[32] Please refer to Barnes Report, CHRC BOD, Ex. HR-011-219-094, Tab 219, at Part II, pages 23-30.

53. Without a Remoteness Quotient and without the underlying data regarding remoteness factors, the Tribunal risks ordering ineffective remedies which perpetuate the discrimination faced by northern, remote communities. Remedies need to be particularized in order to be effective and ineffective remedies perpetuate and compound the original discrimination.

54. NAN takes the position that a Remoteness Quotient is a central piece of a Northern Remoteness Framework. Further, NAN takes the position that a Remoteness Quotient should be applied to all remedies affecting remote, northern communities.

55. **NAN submits the following immediate relief**: that the Tribunal update the Barnes report by engaging experts to develop a Remoteness Quotient. These experts will collect data for the development of a credible, empirically-based Remoteness Quotient. This exercise should be funded by the Federal Government. NAN further proposes that the selection of the experts should be by joint-agreement between NAN and the Federal Government and that if no agreement is capable of being reached within a reasonable but short timeframe, that the Tribunal select the appropriate experts. Lastly, NAN proposes that this Remoteness Quotient apply to all funding remedies, including the immediate relief request for prevention funding and Band Representatives. In the case of Band Representatives, applying a Remoteness Quotient would reflect the fact that a Band Representative in the north may have qualitatively different duties, caseloads and costs (i.e. travel and transportation).

C. Children with Special Needs

56. In NAN's leave to intervene materials, evidence was submitted to highlight the challenges of inadequate and inaccessible health and social services faced by NAN communities. In

NAN's motion for leave to intervene, NAN's Deputy Grand Chief, Anna Betty Achneepineskum, provided affidavit evidence stating that the vastness and isolation of NAN's member communities creates "numerous overlapping difficulties, including inadequate housing, community services, medical services, dental services and education."[33] NAN's Director of Social Services, Bobby Narcisse, also attested to this issue as a chronic problem facing NAN communities in his affidavit evidence. These challenges have resulted in disproportionately high incidents of diabetes, child obesity, heart disease and other chronic diseases within NAN communities.[34]

57. The absence of adequate health and social services has also significantly contributed to fostering "fourth world living conditions" in some NAN communities, which, coupled with a general lack of adequate mental health, counselling and addiction services, has also contributed to an ongoing suicide epidemic across NAN communities.[35] The dearth of adequate services in First Nations and remote communities has also been cited as reason behind an inordinately high number of accidental deaths in First Nations communities, as well as large numbers of alcohol-related deaths amongst young people. It has also been identified as partially responsible for the disproportionately high infant mortality rates and incidences of sudden infant death syndrome (SIDS).[36] In such living conditions, there are *few* children who are *not* at risk.

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[33] Please refer to "NAN's Motion to Intervene Record", the Affidavit of Deputy Grand Chief Anna Betty Achneepineskum, dated March 18, 2016, found at Tab 2, page 4-5, para 14.
[34] Please refer to "NAN's Motion to Intervene Record", the Affidavit of Bobby Narcisse, dated March 18, 2016, found at Tab 3, pages 12-13, para 35.
[35] NAN Book of Authorities, NAN Press Release titled 'NAN Issues Call to Action on Suicide Crisis', January 20, 2016, at Tab 4, page 1. ["NAN Press Release re. Suicide Crisis"]. See also the Barnes Report, CHRC BOD, Ex. HR-011-219-094, Tab 219, at page 4.
[36] Please refer to "NAN's Motion to Intervene Record", the Affidavit of Deputy Grand Chief Anna Betty Achneepineskum, dated March 18, 2016; 'Goudge Report, Chapter 20, found at Exhibit C, page 1 of Chapter.

58. The tragic truth is that northern remoteness realities have served to create social, health and education disparities in NAN communities. The impact of these disparities on the developmental health of children in northern remote communities is such that the special needs of children and youth almost always involve compounded and concurrent conditions. As a result, the required intervention is complex. Further, the lack of adequate access to quality special needs diagnostic and care services in these communities has created a significant backlog of unidentified special needs. NAN has found that absent early detection, attention and intervention, the complexity of children's special needs increases dramatically and unnecessarily compromises the quality of life of children with special needs and the families responsible for their care.

59. Suffice it to say, the chronic and discriminatory under-serving of the health of remote First Nations communities has resulted in a deplorable panoply of social ills in the areas of northern First Nations' health, mental health and social well-being.

60. The Tribunal referred to and summarized the *Abinoojii Mental Health Services Mandate* document in its January 26, 2016, ruling, stating that:

> AANDC does not have a mandate for mental health services and that these expenditures are not eligible under the *1965 Agreement*. Rather, Health Canada has the federal mandate on mental health and provides funding through a number of programs. However, those programs focus more on prevention and mostly deal with adult issues. Health Canada programs do not specifically deal with children in care and do not cover mental health counselling.[37]

61. It is in this context - where there is a paucity of health services to NAN communities - that NAN communities have been additionally struggling with a crisis related to special needs.

[37] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 241.

No group of children suffers more due to discriminatorily inadequate access to health and social services than First Nations children with special needs.

62. A child or youth can be deemed as having special needs because of developmental challenges in their: speech and language development; physiology; psychological health; behavioural characteristics; and/or mental health status. In light of this, NAN defines special needs rehabilitative and support services as including occupational therapy, physiotherapy, speech and language therapy, hearing testing, vision testing, developmental screening, and psychological assessments. The assistance equipment needed to support a child with such needs is also considered by NAN to be included in the definition of special needs services.

63. NAN has *very recently* engaged in a new provincial government initiative which would develop an Ontario Special Needs Strategy. The Strategy identifies occupational therapy, physiotherapy, and speech and language therapy as the core services that are being re-organized and improved. NAN's Public Health Education department has been gathering information from NAN First Nation community members, front line workers, and regional service providers to assist in the development of a proposal that outlines options for a NAN-specific system of services for children with special needs. The special needs focus groups, interviews, and surveys were conducted by NAN from January to March 2016 and involved speaking with community workers, parents, educators and service providers. The proposal will be developed in the spring/summer of 2016, and submitted to the Ministry of Children and Youth Services shortly thereafter.[38]

[38] An official copy of the findings for the Ontario Special Needs Strategy is not yet publicly available.

64. The study has identified two stark realities: (1) families are afraid to have their children assessed because they fear that their children might be taken away and placed into care if identified as having special needs, or if a child welfare agency sees there are no services to help the child and the family; and (2) parents are sometimes forced to place children and youth with a child welfare agency so that the children/youth can be identified and access necessary services.

65. This reality was recognized by the Tribunal in its January 26, 2016, ruling where the Tribunal stated that "[H]aving to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made."[39]

66. The primary issue of concern with respect to special needs services is that there is a lack of assessment and identification services for children with special needs within NAN communities. As such, the mere assessment of a special need requires travel outside the community. It has been a theme throughout NAN's submissions, that northern remoteness realities are compounded by the requirement for travelling significant distances to access services which are normally available in urban communities.

67. In the case of children with special needs, travel outside of the community for special needs assessment or services, even with a physician referral, is not funded by Non-Insured Health Benefits (NIHB) or Health Canada. The absence of assessment services presents one of many roadblocks to obtaining necessary special needs supports. This again brings families back to the difficult decision of deciding whether they should place their child with a child welfare

[39] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 382.

agency in order to increase the chance of accessing assessments and further special needs services.

68. Additionally, caregivers of children with special needs are at a high risk of burn-out. Through NAN's involvement in the Ontario Special Needs Strategy, NAN has been repeatedly told by parents that respite care is a critical need. Without respite care, caregivers may opt to place children in care out of exhaustion resulting from lack of supports.

69. Special needs health service providers are also over-extended with unsustainably high caseloads of children with complex conditions. NAN has also been told that these workers are in desperate need of diagnostic and service resources and tools to meet the considerable special needs demands in NAN communities.

70. One of the Caring Society's immediate relief submissions with respect to the *1965 Agreement* was for the Tribunal to order Canada to update the schedules of the *1965 Agreement* to reflect the current version of the *Child and Family Services Act* in order to ensure funding for the full range of statutory services, including prevention services, amongst other things.[40]

71. As noted above, NAN defines special needs rehabilitative and support services as including occupational therapy, physiotherapy, speech and language therapy, hearing testing, vision testing, developmental screening, and psychological assessments, in addition to the assistance equipment needed to support a child with such needs. To be effective and sustainable in NAN and other northern remote communities, these special needs services

[40] This immediate relief request was also supported by the AFN and COO.

must be multidisciplinary and holistic. They must also serve to help rebuild capacity in communities so that eventually, community-based designed and developed solutions to these issues can be deployed and implemented within the community by the community.

72. **NAN submits the following immediate relief**: that the Tribunal update the *1965 Agreement* to include prevention services and that the Tribunal order that the definition of 'prevention services' be expansive enough to include special needs rehabilitative and support services and respite care. The rationale is that if special needs supports and respite care are provided as a form of prevention services, this may lead to a *reduction* of children in care. Families will no longer have to make the decision between keeping their families together and having a child's special needs unassessed or supported, on the one hand, **or** breaking families apart by placing a child in care with an increased chance that the child will have better access to supports.

D. Medical Travel Costs

73. Effective remedies to the discriminatory service restrictions of the *1965 Agreement* cannot be realized without meaningfully accounting for the northern remoteness. As such, the Tribunal should also order that the definition of services under the agreement be expanded to include travel to access needed and prescribed health services which are not readily available within remote and northern communities.

74. Access to special needs services offers an example that illustrates the imperative of including travel costs within the expanded definition of all services under the *1965 Agreement*.

Currently, the NIHB Medical Transportation Policy Framework ("MTPF") defines the terms and conditions under which the costs of medical transportation services will be covered.[41]

75. Among the transportation services covered by the MTPF are diagnostic tests and medical treatments covered by the Ontario Health Insurance Plan ("OHIP"). However, special needs services are not covered by OHIP. As a result, transportation for assessment and other special needs services are denied by NIHB. The prohibitive cost of travel leaves children and youth without access to special needs assessment.

76. Under Ontario's *Child and Family Services Act*, children perceived to be in a position where they are not being provided with required care by their families may be viewed as children in need of protection. In other words, children with special needs are at a significantly higher than normal risk of being apprehended due to their inability to travel to get access to the care and services they require. Instead of reasonably accommodating children with special needs, the MTPF punishes them and exacerbates their condition of disadvantage by not providing funding for travel to access special needs services and assessments.

77. While the preceding paragraphs have focused only on special needs, the problem of prohibitive travel costs impeding access to needed health services is one that impacts all children and youth in northern remote communities. This is because the MTPF permits travel costs to be denied for a child or youth seeking health care services for which they have a referral from a doctor or appropriately designated health care professional. The lack of funding for travel costs for children and youth to receive medical attention for medically

[41] NAN Book of Authorities, Non-Insured Health Benefits (NIHB) Program: First Nations and Inuit Health Branch, Health Canada, Medical Transportation Policy Framework, Effective Date: July 2006, at Tab 5. ["NIHB Medical Transportation Policy Framework"].

prescribed services dramatically exacerbates the health care crisis amongst children and youth in NAN communities.

78. In light of the above considerations, this submission seeks to build on the immediate relief requests made by the Caring Society in relation to prevention services. It is NAN's submission that funding travel for special needs assessments and services as well as all physician-prescribed health services should be recognized by this Tribunal as an important measure that would serve to prevent and reduce child apprehensions and keep First Nations families and communities together.

79. **NAN submits the following immediate relief**: that the Tribunal update the *1965 Agreement* to include prevention services and that the Tribunal order that the definition of 'prevention services' includes funding for travel to access all physician-prescribed health services, including special needs assessments and services.

E. Family Healing

80. The ongoing tragic suicide epidemic gripping First Nations communities across Ontario, and the underlying conditions of socio-economic disadvantages, is evidence that hundreds of Indigenous families and communities across the province are living in crisis. As has been recognized by the Ontario Government, this state of crisis is sometimes manifested in the form of domestic violence, which is in large measure due to the effects of intergenerational trauma.[42]

[42] NAN Book of Authorities, Canadian Press Article titled 'Ontario Pledges $100 million to help end violence against indigenous women', February 26, 2016, at Tab 6. ["CP February 26, 2016, Article re. Ontario $100 Million Pledge"]

81. Undoubtedly, children and youth living in families in crisis are significantly more vulnerable and likely to be apprehended and brought into care. The Canadian Centre for Policy Alternatives specifically addressed this issue in their May 2016 report, which stated:

> In Canada half of all **foster children** are Indigenous. One of the contributing factors has been **discriminatory underfunding of child welfare services** on reserves, as confirmed by a recent ruling of the Canadian Human Rights Tribunal. Chronic underfunding, combined with low incomes, makes **child removal dramatically more common in Indigenous families.**[43] [Emphasis added]

82. The separation of children from their families compounds and perpetuates the traumas of families in crisis.

83. Investing in families in crisis is an effective prevention measure that helps to address the precarious family circumstances that can often lead to children being placed in care, such as violence in the home. For instance, such investments can enable families to have access to services that work with families to develop and strengthen healthy responses to high levels of stress, frustration and sometimes anger that result from living in conditions of chronic poverty, unemployment, poor housing and food insecurity. With access to services that help address the immediate causes and consequences of crisis within families, children and youth have a greater chance of remaining in their homes as opposed to being exposed to the unstable and harmful realities of living in a home in crisis.

84. In recognition of the importance of addressing the needs of families experiencing domestic violence, and the vulnerability of the children and youth living in such conditions, NAN supports the Ontario Government's recent commitment to dedicate $80 million over three

[43] NAN Book of Authorities, CCPA Report on Indigenous Child Poverty, at Tab 1, Page 21.

years to launch a new Family Well-Being Program to support First Nations families in crisis.[44] NAN welcomes and supports this important initiative and looks forward to working with the Ontario Government to ensure that the initiative can most effectively address violence within First Nations families and communities. However, it is important to recognize that the Ontario Government is not alone in creating the conditions that have resulted in First Nations families living in crisis. The Government of Canada, which has a fiduciary responsibility to First Nations communities, has also played a significant role in causing and contributing to the conditions that lead to crisis within First Nations families.

85. **NAN submits the following immediate relief**: that the Tribunal order the update the *1965 Agreement* to include prevention services and that the Tribunal order that the definition of 'prevention services' include family well-being programs suited to families in crisis. Further, that the Tribunal order the Government of Canada to match the Ontario Government's financial commitment to serving families in crisis under the Family Well-Being Program. Lastly, that the Tribunal order that the above detailed Remoteness Quotient apply to any funding remedies under a prevention service model, including the announced Family Well-Being Program.

86. This requested remedy builds on that which has already been requested by the Caring Society. The Caring Society's submissions call for the schedules of the *Agreement* to reflect the current version of the *Child and Family Services Act* (Ontario), and require that funding be provided for the full range of statutory services, including prevention services. NAN's

[44] NAN Book of Authorities, CP February 26, 2016 Article re. Ontario $100 Million Pledge, at Tab 6.

proposal is that the term "prevention services" be expanded to include supports such as those identified under the announced Family Well-Being Program.

F. Residential Care

87. Although residential care services are only provided once a child has already been taken out of their home and brought "into care", these services must still be delivered in a manner that best supports First Nations family and community healing.[45] This is because residential care services also have an important role to play in prevention efforts to remedy the traumatic legacy of child protection services, which have historically served to unnecessarily break up First Nations families, and by extension, communities. By placing First Nations children in care in families, facilities and communities that are geographically or culturally remote from the child's home community, residential services help to perpetuate cultural genocide. The structure and funding of the *1965 Agreement* must urgently address this reality.

88. To do so, NAN supports and would add to the Caring Society's call for enhanced and extended funding for prevention services through having the *1965 Agreement* reflect the current version of the *Child and Family Services Act* (Ontario). NAN would add that funding for prevention services should be directed specifically towards ensuring that residential care services keep First Nations children and youth as reasonably close and connected to their home communities as possible.

[45] The Ontario Government defines residential care as care for children and youth in Ontario that is provided through foster care, kinship care, group homes, residential secure treatment facilities and youth justice facilities. For the purposes of this submission, "residential care" refers only to care provided in relation to child protection matters pursuant to Ontario's *Child and Family Services Act*. This includes, foster care, kinship care and group homes. Refer to NAN Book of Authorities, Provincial Advocate for Children and Youth Report, titled 'Searching Home: Reimagining Residential Care', February 2016, at Tab 7.

89. The imperative of providing residential care services in a manner that keeps First Nations children and youth connected and close to their communities is reflected in a recent report by the Office of the Provincial Advocate for Children and Youth entitled, *Searching for Home: Reimagining Residential Care* [*Searching for Home*].

90. In *Searching for Home*, the Provincial Advocate's report states the following:

> It was striking and heartbreaking to us to **see the number of First Nations youth living in homes or residential care settings so far from their communities**. Severed from their culture, community, family and friends, it was almost impossible to imagine the courage and strength it took for them to cope with their life circumstances. **We feel that First Nations children and youth need to be closer to their communities and that they deserve a support and intervention strategy of their own.** [46] [emphasis added]

91. In light of the above, the report asserts that:

> The Ministry of Children and Youth must adopt **a principle that children and youth living in residential care must live as close as possible to their home communities. This is especially critical for First Nations, Aboriginal and Métis children from remote and fly-in communities.** Funding and resources must be provided to communities, service providers and residential care providers to ensure this fundamental need is met.[47] [emphasis added]

92. **NAN submits the following immediate relief**: that the Tribunal order the Respondent to adopt the principle of that children and youth living in residential care must live as close as possible to their home communities and that the necessary funding and resources be provided to ensure this fundamental principle is met. This relief would diminish to some extent the degree to which residential care services in Ontario impede NAN children and youth's ability

[46] NAN Book of Authorities, Provincial Advocate for Children and Youth Report, titled 'Searching Home: Reimagining Residential Care', February 2016, at Tab 7, page 19. ["PACY 'Reimagining Residential Care' Report"]
[47] NAN Book of Authorities, PACY 'Reimagining Residential Care' Report, at Tab 7, page 50.

to maintain a strong and healthy connection to their history, culture, heritage, community and identity.

G. Capital Infrastructure

93. The Tribunal's January 26, 2016, Ruling stated: "In terms of infrastructure and capacity building, the *1965 Agreement* has not provided for the cost-sharing of capital expenditures since 1975."[48] Clause 4 of the *1965 Agreement* provided for 90% of capital costs for the first five years of the agreement.[49] This agreement was extended for an additional five years.

94. The Tribunal noted that the impact of the absence of cost-sharing for capital expenditures resulted in "high-risk children [being] sent outside the community to receive services because there is no treatment centre in the community."[50]

95. In the Barnes report, the consultants noted that:

> "[m]ost of the communities currently served by either Tikinagan or Payukotayno have limited infrastructure that can house community-based staff. When facilities are obtained, the costs of renting and maintaining them are high. A premium is paid for space. … All these factors add to the high costs incurred by the Societies, in maintaining the basic level of service for staff to operate from."[51]

96. The Judith Rae report, *The 1965 Agreement: Comparison & Review*, noted that the:

> First Nations agencies have seriously inequitable capital infrastructure resources compared to mainstream agencies. Many of the First Nations agencies on reserve are operating out of small sub-standard buildings or trailers, while mainstream agencies have larger, higher-quality facilitates. Adequate funding is

[48] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 245.
[49] Please refer to the *1965 Agreement*, CHRC BOD, Ex. HR-11, Tab 214, at pages 8-9.
[50] Please refer to the Tribunal's January 26, 2016 Ruling, 2016 CHRT 2, at para 245.
[51] Please refer to Barnes Report, CHRC BOD, Ex. HR-011-219-094, Tab 219, at page 17.

> not available to First Nations agencies to acquire capital infrastructure or provide building maintenance and repair.[52]

97. The Rae report draws attention to the fact that the funding of capital costs, which stopped in 1975, is notable as this was before any First Nations Child and Family Services agencies were created in Ontario.[53]

98. **NAN submits the following immediate relief**: that the Tribunal order the Respondent to re-instate the cost-sharing of capital expenditures under the *1965 Agreement* at the same allocation of 90%, as provided for in clause 4 of the *Agreement*.

H. Eligibility

99. Another significant and discriminatory barrier to services flowing from the *1965 Agreement* concerns the restrictive residency and status requirements for a child or youth to receive services. To be eligible for federal funding under the cost-sharing formula, children and youth must be: 1) registered Indians, and; 2) resident on reserve, on Crown land, or off reserve less than 12 months.[54]

100. This residency and status requirement under the *1965 Agreement* has a significantly negative impact on children and youth in NAN communities who are entitled to be registered, but for a variety of reasons, have not been. NAN has come to learn that the documentation requirements for registering a child at birth or while still young present a serious challenge. For example, the requirement that two parents provide signatures to complete the child's registration documents is a barrier for families where one parent is inaccessible for extended

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[52] Please refer to the Judith Rae, The1965 Agreement: Comparison & Review (2009), already filed into evidence and assigned: CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/3, at page 56. ["Judith Rae Report"].
[53] Please refer to the Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/3, at page 63.
[54] Please refer to the Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/3, at page 23.

periods of time due to, for instance, living and/or working off-reserve in a location that is many hours away and/or requires air travel. Additionally, many families do not have the resources in the community to fill out the necessary documentation. The result of this is that each year countless First Nation children and youth, who for all intents and purposes, are eligible for registration but have not registered, are denied access to much needed health and social services. The cost of this medical and health care falls entirely on families who are already living with the compounded burdens of poverty, unemployment, food insecurity and often the health challenges of other family members in the home.[55]

101. **NAN submits the following immediate relief**: that the Tribunal order the amendment of the *1965 Agreement's* residency and registered status requirements to ensure that not only children and youth who are registered are eligible for services but also children and youth who are *entitled to be registered*.

I. National Advisory Committee and Regional Tables

102. The Government of Canada has committed to re-establishing a National Advisory Committee and Regional Roundtables as a measure of immediate relief that Canada will undertake to address discriminatory disparities in the funding of child welfare services on reserves.[56] NAN supports this initiative and is seeking: participation on the National Advisory Committee and Regional Roundtables; and, a Northern Remoteness Subcommittee with representation from NAN.

[55] NAN Book of Authorities, NAN Press Release & Background, titled 'First Nation Leaders Declare Health and Public Health Emergency', at Tab 8.
[56] Please refer to the Respondent's immediate relief submissions of: March, 10, 2016 at pages 1, 2-3; April 6, 2016, at pages 3-4; and, April 18, 2016, at page 2.

103. **NAN submits the following immediate relief**: that the Tribunal order that NAN be granted representation at the National Advisory Committee and Regional Roundtables. Further, NAN requests that this Tribunal order that the National Advisory Committee include Northern Remoteness Subcommittee with representation from NAN.

PART III: RELIEF REQUESTED

104. NAN has a direct affiliation with First Nations communities experiencing the unique, complex and multivariate challenges of providing child welfare services in the remote north. The Tribunal recognized that this affiliation establishes NAN's interests in the remedies to be ordered by this Tribunal.

105. Towards this end, NAN's submissions have applied a Northern Remoteness Framework for adoption by this Panel as a guide or organizing principle to support and inform the implementation of all immediate relief remedies to be ordered by this Tribunal, which impact northern remote communities. NAN's submissions are meant to ensure that the remedies ordered by this honourable Tribunal reflect and redress the challenging northern remoteness realities of providing child welfare services to distant, dispersed and disadvantaged communities like those of NAN. This is most particularly reflected in NAN's submissions concerning special needs, travel, family healing and the establishment of National Advisory Committee and Regional Roundtables.

106. While NAN has proffered a number of distinct measures that it submits that the Panel should adopt as immediate relief, it should be recognized that these measures are *consistent with* and *build upon* the immediate relief submissions made by the Parties.

107. Moreover, it should be recognized that the orders requested by NAN are also consistent with the recommendations from the Truth and Reconciliation Commission (TRC), which were referenced in the March 3, 2016, immediate relief submissions submitted by the AFN. In particular, NAN's submissions are consistent with the following child welfare recommendations made by the TRC:

> We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by: ii. **Providing adequate resources** to enable Aboriginal communities and child-welfare organizations to **keep Aboriginal families together** where it is safe to do so, and to **keep children in culturally appropriate environments, regardless of where they reside**. [emphasis added].
>
> We call upon the federal government, in collaboration with the provinces and territories, to **prepare and publish annual reports on** the number of Aboriginal children (First Nations, Inuit, and Métis) who are in care, compared with non-Aboriginal children, as well as the reasons for apprehension, the **total spending on preventive and care services by child-welfare agencies**, and the effectiveness of various interventions. [emphasis added]
>
> We call upon the federal, provincial, territorial, and Aboriginal governments to develop **culturally appropriate parenting programs for Aboriginal families**.[57] [emphasis added]

108. Below is a summary of the remedies for immediate relief that NAN requests that this Honourable Tribunal order in the present proceedings. NAN reiterates its position that to be effective at responding to the discriminatory impacts of the *1965 Agreement*, the Tribunal must apply a Northern Remoteness Framework to each of these remedies. This is essential for the purpose of ensuring that all remedies ordered are responsive to the unique challenges faced by northern communities and thereby serve to prevent continued discrimination of First Nations children and youth in northern remote communities:

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[57] Please refer to the AFN's immediate relief submissions of March 3, 2016, which attaches a copy of the Truth and Reconciliation Commission of Canada: Calls to Action, section heading 'Child Welfare', at page 1 of document. ["TRC Calls to action re. Child Welfare"].

i. **Filling the Data Gap**: that the Tribunal make the following 'data collection' orders to fill the existing data gap, specifically:

   i. **Barnes Report Remoteness Quotient:** That the Tribunal update the Barnes report by engaging experts to develop a comprehensive Remoteness Quotient.

      Further, that the Tribunal apply the Remoteness Quotient to <u>all</u> remedies affecting remote northern communities, in particular:

      (1) any and all funding for prevention services;

      (2) funding for Band Representatives; and,

      (3) funding for the Ontario Special Study. Further, that the Tribunal order that the selection of the experts be by joint-agreement between NAN and the Federal Government.

      The Tribunal should further order that if no agreement is reached within a reasonable but short timeframe, the Tribunal will proceed to select the appropriate experts;

   ii. **Ontario Special Study**: That the Tribunal order that the Ontario Special Study specifically include a comprehensive data collection which includes a specific component studying the effects of the *1965 Agreement* on northern remote communities; NAN submits that the Ontario Special

Study should be properly funded and that such funding should again be subject to the Remoteness Quotient;

iii. **Canadian Incidence Study of Child Abuse and Neglect:** That the Tribunal order the updating of the Canadian Incidence Study of Child Abuse and Neglect and order that an update to the study include data collection specific to remote and northern First Nations communities; and,

iv. **Other Data Collection Orders by the Tribunal:** Where the Tribunal makes any *other* data collection orders, that such orders should specifically include comprehensive data collection for remote and northern First Nations communities;

ii. **Update *1965 Agreement*:** That the schedules of the *1965 Agreement* be updated to reflect the current version of Ontario's *Child and Family Services Act*, and ensure funding for the full range of statutory services, including band representatives, children's mental health, and prevention services.

Further, that the Tribunal ensure that the definition of "prevention services" is expansive enough to include the following:

i. **Children with Special Needs:** Special needs rehabilitative and support services and respite care for families of children with special needs;

ii. **Medical Travel Costs:** Funding for travel to access all physician-prescribed health services, including special needs assessments and services;

iii. **Family Healing:** Programs aimed at addressing the needs of families in crisis.

iii. **Matched Funding for Family Well-Being Program:** That the Government of Canada match the Ontario Government's financial commitment, of $80 million over three years, to serve families in crisis under the Family Well-Being Program;

iv. **Residential Care:** That the Tribunal order the Respondent to adopt the principle that children and youth living in residential care must live as close as possible to their home communities and that the necessary funding and resources be provided to ensure this fundamental principle is met;

v. **Capital Infrastructure:** Reinstate the cost-sharing of capital expenditures under the *1965 Agreement* at the same allocation of 90%, as provided for in clause 4 of the *1965 Agreement*;

vi. **Eligibility:** Ensure that all services under the *1965 Agreement* for children and youth are not only provided to those who are registered, but also those who are *entitled to be registered*; and,

vii. **National Advisory Committee and Regional Tables:** That NAN be granted representation at the National Advisory Committee; that the National Advisory Committee include a 'Northern Remoteness Subcommittee' with representation from NAN; and, that participation in the National Advisory Committee and Regional Tables be funded by Canada.

109. In the following section, we review the Tribunal's jurisdiction to order the above immediate relief remedies.

PART IV: JURISDICTION ON REQUESTED REMEDIES

J. Overview of the Tribunal's Jurisdiction

110. The remedies requested herein are within the Tribunal's jurisdiction to order pursuant to sections 16(1), 16(3), and 53(2)(a)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 ("*CHRA*").[58]

111. Sections 16(1) of the *CHRA* permits the Tribunal to consider an expansive variety of remedies including ordering a "special program, plan or arrangement" which would assist with preventing, eliminating and/or reducing the disadvantages created by the found discrimination. Section 16(1) of the *CHRA* reads as follows:

> **Special programs**
>
> 16 (1) It is not a discriminatory practice for a person to adopt or carry out a **special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination**, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group. [Emphasis Added]
>
> …

112. Further, section 16(3) of the *CHRA* permits the collection of information where the information is used for the purposes of a special program, plan or arrangement under section 16(1).

---

[58] See Schedule "A" of these submissions.

> **Collection of information relating to prohibited grounds**
>
> (3) It is not a discriminatory practice to collect information relating to a prohibited ground of discrimination if the information is intended to be used in adopting or carrying out a special program, plan or arrangement under subsection (1).[59]

113. Where a complaint under the *CHRA* is substantiated, as is the case in the current proceedings, section 53(2)(a)(i) of the *CHRA* enables the Tribunal to order the expansive remedies provided for in section 16(1). Section 53(2)(a)(i) reads as follows:

> **Complaint substantiated**
>
> 53 (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the **adoption of a special program, plan or arrangement referred to in subsection 16(1)**[60] [emphasis added]
>
> …

114. Both sections 16(1) and 53(2)(a) were interpreted in a case called *National Capital Alliance on Race Relations v. Canada (Department of Health & Welfare)*[61] ("the *Race Relations* decision"). The *Race Relations* decision states that the Tribunal's powers are not just limited to ordering the Respondent to cease the discriminatory practise. The Tribunal may go further

---

[59] See Schedule "A" of these submissions.
[60] See Schedule "A" of these submissions.
[61] NAN Book of Authorities, *National Capital Alliance on Race Relations v. Canada (Department of Health & Welfare)*, 1997 CanLII 1433 (CHRT), at Tab 9. ["*Race Relations* v. Canada"]

and order measures, including a special program, plan or arrangement, in order to prevent the same or a similar practice from occurring in the future.

> The Respondent argued that the Tribunal's jurisdiction is limited to making an order that HC cease the discriminatory practice. … As we indicated earlier in our reasons, we do not agree with this argument. Section 53(2)(a) of the CHRA gives this Tribunal the jurisdiction to make a cease and desist order. **In addition if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the CHRA**.[62] [emphasis added]

115. Although the *Race Relations* decision is about employment equity for visible minorities, the underlying principle is that the Tribunal's powers are broad enough to order remedies which prevent future discrimination. Those remedies can include a "special program, plan or arrangement". The terms 'special program, plan or arrangement', are *broad* enough to capture a variety of measures.

116. The scope of the Tribunal's jurisdiction to order expansive remedies was considered by the Supreme Court of Canada in the Action Travail des Femmes case, referenced as *CN v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114, 1987 CanLII 109 (SCC) ["*Action Travail des Femmes*"][63]. The *Action Travail des Femmes* case was about systemic gendered discrimination in the workplace, wherein the hiring practices of the employer perpetuated systemic discrimination against female workers, preventing their hiring and promotion within the company. In the *Action Travail des Femmes* case, the Canadian Human Rights Tribunal issued a 'Special Temporary Measures Order' which had three components: (1) firstly, CN was required to cease certain discriminatory hiring and

[62] NAN Book of Authorities, *Race Relations v. Canada*, Tab 9 at page 31.
[63] NAN Book of Authorities, *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 1987 CanLII 109 (SCC), at Tab 10. ["Action Travail des Femmes"]

employment practices; (2) secondly, the Tribunal ordered that CN reach a goal of 13% female participation in the target job positions and establish a requirement to hire at least one woman to fill every four job openings until that 13% goal was reached; and, (3) thirdly, the Tribunal required the collecting of hiring data and information in order to file periodic reports with the Commission.[64]

117. In the *Action Travail des Femmes* case, the employer argued that this 'Special Temporary Measures Order' was outside the jurisdiction of the Tribunal. The Supreme Court disagreed and found that the Tribunal's remedial powers were broad enough to include all parts of the 'Special Temporary Measures Order'. In the Supreme Court's *Action Travail des Femmes* decision, the court endorsed a dissenting opinion of a Federal Court of Appeal Justice, which stated that:

> s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent **future discrimination against identifiable protected groups** […] that **"prevention" is a broad term** and that it is often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future.[65]

118. The Supreme Court went on to note that:

> When confronted with such a case of "systemic discrimination" […] it may be that **the type of order issued by the Tribunal is the only means by which the purpose of the Canadian Human Rights Act can be met**.[66] [emphasis added]

[64] NAN Book of Authorities, Action Travail des Femmes, Tab 10, at pages 1126-1127.
[65] NAN Book of Authorities, Action Travail des Femmes, Tab 10 at 1141, "Jurisdiction on Remedy".
[66] NAN Book of Authorities, Action Travail des Femmes, Tab 10 at 1141, "Jurisdiction on Remedy".

K. Application to the Requested Remedies

119. In these submissions, NAN has proposed a number of remedies. NAN submits that the proposed immediate relief remedies can be ordered under sections 16(1), 16(3), and 53(2)(a)(i) of the *CHRA*.

120. Further, NAN submits that the Tribunal should look to both the *Race Relations* and the *Action Travail des Femmes* cases which interpret sections 16(1) and 53(2)(a)(i) of the *CHRA*. Both decisions indicate that the Tribunal's powers are broad enough to order expansive remedies, including special programs, plans or arrangements. In the *Action Travail des Femmes* decision, in particular, the remedy included both an employment equity target and the collection of data.

121. Although both the *Race Relations* and *Action Travail des Femmes* decisions are in the context of *employment equity*, NAN submits that the Tribunal can also apply the same lens in the context of these proceedings for the purposes of achieving *child welfare equity*.

122. As already stated, the *Action Travail des Femmes* case, in particular, involved a comprehensive remedial order which directed the employer to collect employment data with periodic reports. In the current proceedings, NAN is similarly requesting that the Tribunal make four 'data collection' orders, specifically:

    i. That the Tribunal order an update to the Canadian Incidence Study of Child Abuse and Neglect ("CIS") and ensure that an update to the CIS includes data collection specific to remote and northern First Nations communities;

ii. That the Tribunal order that the Ontario Special Study include comprehensive data collection with a specific component studying the effects of the *1965 Agreement* on northern remote communities;

iii. That the Tribunal order an update to the Barnes report by engaging experts to develop a comprehensive Remoteness Quotient; and,

iv. Where the Tribunal makes *any other* data collection orders, that such orders should specifically include comprehensive data collection for remote and northern First Nations communities.

123. The Canadian Human Rights Tribunal in the *Action Travail des Femmes* case ordered the collection of data. That order, in addition to other remedies, was upheld by the Supreme Court because the information was related to a prohibited ground of discrimination and the intended use of the information was to support a 'special program, plan or arrangement'. In the *Action Travail des Femmes* case, that 'special program, plan or arrangement' was the implementation of an employment equity program.

124. NAN submits that the Tribunal can similarly order data collection in the current proceedings, as articulated above. The data collection proposed by NAN will obtain information that is related to the prohibited grounds of discrimination identified in the current proceedings. Further, as NAN has argued above, this data will assist the Tribunal with ensuring that any ordered remedies which affect remote and northern communities will be informed by a particularized dataset specific to the northern remoteness realities. As such, the data collection *supports* other remedies ordered by the Tribunal. This is similar to the *Action Travail des Femmes* case where the data *supported* the employment equity program.

125. NAN has proposed a number of other immediate relief remedies which are not about the collection of data. These remedies include: updating the *1965 Agreement* to include an expanded concept of 'prevention services' to include special needs services, medical travel costs, family healing and well-being programs; matching provincial funding for family well-being programs; reinstating the capital infrastructure cost-sharing mechanism in the *1965 Agreement*; adopting a Residential Care principle; and, expanding eligibility requirements.

126. NAN submits that all of these remedies are examples of 'special programs, plans or arrangements' which are designed to prevent further discrimination and can be so ordered under sections 16(1) and 53(2)(a)(i) of the *Canadian Human Rights Act*.

SUMMARY

127. In sum, these submissions have been offered by NAN for the purpose of assisting the Tribunal in its aim to craft remedies for immediate relief that are adequately reflective and responsive to the circumstances of First Nations children and youth living in northern and remote communities. NAN has identified, explained and proposed a number of measures specifically tailored to enable the Tribunal to achieve this end.

128. Ordering the remedies proposed herein is an essential measure to account for the fact that the child welfare discrimination that is at the centre of this case has been experienced in very particular ways by First Nations children and youth living in northern and remote communities.

129. As such, NAN offers these submissions to ensure that the Tribunal's orders for immediate relief do not inadvertently serve to perpetuate child welfare discrimination by being

inattentive to the unique circumstances of northern remoteness realities of NAN and other First Nations communities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19TH DAY OF MAY 2016

Dated: May 19, 2016

FALCONERS LLP
Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, Ontario
M4V 3A9

Tel.: (416) 964-0495
Fax: (416) 929-8179

Julian N. Falconer (L.S.U.C. No. 29465R)
Akosua Matthews (L.S.U.C. No. 65621V)
Anthony Morgan (L.S.U.C. No. 64163F)

Lawyers for the Interested Party
Nishnawbe Aski Nation (NAN)

SCHEDULE "A' – STATUTES AND REGULATIONS

Canadian Human Rights Act, RSC 1985, c H-6

Special programs

16 (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

Advice and assistance

(2) The Canadian Human Rights Commission, may

(a) make general recommendations concerning desirable objectives for special programs, plans or arrangements referred to in subsection (1); and

(b) on application, give such advice and assistance with respect to the adoption or carrying out of a special program, plan or arrangement referred to in subsection (1) as will serve to aid in the achievement of the objectives the program, plan or arrangement was designed to achieve.

Collection of information relating to prohibited grounds

(3) It is not a discriminatory practice to collect information relating to a prohibited ground of discrimination if the information is intended to be used in adopting or carrying out a special program, plan or arrangement under subsection (1).

Complaint substantiated

53 (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

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

…

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Complainants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

IMMEDIATE RELIEF SUBMISSIONS OF THE INTERVENOR, NISHNAWBE ASKI NATION

FALCONERS LLP
Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A9

Julian N. Falconer (L.S.U.C.#29465R)
Akosua Matthews (L.S.U.C.#65621V)
Anthony Morgan (L.S.U.C.#64163F)

Tel: (416) 964-0495
Fax: (416) 929-8179

Lawyers for Nishnawbe Aski Nation

BOOK OF AUTHORITIES OF THE INTERVENOR
NISHNAWBE ASKI NATION (NAN)
IN FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA PROCEEDINGS

May 19, 2016

Litigation with a conscience.

Docket: 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

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

-and-

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

BOOK OF AUTHORITIES OF THE INTERVENOR NISHNAWBE ASKI NATION (NAN)

May 19, 2016

Falconers LLP
Barristers-at-law
10 Alcorn Ave., Suite 204
Toronto, Ontario
M4V 3A9

Julian N. Falconer (L.S.U.C No. 29465R)
Akosua Matthews (L.S.U.C. No. 65621V)
Anthony Morgan (L.S.U.C. No. 64163F)

Tel: (416) 964-0495
Fax: (416) 929-8179

Lawyers for the Intervenor
Nishnawbe Aski Nation (NAN)

TO: **CANADIAN HUMAN RIGHTS TRIBUNAL**
Attn: Dragisa Adzic, Registry Officer
160 Elgin Street, 11th Floor
Ottawa, ON K1A 1J4
Email: dragisa.adzic@tribunal.gc.ca

AND TO: **David P. Taylor**
JURISTES POWER | POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4
Phone: (613) 702-5568
Fax: 1 (888) 404-2227
Email: dtaylor@juristespower.ca

Counsel for the Complainant, First Nations Child and Family Caring Society of Canada

AND TO: **David C. Nahwegahbow**
NAHWEGAHBOW, CORBIERE
Genoodmagejig/Barristers & Solicitors
5884 Rama Road, Suite 109
Rama, ON L3V 6H6
Email: dndaystar@nncfirm.ca

Stuart Wuttke
ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
Phone: (613) 241-6789
Fax: (613) 241-5808
Email: swuttke@afn.ca

Co-Counsel for the Complainant, Assembly of First Nations

AND TO: **Jonathan Tarlton, Melissa Chan, Patricia MacPhee, Terry McCormick and Ainslie Harvey**
Atlantic Regional Office, JUSTICE CANADA
Duke Tower, 5251 Duke Street, Suite 1400
Halifax, NS B3J 1P3
Phone: (902) 426-5959
Fax: (902) 426-8796
Email: Jonathan.Tarlton@justice.gc.ca, melissa.chan@justice.gc.ca, ainslie.harvey@justice.gc.ca, patricia.macphee@justice.gc.ca, Terry.McCormick@justice.gc.ca

Counsel for the Respondent, the Attorney General of Canada

AND TO: **Daniel Poulin and Samar Musallam**
Litigation Services Division
CANADIAN HUMAN RIGHTS COMMISSION
344 Slater Street, 9th Floor
Ottawa, ON K1A 1E1
Phone: (613) 947-6399
Fax: (613) 943-3089
Email: daniel.poulin@chrc-ccdp.gc.ca, samar.musallam@chrc-ccdp.gc.ca

Counsel for the Canadian Human Rights Commission

AND TO: **Maggie Wente**
Olthius, Kleer, Townshend LLP
250 University Avenue, 8th Floor
Toronto, ON
M5H 3E5
Phone: (416) 981-9330
Fax: (416) 981-9350
Email: MWente@oktlaw.com

Counsel for the Interested Party, the Chiefs of Ontario

AND TO: **Justin Safayeni**
STOCKWOODS LLP BARRISTERS
TD North Tower
77 King Street West, Suite 4130
P.O. Box 140
Toronto-Dominion Centre
Toronto, ON M5K 1H1
Phone: (416) 593-3494
Fax: (416) 593-9345
Email: justins@stockwoods.ca

Counsel for the Interested Party, Amnesty International

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2.	Band Support Funding Program Policy. Dated January 15, 2016.
3.	Accessibility-Remoteness (A-R) Index Summary Paper: Newfoundland & Labrador Statistics Agency. Dated February 2014.
4.	Nishnawbe Aski Nation Press Release titled 'NAN Issues Call to Action on Suicide Crisis'. Dated January 20, 2016.
5.	Non-Insured Health Benefits (NIHB) Program: First Nations and Inuit Health Branch, Health Canada, Medical Transportation Policy Framework, Effective Date: July 2006.
6.	Canadian Press Article titled 'Ontario pledges $100 million to help end violence against indigenous women'. Dated February 23, 2016.
7.	Provincial Advocate for Children and Youth Report, titled 'Searching For Home: Reimagining Residential Care'. Dated February 2016.
8.	Nishnawbe Aski Nation Press Release & Background, titled 'First Nation Leaders Declare Health and Public Health Emergency. Dated February 24, 2016.
9.	*National Capital Alliance on Race Relations (NCARR) and Canadian Human Rights Commission and Her Majesty the Queen as Represented by Health and Welfare Canada, The Public Service Commission and the Treasury Board and Professional Institute of the Public Service of Canada.* T.D. 3/97 1997 CanLII 1433 (CHRT).
10.	*CN v. Canada (Human Rights Commission)* [1987] 1 S.C.R.

TAB 1

Canadian Centre for Policy Alternatives
May 2016

Shameful Neglect

Indigenous Child Poverty in Canada

David Macdonald and Daniel Wilson

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ABOUT THE AUTHORS

David Macdonald is a senior economist with the Canadian Centre for Policy Alternatives.

Daniel Wilson is a research associate with the Canadian Centre for Policy Alternatives.

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Executive Summary

A RECENT SURGE of suicide attempts in the Cree community of Attawapiskat, Ontario drew national attention to the effects that poor living conditions and housing shortages have on First Nation children. The outrageous reality is that the majority of children on First Nation reserves in Canada live in poverty and their situation is getting worse. This report includes poverty rates on reserves and in the territories, something never before examined using the 2011 National Household Survey data. The most recently available data show that child poverty rates for status First Nations children living on-reserve rose to a staggering 60% in 2010. By contrast, poverty rates among Indigenous children living off reserve have improved somewhat, while non-Indigenous children have seen little change to their circumstances since 2005.

Disaggregating child poverty by identity reveals three broad groupings, or tiers, of suffering in Canada.

The worst is among status First Nation children, 51% of whom live in poverty, rising to 60% on reserve. A second tier encompasses other Indigenous children and disadvantaged groups. The children of immigrants in Canada suffer a child poverty rate of 32% while racialized (visible minority) children have a poverty rate of 22%. Between these are found non-status First Nations children (30%), Inuit children (25%) and Métis children (23%). The third tier of poverty consists of children who are non-Indigenous, non-racialized and non-immigrant, where the rate of 13% is similar to the average among all countries in the Organization for Economic Co-operation and Development (OECD).

Even among status First Nation children living on reserve, poverty is not evenly distributed, with shocking rates of 76% in Manitoba and 69% in Saskatchewan, **easily the worst in the country. At the other end is Quebec where** the poverty rate is 37%. This is largely due to the relatively low poverty rate (23%) among the children of Eeyou Itschee (James Bay Cree), who benefit from a resource revenue sharing agreement. If we break it down by cities, **Winnipeg, Regina, and Saskatoon have the highest Indigenous child poverty** with rates of 42%, 41%, and 39% respectively. At 19%, Toronto has the lowest Indigenous child poverty rate.

This report examines poverty as measured by income. In actuality, poverty can be exacerbated by other conditions, creating additional barriers for children trying to achieve their full potential. On reserve, these barriers include chronic underfunding of schools and child welfare services, crowded housing, and undrinkable water, to name just a few of many examples.

Canada's overall child poverty rate of 18% is among the worst in the OECD, putting it in 27th place out of 34 countries. That is more than three times higher than the Nordic countries, where child poverty rates average 5%. This clearly suggests that Canada could do a great deal more to address child poverty, regardless of its identity or location.

But the fact that status First Nation children living on reserve in Manitoba **have a poverty rate fifteen times that affecting children in Denmark, Finland,** Norway, and Sweden suggests a far deeper problem, one that should provoke outrage and an immediate policy response. By way of modest first steps, this report recommends action on the following priorities:

1. Report poverty rates on reserves and in the territories;
2. Improve direct income support;
3. Improve employment prospects; and
4. Begin to implement longer-term solutions.

These first steps will not eliminate the enormous gap in circumstance between children in Canada, but they may slow or reverse a worsening trend of increasing poverty among status First Nations children on reserve and increasing disparity between the three tiers of child poverty in this country. If we are to restore some hope to communities suffering from a pandemic of adolescent suicide, it is one place to start.

Introduction

THE FIRST BUDGET of the new Liberal government, tabled in March 2016, improved Canada's position with respect to Indigenous peoples and First Nations reserves in particular. Substantial investments were announced that focus on housing, clean water, and education. Given that the bulk of this new investment will not roll out for a few years, it will take some time to tell whether these initiatives sufficiently combat chronic overcrowding in houses, boil water advisories, and sub-standard schooling. However, the investment signals a welcome change in approach to Indigenous issues, described in the speech from the throne as building toward a "nation to nation" relationship.[1] How that relationship is manifest will determine how significant a departure from historical injustice toward Indigenous Peoples in Canada the change in government truly constitutes. What is certain is the overwhelming need to address the deepening poverty faced by Indigenous children in this country – and to do so with urgency.

Roughly one-quarter of all Indigenous people in Canada live on a reserve. For the most part, they are members of a First Nation and considered "status or registered Indians" under the Indian Act. Roughly half of status First Nation people live on reserve, the other half live elsewhere in Canada or "off reserve." Irrespective of location, status First Nations people make up roughly half of all Indigenous people in Canada. Unlike other identities, status is legally regulated under the Indian Act. For the purposes of the 2006 census and 2011 National Household Survey (NHS), however, Indigenous identities are self-declared, meaning people declare for themselves if they have that identity or not.

About another quarter of Indigenous people are Métis. This Indigenous identity has historical roots in early marriages between First Nations people and European settlers. Between the 2001 and 2006 censuses, the Métis population grew by more than 50% as people discovered and self-declared their Métis identity on the census questionnaire.

Roughly the final quarter of Indigenous people are made up of non-status First Nations, Inuit, and mixed-heritage identities. Non-status First Nation people are those who declare they have First Nation heritage but have not been accorded status under the Indian Act. Similar to the Métis, there was large growth in the non-status First Nation population between 2006 and 2011 as many self-identified for the first time. These increases in Métis and non-status Indian identification cannot be explained fully by higher birth-rates as they exceed possible levels of natural increase.

The Inuit live for the most part in the Nunangat of Northern Canada, particularly northern Quebec, northern Labrador, and the three territories. Inuit identity is also self-declared on the census. Like status First Nations, the Inuit have not experienced the substantial increases in "identity discovery" that other Indigenous identities have recorded.

This report updates a previous CCPA report, *Poverty or Prosperity: Indigenous Children in Canada*, which examined Indigenous child poverty rates based on the 2006 census.[2] While it looks at that same topic, we have updated our findings based on data from the 2011 National Household Survey (NHS). For a discussion of the differences between the 2006 census and the 2011 NHS please see Appendix A.

Using custom tabulations from the 2011 NHS and 2006 census, this report applies the After Tax Low Income Measure (LIM-AT) to reserves and the territories to determine poverty rates by Indigenous identity, something never before examined using the National Household Survey data. It should be noted that population counts come from the 2011 NHS and the 2006 census while the income data, and therefore poverty rates, come from the years 2010 and 2005 respectively.

It is important to point out that Statistics Canada reports on poverty rates do not include people who live on a reserve or people living in the territories (where roughly half of all Inuit people are located). Because this data is excluded, official poverty rates in Canada are lower than they would be if these populations were counted. Poverty rates for Indigenous people, especially status First Nations and Inuit, are reported to be much lower than a full count would indicate is truly the case. Statistics Canada argues it excludes reserves and the territories from poverty counts because "the con-

sumption of hunting or fishing products, barter economies or substantial in-kind transfers may reduce the interpretability of income-based measures."[3] But there are several problems with this position.

First, it ignores that hunting and fishing are significant food sources across rural Canada, not just on reserves or the territories, yet rural Canada is included in poverty statistics. The argument is also circular, as barter economies are more common in impoverished regions generally.[4] "In-kind **transfers" on reserves most commonly refer to band housing provided at** no cost to band members.[5] This is far from universal and has greatly diminished due to growth in both band-operated rental regimes and individual **home purchasing on reserve. Furthermore, the value of such housing is limited by the fact that the occupiers cannot resell them.[6] More broadly, the** LIM-AT approach to poverty is strictly an income measure, not a measurement of the cost of living. As such, non-commercial food, barter, and housing that cannot be re-sold has no impact on this measurement given it produces no income.

The timing of data availability means that more recent programs that will have an impact on child poverty will not be included in the figures below. The impact of the Canada Child Benefit on child poverty for instance, although modeled below, is not included in the poverty figures. In Manitoba, a province with high child poverty, recent measures like the 2014 Rent Assist program that would increase incomes for low income families with children also will not be included.

Indigenous Child Poverty Since 2006

GIVEN THE METHODOLOGICAL differences between the NHS and the census, we decided it would be unwise to publish comparisons other than at the national level. A concerted effort was made by Statistics Canada, in 2011, to improve NHS data collection on reserve, mostly through in-person enumeration for the voluntary long-form. The result was a higher response rate on reserves than the Canadian average, providing additional confidence for the comparison of on-reserve First Nations populations.[7] Unfortunately, non-response rates in areas with larger off-reserve Indigenous populations tended to be worse than the average.[8] As a result, only comparisons of all Indigenous people off reserve are made in *Table 1*. More detailed comparisons of identity and geography across the 2006 census and the 2011 NHS are not possible given the available data.

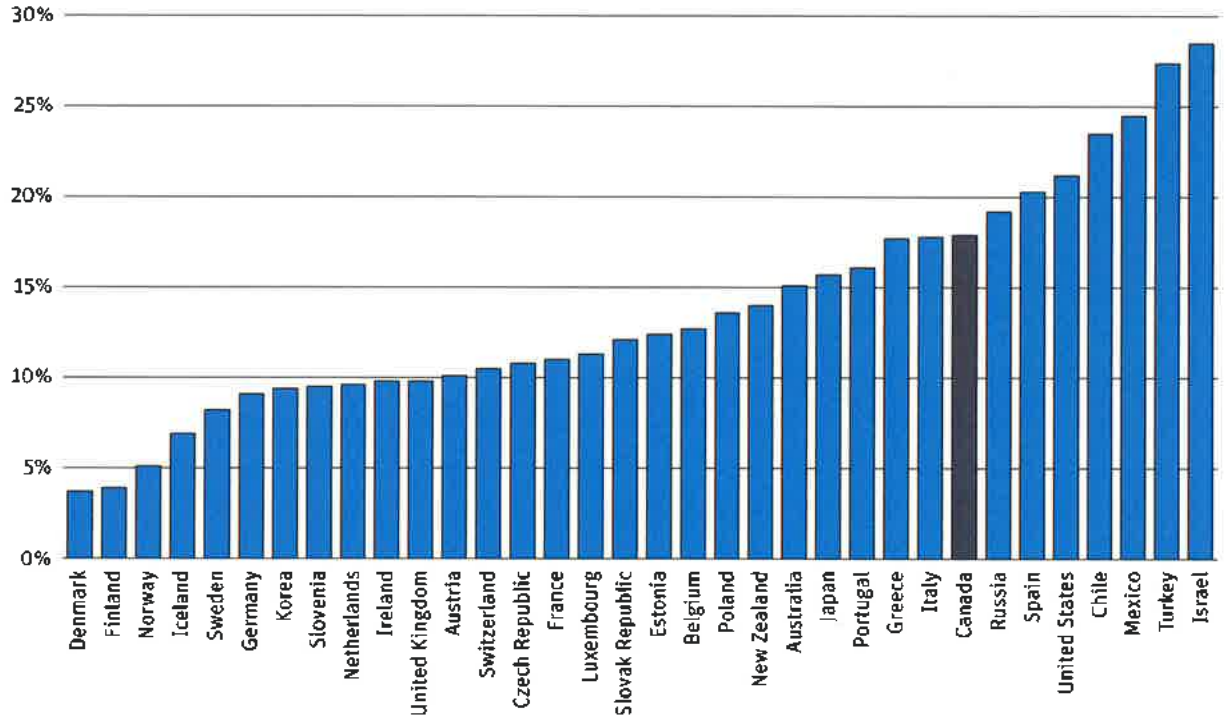
Child poverty is unchanged—at 18%, or just under one in five—between 2005 and 2010 when looking at all children in Canada. The poverty rate has actually increased slightly for non-Indigenous children, going up 0.3%, while the number of non-Indigenous children has fallen slightly as the Canadian population ages. For Indigenous children, two different paths are clear since 2005. On-reserve status First Nations child poverty, which is the highest in *Table 1*, has continued to worsen, moving from 56% in 2005 to 60% in 2010—adding 7,200 children to the 65,000 who were there in 2006. On the other hand, child poverty dropped slightly, from 35% to 31%, among all other Indigenous children during this time.

TABLE 1 Child Poverty Since 2006

	Child Poverty Rate		Child Population		Population Growth
	2005	2010	2006	2011	2006–2011
Status First Nation on reserve	56%	60%	117,520	122,025	4%
All other Indigenous off reserve[11]	35%	31%	306,595	351,400	16%
All Indigenous	41%	38%	424,125	477,965	13%
Non-Indigenous	16%	17%	6,454,045	6,409,025	-1%
All Children	18%	18%	6,878,165	6,886,990	0%

Source National Household Survey 2011 custom tabulation.

FIGURE 1 International Child Poverty Rates



Source OECD.stat 2010 and National Household Survey 2011 custom tabulation, data from 2011 in the case of Switzerland, New Zealand & Chile, data from 2009 for Japan. Canadian data using 2011 NHS instead of the OECD source of the Survey of Labour and Income Dynamics.

While this decline in off-reserve Indigenous child poverty may initially appear to be positive, it is difficult to disentangle how much of it is due to improved circumstances and how much to what we have termed "identity discovery" — families discovering and declaring their Indigenous heritage,

pulling up the average income as a result. The population growth rate of off-reserve Indigenous children is far too high to derive only from the birth rate; the non-status First Nation child population alone increased by 49% between 2006 and 2011, likely due to identity discovery. Similar, though less pronounced, trends appear to be at work among Métis, whose numbers grew considerably between 1996 and 2006 as well.[9] The recent decision of the Supreme Court in Daniels v. Canada may lead to continued growth in the Métis and non-status populations through the phenomenon of discovered identity. Although the effect of that growth on poverty rates cannot be estimated at this time, if recent trends continue it would be accompanied by a decrease in the child poverty rates for these two demographics.[10] In general, the increased discovery of Indigenous heritage, and the acceptability of acknowledging that identity in official ways, such as Statistics Canada surveys, is a positive development.

Canada does not do well in child poverty rankings of developed countries. Once reserves and the territories are included, Canada's child poverty rate of 18% puts us in 27th place among the 34 OECD countries with comparable data (the OECD average child poverty rate is 14%). Canada does better than the United States, where child poverty sits at 20%, and the OECD's worst performer, Israel, where it is 29%. However, Canada's performance pales in comparison to the Nordic countries of Denmark, Finland, and Norway, whose rates are below 5%, as well as most other European countries, where child poverty rates are closer to 10%. Canada is essentially tied with Greece, which is experiencing a full-scale economic depression. If, on the other hand, we were to strive for Nordic standards of only 5% child poverty, 901,000 fewer children would be in poverty in Canada today.

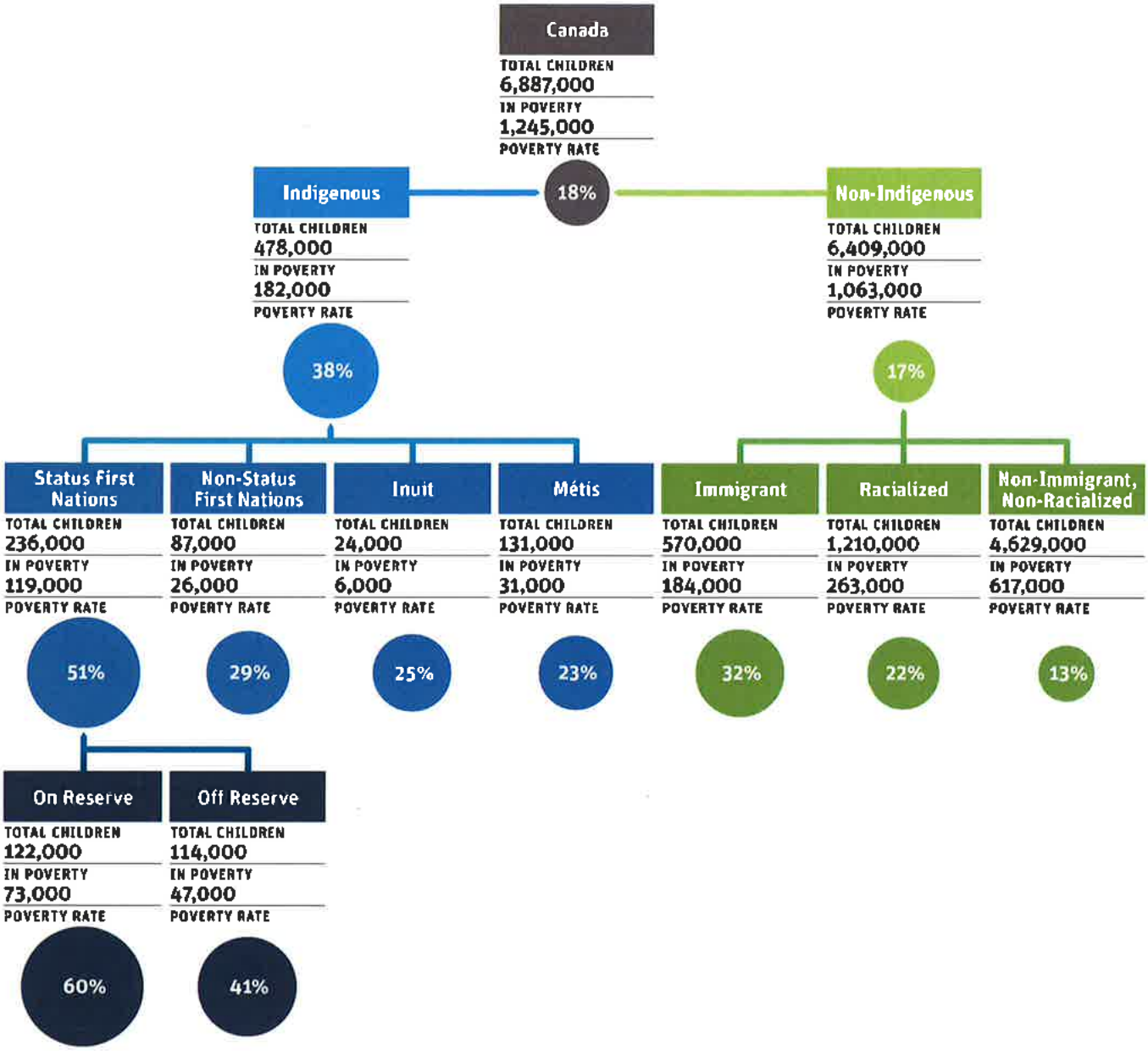
Three Tiers of Child Poverty

DISAGGREGATING POPULATIONS BY identity reveals that different identities experience markedly different poverty rates. For all children in Canada the average child poverty rate is 18%. Breaking this down by Indigenous and non-Indigenous identity immediately reveals that non-Indigenous children have a 17% poverty rate. As non-Indigenous children are further disaggregated into immigrants and racialized (visible minority) children, the poverty rates sit at 32% and 22% respectively for those groups. For children that are not immigrants, not racialized, and not Indigenous, the child poverty rate is 13%, just below the OECD average of 14%. This group constitutes the lowest tier of poverty.

The second tier appears when examining non-Status First Nations, Inuit and Métis children. Among these identities, child poverty ranges from 23% to 29%, much higher than the national average, but similar to the rates among immigrants and racialized children. This second tier includes child poverty rates ranging from 32% among immigrants to 22% among visible minorities with the Indigenous identities outlined above sitting within that range.

The third tier comprises First Nations status children. On average, the child poverty rate within this identity is 51%, which is to say that every second status First Nations child lives in poverty. However, this average masks an even worse situation faced by on-reserve children where the national poverty rate is 60%. The off-reserve situation is somewhat better for

FIGURE 2 Breakdown of Child Poverty Rates by Identity



Source National Household Survey 2011 custom tabulation. Totals may not add due to rounding. "Non-Status FN" category includes the categories of: "non-status First Nations", "Aboriginal Identity not elsewhere specified" and "Multiple Aboriginal Identity". The "Immigrant" category includes immigrants and non-permanent residents.

status First Nations children, who experience a poverty rate of 41%. However, this rate is well above the range for the second tier of child poverty and many times that of the first tier.

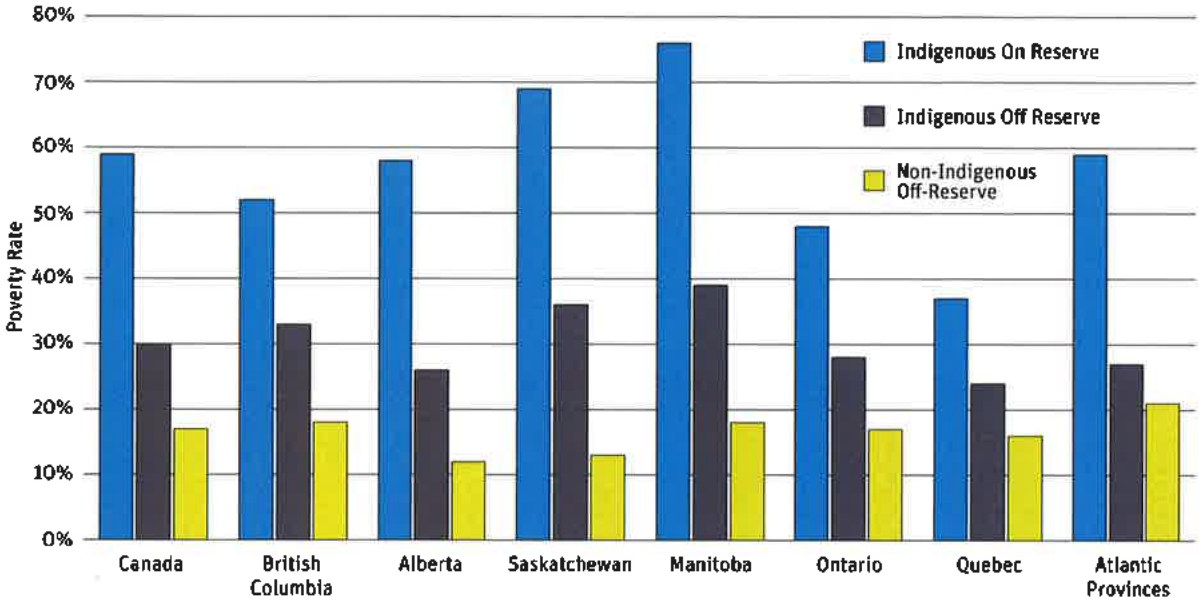
The Geography of Indigenous Child Poverty

GEOGRAPHIC BREAKDOWN BASED on identity reveals even more extreme child poverty in the Prairies, as shown in *Figure 3*. On reserves in Manitoba, Indigenous child poverty reaches an obscene level of 76%. In other words, three out of every four children on reserve in the province lives below the poverty line. Off reserve, the situation is better, but for Indigenous children Manitoba still has the highest poverty rate of any province (39%). Non-Indigenous children in Manitoba face much lower rates, but at 18% those rates remain among the highest in the country.

The situation isn't much better in Saskatchewan, where on-reserve First Nation child poverty rates are 69%. Despite having the second highest on-reserve child poverty rates, Saskatchewan has the lowest non-Indigenous child poverty rate of any province (13%), constituting the greatest disparity between non-Indigenous and status First Nation children anywhere in the country.

At 37%, Quebec has the lowest on-reserve child poverty rate in Canada. Its non-Indigenous child poverty rate of 16% is also lower than many other provinces, but the gap between on-reserve status First Nations and non-Indigenous child poverty is the smallest in Quebec. A large part of this is due to the low poverty rate for the James Bay Cree of northern Quebec, whose on-reserve population makes up roughly half of the total Quebec on-reserve population.[12]

FIGURE 3 Child Poverty Rates by Reserves, Province, and Identity



Source National Household Survey 2011 custom tabulation.

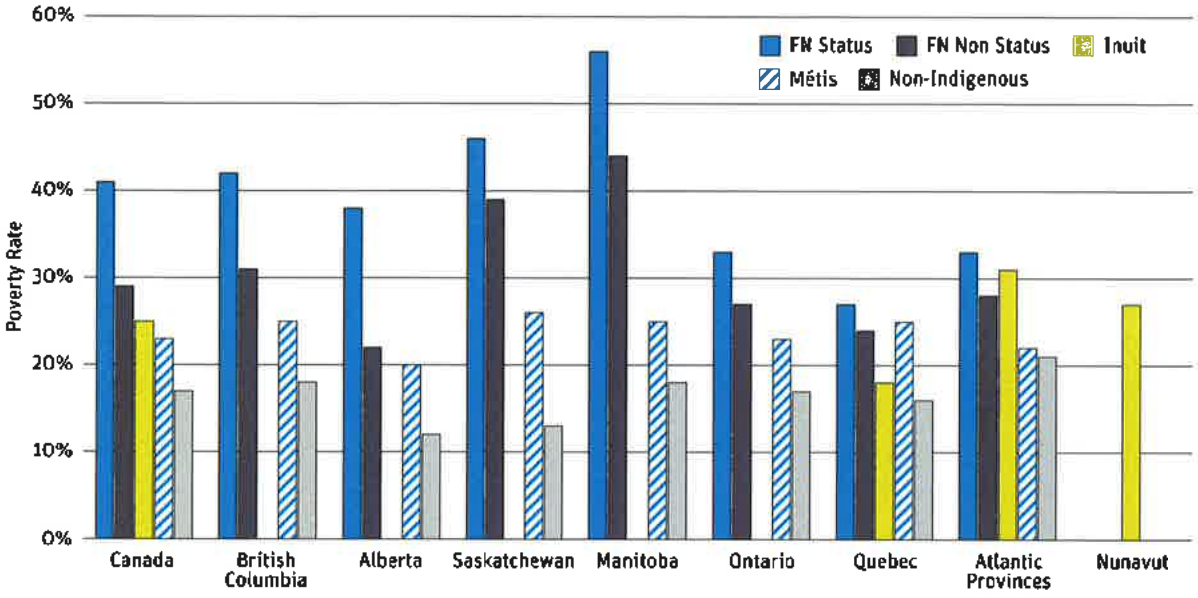
The on-reserve status First Nation child poverty rate for this area was 23%, much closer to the Canadian average for all children than reserves generally.[13]

The better situation for the James Bay Cree is likely linked to a resource revenue sharing agreement with the Province of Quebec relating to hydro-electric projects. Pursuant to the original 1975 agreement and the 1992 follow-up known as *La Paix des Braves*, the James Bay Cree receive a fixed $70 **million per annum.**[14] **Revenue from those agreements seems to have allowed** the James Bay Cree to offset chronic underfunding from the federal government. One of the effects of this additional funding has been to dramatically lower child poverty on those reserves.

Without exception, Indigenous child poverty is lower off reserve than on. In most cases, the off-reserve rates are half what they are on reserves. The worst provinces for Indigenous child poverty on or off reserve are the **same, Manitoba and Saskatchewan, where rates sit at 39% and 36% respectively.** The lowest rate of off-reserve Indigenous child poverty is also found in Quebec (24%), followed closely by Alberta (26%).

Simply moving off reserve does not eliminate poverty among Indigenous children, as the rates for non-Indigenous child poverty are lower in every province. It may initially seem unfair to compare non-Indigenous children,

FIGURE 4 Off-Reserve Detailed Identity Child Poverty Rates



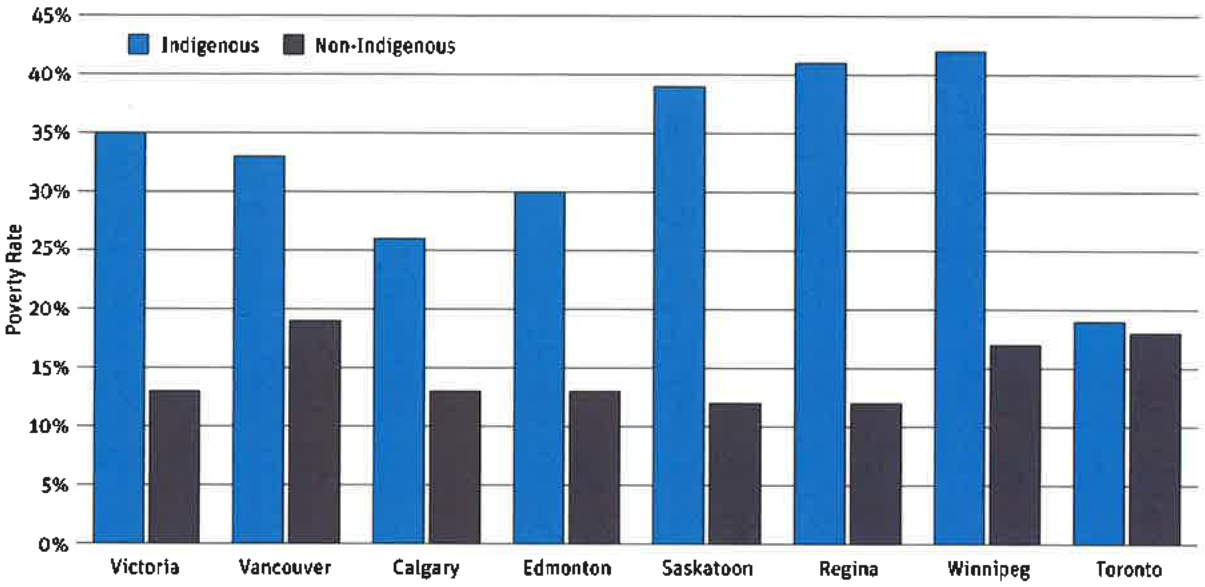
Source National Household Survey 2011 custom tabulation. Inuit identity excluded in some provinces due to small sample size at the provincial level.

who generally live in larger centres, to on-reserve Indigenous children, who generally live in more remote or rural locations. However, non-Indigenous child poverty rates are actually lower in rural areas for each province than the general child poverty rate. In other words, for non-Indigenous children, urbanization does not reduce poverty.

As shown in *Figure 4*, a broad trend of poverty has emerged by identity: First Nation status children have the worst child poverty rates, followed by non-status First Nation children, then by Métis children, Inuit children (nationally), and finally by non-Indigenous children. Interestingly, 18% of Inuit children in Quebec live in poverty, which is similar to non-Indigenous children in that province (16%). Similar to the James Bay Cree, the low poverty rate for Inuit in Quebec may be due to the fact that, pursuant to the Nunavik Land Claims Agreement, Nunavik Inuit receive 50% of the first $2 million and 5% of additional resource royalty received by the government of Canada for all natural resource development on the lands covered by the agreement.[15] The experiences of the James Bay Cree and the Nunavik Inuit of northern Quebec prove remoteness is not a sentence to higher child poverty.

Alberta has the lowest child poverty for non-Indigenous children, as seen in *Figure 4*, likely due to a strong labour market and higher-than-average

FIGURE 5 Child Poverty Rates By City



Source National Household Survey 2011 custom tabulation. Includes both on and off reserve populations.

wages over the time period examined. Those benefits seem to have translated to both Métis and non-status First Nations children, since for both identities Alberta has the lowest child poverty rates. As noted, the child poverty rate for status First Nation children off-reserve is lowest in Quebec, while Ontario has the second lowest rate in part due to lower poverty in Toronto as examined below. Quebec also has the second lowest child poverty rate for non-status First Nation children.

Saskatchewan and Manitoba have been highlighted previously as areas of high Indigenous child poverty. This is equally true for the disaggregated identities. For status First Nations on and off reserve, as well as non-status First Nations and Métis children, poverty rates are highest in these provinces. For non-Indigenous children poverty rates remain relatively high in Manitoba. However, the situation is quite different in Saskatchewan where non-Indigenous child poverty is the second lowest of the Canadian provinces despite persistently high Indigenous child poverty. British Columbia consistently ranks as third worst in child poverty among status First Nations, non-status First Nations, and Métis. It also has relatively high non-Indigenous child poverty.

Of the cities with larger Indigenous populations child poverty levels largely reflect provincial trends. The highest Indigenous child poverty for any **city is found in Winnipeg, where 42% of Indigenous children live below the poverty line, and the non-Indigenous child poverty rate is also high at 17%. Winnipeg has, by far, the largest Indigenous population of any city in Canada.**

Regina and Saskatoon are not far behind in terms of Indigenous child poverty, with rates of 41% and 39% respectively. However, at 12% in both **cities, non-Indigenous child poverty is the lowest of any city examined, pro**ducing the largest gap between child poverty rates. At the other end of the **spectrum sits Toronto, where Indigenous and non-Indigenous child poverty** is almost equal at 19% and 18% respectively. The Indigenous population in **Toronto is primarily made up of non-status First Nations and Métis who tend** to have lower child poverty rates. Although part of the reason for the small gap is that Toronto has the second highest non-Indigenous child poverty of the cities examined.

Poverty Only Measures the Lack of Income

POVERTY FIGURES, LIKE those examined above, are simply a reflection of whether the household income in a given family is below a certain dollar figure. Clearly, household income is an important determinant of a family's capacity to give their children the best possible start in life. However, it tells us nothing about other barriers that may impede a child's ability to achieve their full potential. Unfortunately, for Indigenous children, particularly those on reserves, the barriers to achieving their full potential do not end with low family income. In fact, the barriers for children living on reserves are substantial, systemic, and exacerbate income poverty.

Despite evidence that education can counteract the effects of poverty, barriers to obtaining a quality education on reserve abound. Capital budgets for reserve schools are underfunded by at least $169 million a year.[16] Operational budgets for schools on reserve have been frozen at the rate of inflation since 1996, ignoring large increases in the school populations. Programs to aid First Nations students to obtain post-secondary education are heavily over-subscribed, meaning many students who want to go to university and college cannot access the requisite funding.[17] These barriers further exacerbate the painful historical legacy in Canada of First Nations children being forcibly removed from their families and shipped off to residential schools rife with abuse.[18]

Barriers for children on reserve do not stop at education but extend to other public services. While access to clean water is taken for granted by

most Canadians, in the fall of 2015 there were 120 First Nations communities living under boil water advisories.[19] Some of those advisories have been in place for nearly 20 years. In addition, First Nations people living on reserve, as well as the Inuit, are far more likely to live in houses that are overcrowded an/or in poor repair.[20]

In Canada half of all foster children are Indigenous.[21] One of the contributing factors has been discriminatory underfunding of child welfare services on reserves, as confirmed by a recent ruling of the Canadian Human Rights Tribunal.[22] Chronic underfunding, combined with low incomes, makes child removal dramatically more common in Indigenous families.

A Poverty Reduction Plan for Reserves

THE EXTRAORDINARY POVERTY rates on reserves scream out for an urgent plan of action. The following suggestions may be of assistance in moving such a plan forward.

1. Track and Publish Poverty Rates on Reserves and in the Territories

The first step to reducing poverty among Indigenous children is to actually track and publish poverty statistics affecting this group. Poverty rate calculations on reserves and in the territories are possible, since income data are being collected. However, such calculations are not being completed or published. If data isn't being tracked and published it is impossible to tell whether policies and programs are having an impact. When the Canadian LIM-AT poverty lines are applied, as we have done in this report, communities on reserves and in the territories are revealed to be among the poorest in the country.

Income data on reserves and in the territories are at present only being collected during the census every five years. Since no income data are collected in the interim periods trends in poverty cannot be tracked. Major income surveys such as the Canadian Income Survey and the Labour Force

Survey should be extended to reserves and the territories to provide poverty and income data in non-census years. In 2007, Statistics Canada was approached by the Siksika Nation to extend the Labour Force Survey as a pilot on that reserve.[23] The First Nations Information Governance Centre working with several federal departments is developing a new national survey examining employment on reserves although data won't be available until 2020.[24] This successful pilot may provide a template for expansion of similar data collection on other reserves.

2. Income Support

As income poverty is due to a lack of income, income support programs can have a major impact on poverty rates. They are not the only way to reduce poverty, but creating an income safety net should be part of any plan.

The most specific transfers for low-income families with children are the federal child benefits. Presently, those are the Universal Child Care Benefit (UCCB), the Canada Child Tax Benefit (CCTB) and the National Child Benefit Supplement (NCBS). In July 2016, those three programs will be folded into a new program called the Canada Child Benefit (CCB). The CCB cancels transfers to high-income households and increases transfers to lower-income families.

The CCB will likely have a significant effect on child poverty rates, with the best results in groups where poverty rates are already high, such as among Indigenous children. In order to simulate the expected impact of the new CCB on child poverty rates by identity, the Public Use Microdata File (PUMF) from the National Household Survey is used. Income data contained in the PUMF is from 2010 and, as such, this simulation determines the impact of the CCB as if it were implemented in 2010 compared to the child benefit programs that existed in that year, adjusting for inflation.[25]

Table 2 shows that, had the CCB been introduced in 2010, the reduction in child poverty would have been largest among status First Nation children. Their poverty rate prior to the simulated CCB was 50%. The rate would be reduced to 42% following the new program's introduction. This 8% reduction in the poverty rate among status First Nation children is the largest observed in *Table 2*, although child poverty remains highest for this identity regardless of the CCB. Unfortunately, disaggregation between on- and off-reserve children is not possible using this data source.

TABLE 2 Impact of CCB on Child Poverty Rates in 2010

Child Identity	Status Quo	After CCB
Status First Nations	50%	42%
Non status First Nations	29%	23%
Inuit	27%	22%
Métis	23%	18%
Non-Indigenous	17%	14%

Source NHS PUMF and author's calculations.

Non-status First Nation children see the second largest decline (6%) in child poverty rates, from 29% to 23%. Inuit and Métis children see a similar 5% rate reduction. Non-Indigenous children see the lowest fall in child poverty (3%); however, child poverty was lowest in this identity to begin with.

Clearly, improving child-related income support can help reduce child poverty, with the largest reductions going to those identities that started with the highest poverty rates. However positive these reductions may be, they do not eliminate child poverty, nor do they significantly reduce the substantial disparity between identities.

One administrative difference that may reduce the impact of the CCB on reserves, where child poverty is the highest, is the incidence of tax filing among status First Nations people. In most cases, status First Nations people working on reserve do not have to pay federal income taxes, although they may pay income taxes to their band government.[26] Not paying federal income taxes may also mean not filing a federal income tax return, which makes a family eligible for federal child benefits. This situation may be more common on reserves due to the legal exemption and low employment rates, with the possible effect that the CCB transfer will be less often applied among children on reserves.

3. Jobs on Reserves

As the situation in Alberta clearly illustrates, the availability of employment, and wage levels, can have a significant impact on child poverty. These factors have likely contributed to the province having the lowest poverty rates among non-status First Nation and Métis children, and the second lowest for status First Nation children. Employment with good wages is an important route out of poverty.

Reserves are often located in remote and rural areas, which may restrict access to employment that is otherwise available in more populated, urban areas. On the other hand, resource development is more likely to happen in remote locations. As observed above, non-Indigenous child poverty is actually lower in rural areas compared to urban areas. As such, merely living in a rural area does not assure higher child poverty rates.

The education level is quite low among status First Nations parents with children living in poverty, even compared to other Indigenous identities and certainly compared to non-Indigenous parents with children in poverty. Almost 60% of status First Nations parents with children in poverty did not **graduate high school.[27] Part of this shortfall is due to the long shadow of resi**dential schools and the result of chronic underfunding of reserve schools. Low levels of education, over and above the limitations imposed by geography, make a good job that much harder to obtain. With this in mind, it is likely that adult education in literacy and numeracy, as well as high school **equivalence, are also important to reducing child poverty through better** parental employment.

The 2016 federal budget proposed substantial new investments in physical infrastructure on reserves, particularly in housing, schools, and drinking-water processing. The construction of this new infrastructure will certainly create jobs directly on reserves where child poverty is highest. Efforts should be made to have a high proportion of those jobs go to First Nations people living on each reserve. However, given low education levels, a long**er-term approach would pair those new jobs with training programs that emphasize literacy, numeracy, and help workers obtain high-school-equiva**lent GED (General Educational Development). Jobs created through infrastructure investment should be a catalyst to address broader problems on reserves; we should not assume they will solve those problems outright.

4. Longer-term Solutions

Over the longer term, three policy areas are most likely to provide the great**est impact on Indigenous child poverty, particularly in the most affected segment of this population — status First Nations children living on reserve.** They are sustainable funding for reserves, resource revenue sharing agreements, and self-government.

With its first budget, the federal Liberal government has signalled a willingness to make investments in reserve communities at a level previous gov-

ernments were not prepared to meet. However, the gap between reserves and non-Indigenous communities in infrastructure and public services is so large – especially after two decades under a cap that met inflation but ignored the highest population growth in the country – that much more will be needed.

For children to succeed, they need a secure and healthy environment in which to grow and a decent education to prepare them for adulthood. Overcrowding, mould, unclean water, poor sanitation, and a lack of access to health care all contribute to a level of insecurity that rob children of a fair start in life. Schools, where they exist at all, frequently have no computers, antiquated science labs, and poor physical education facilities, among other shortcomings. As noted, this makes graduation from secondary school less likely and reduces employability for youth when they do graduate. Unemployment and incarceration are common consequences of a lack of opportunity. The high level of intervention by child welfare authorities and removal from the home environment put children at a real disadvantage, with increased safety risks.

If the significantly lower poverty rates among the children of the James Bay Cree truly are indicative of what can be accomplished through resource revenue sharing agreements, we should pay greater attention to what worked for that community. Of the 27 resource revenue agreements put in place since the 1992 *Paix des Braves* none include that agreement's important fixed-rate formula (although some do include a base in addition to more complex formulae for calculating benefits).[28]

Have these latter agreements been as successful? If not, why is that the case? Much more study is required to identify whether the James Bay Cree experience, which includes a poverty rate of 23% compared to the national on-reserve average of 60%, is replicable. The relative value of business versus government resource sharing agreements should be part of that study. We need only look to the other side of James Bay, where the struggling Attawapiskat First Nation signed an Impact Benefit Agreement (IBA) with mining company DeBeers, to see why the former might be a much more prudent and beneficial approach.

One important non-financial aspect of resource revenue agreements is that they are often part of self-government agreements. As explained in every credible study, from the 1996 report of the royal commission on Aboriginal peoples to the report, last year, of the Truth and Reconciliation Commission, self-government is the key to unlocking the potential of First Nations to improve the lives of their own citizens, including their children.[29]

Of particular note, in this time of heightened awareness over youth suicide on reserve, are studies by UBC professors Michael J. Chandler and Christopher Lalonde demonstrating the correlation between lower suicide rates and greater self-governing institutions that provide cultural continuity to young people.[30] The commitment of the current federal government to a nation-to-nation relationship, and recent remarks by the Minister of Justice committing to a "reconciliation framework," suggest this issue is being taken seriously, perhaps picking up where Paul Martin's government left off with the defunct Kelowna Accord.[31] We hope this is the case, and that a new process will finally be implemented.

Conclusion

CANADA'S PAINFUL LEGACY of residential schools and the long-term underfunding of basic services on reserves have left First Nation communities experiencing living conditions many would expect to see in the developing world, not a rich nation such as Canada. Too many First Nations children live in abject poverty, in many cases without hope of improved prospects in the future. As reported prominently in the news this spring in the case of Attawapiskat, these factors have culminated in the deplorable and ongoing youth suicide crisis on reserves.

It is critical that poverty rates begin to even be calculated for reserves and in the territories. Without this basic data, progress will be far more difficult. This study represents the first time poverty rates have been applied to those areas using the 2010 NHS and they reveal deplorable rates. In order to tackle the desperate poverty levels, we recommend the following:

1. Report poverty rates on reserves and in the territories;
2. Improve direct income support;
3. Improve employment prospects; and
4. Begin to implement longer-term solutions.

For Canada's youngest and fastest-growing population, it is critical that we come to terms with the ongoing crisis affecting Indigenous people and act immediately to help resolve it. The circumstances in which these young

Appendix A: Methodology and Data

THE DATA IN this report is the result of a custom tabulation from the 2006 Census and the 2011 National Household Survey. To be included in the custom tabulation, reserves needed to have data for both years. While the NHS was conducted in 2011 and the Census in 2006, the income data used in each was from 2010 and 2005 respectively. As such population counts are from 2011 and 2006 but poverty rates are from 2005 and 2010.

This study uses the After Tax Low Income Measure (LIM-AT) following the convention of the OECD in determining "low income". Statistics Canada does not recognize those living under the LIM-AT line as "living in poverty" instead it defines them as having "low incomes." In this report, living "in poverty" is used synonymously with those having "low incomes." Unfortunately, after-tax income was only first included in the 2006 Census meaning that the LIM-AT line cannot be applied to prior censuses.

Measures of low income, like the LIM-AT or the older Low Income Cut Off (LICO) have never been applied to reserves or the territories, as they were in this study. This new application generates potential complications for the LIM-AT methodology. For instance, the LIM-AT line is calculated as half of the median adjusted household income of the population. As the LIM-AT was not applied to those on reserves or in the territories, it also doesn't include the incomes of those people in the median calculation. Including those incomes is likely to decrease the value of the median, and therefore

decrease the resultant LIM-AT line and also poverty rates generally. However, the population on reserves and the territories is small compared to the general population limiting this impact.

Poverty rates in this report where the count of children in poverty was less than 500 were excluded due to increased uncertainty in the NHS dealing with small samples and Indigenous identities that outside of reserves are less likely to have responded to the NHS.

Notes

1 Speech from the throne: http://speech.gc.ca/sites/sft/files/speech_from_the_throne.pdf

2 David Macdonald and Daniel Wilson, "Poverty of Prosperity: Indigenous children in Canada," Canadian Centre for Policy Alternatives, June 2013.

3 "National Household Survey Dictionary 2011", National Household Survey, Statistics Canada (2011) pg. 132 (www12.statcan.gc.ca/nhs-enm/2011/ref/dict/99-000-x2011001-eng.pdf Accessed on April 7th, 2016)

4 See for instance the Greek experience: Rachel Donadio, "Battered by Economic Crisis, Greeks Turn to Barter Networks", October 1, 2011, New York Times (http://www.nytimes.com/2011/10/02/world/europe/in-greece-barter-networks-surge.html?pagewanted=all&_r=0 Accessed April 19th, 2016); and "The First Canadian Barter Exchange" (barterfirst.com/) or the "Canadian Barter System" (www.canadianbartersystem.com)

5 See for instance footnote 38, "2011 National Household Survey: Data Table: 99-014-X2011047", 2011, (https://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?TABID=7&LANG=E&APATH=3&DETAIL=0&DIM=2&FL=A&FREE=0&GC=01&GID=1118296&GK=1&GRP=1&PID=107758&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=98&VID=23516&VNAMEE=&VNAMEF=#fnb-23516-38 Accessed on April 8, 2016)

6 https://www.aadnc-aandc.gc.ca/eng/1317228209993/1317228233782

7 Population weighted Global Non-response (GNR) rate for reserves was 19.5% versus the Canadian average of 26% across all Census Tracts. On-reserve GNR was calculated by the author using the National Houshold Survey: Final response rates, census subdivisions (CSDs), Statistics Canada, 2011. (http://www12.statcan.gc.ca/nhs-enm/2011/ref/about-apropos/nhs-enm_r013.cfm?Lang=E Accessed on April 8, 2016)

8 For instance, in Winnipeg, which contains the largest Indigenous population of any CMA, the Indigenous population weighted GNR using census tracts was 27% while the Winnipeg CMA in total was only 21.9%. Author's calculations from NHS Profile: Download data for a complete geographic level: 99-004-XWE2011001-401-MAN," Statistics Canada, 2011. (https://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/prof/details/download-telecharger/comprehensive/comp-csv-tab-nhs-enm.cfm?Lang=E Accessed on April 8th, 2016)

9 Population increases in the status First Nation community that are larger than the birth rate may be due to the extension of status via Bill C-3 in response to *McIvor v. Canada* (December 2009),

as status populations cannot increase by changing self-identification alone given the legal definition of "Status Indian."

10 Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12 (CanLII)

11 Including all Indigenous people on reserve who are not status First Nations.

12 As represented here by those on reserve in the Abitibi-Baie James-Nunavik-Eeyou 2003 federal electoral district.

13 NHS 2011, custom tabulation.

14 To read the agreement, see: http://www.pdac.ca/pdf-viewer?doc=/docs/default-source/aboriginal-affairs-docs/la-paix-des-bravest.pdf

15 Nunavut Land Claims Agreement, Signed in 2006, Effective in 2008 (http://www.gov.nu.ca/sites/default/files/files/Nunavik%20Inuit%20Land%20Claims%20Agreement%20%28NILCA%29.pdf Accessed April 19th, 2016)

16 Ashutosh Rajekar and Ramnarayanan Mathilakath, "The Funding Requirement for First Nations Schools in Canada" Parliamentary Budget Office, May 2009, pg 12. (www.pbo-dpb.gc.ca/files/files/Publications/INAC_Final_EN.pdf Accessed April 12th, 2016)

17 In particular, via the Post Secondary Student Support Program (PSSSP). See "Fact Sheet: First Nations Post-Secondary Education," Assembly of First Nations, 2011. (www.afn.ca/uploads/files/pse-fact-sheet.pdf Accessed April 12th, 2016.

18 For more details see the various reports published by the National Centre for Truth and Reconciliation: http://nctr.ca/reports.php

19 Water Chapter, Alternative Federal Budget 2016, pg 144. (https://www.policyalternatives.ca/publications/reports/alternative-federal-budget-2016 Accessed April 12)

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22 "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)" Canadian Human Rights Tribunal, January 26, 2016 (http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/127700/index.do?r=AAAAAQAZQXNzZW1ibHkgb2YgRmlyc3QgTmFoaW9ucwE Accessed on April 12th, 2016)

23 "Siksika Nation Pilot Labour Force Survey: Collection Experience and Results 2010 to 2011" Statistics Canada, December 2013 (http://www.statcan.gc.ca/pub/75-005-m/75-005-m2013001-eng.pdf Accessed on April 12th, 2016)

24 First Nations Information Governance Centre, "New survey to fill long-standing gap in First Nations labour and employment data", November 23, 2015 (Accessed May 6th, 2016 fnigc.ca/news/new-survey-fill-long-standing-gap-first-nations-labour-and-employment-data.html)

25 The results in Table 2 assume the CCB was implemented in 2010, replacing the programs that existed then. More recent data on child poverty including reserves and the territories is not available. Child benefits are more generous in 2016 due to the Enhanced UCCB for children between 7 and 16. As such, the drop in poverty in July 2016 due to the introduction of the CCB will likely be smaller.

26 **For a review of taxes paid by First Nations people see: Chelsea Vowel, "First Nations Taxation", âpihtawikosisân, December 2011 (http://apihtawikosisan.com/2011/12/first-nations-taxation/, Accessed April 13th, 2016. For a review of the various taxes levied on various reserves see: "Fact Sheet** - Taxation by Aboriginal Governments", Indigenous and Northern Affairs Canada, February 2014 (https://www.aadnc-aandc.gc.ca/eng/1100100016434/1100100016435, Accessed April 13th, 2016)

27 **David Macdonald and Daniel Wilson, "Poverty of Prosperity: Indigenous children in Canada,"** Canadian Centre for Policy Alternatives, June 2013, Figure 6.

28 This information is gleaned from unpublished research by the authors collected 2015.

29 **Canada, *Report of the Royal Commission on Aboriginal Peoples*, 1996. See also supra, footnote 16.**

30 Chandler, M.J. & Lalonde, C.E., "Cultural Continuity as a hedge against suicide in Canada's First Nation", 1998, Transcultural Psychiatry, 35(2), 193–211.

31 As reported by J. Barrera, Aboriginal Peoples Television Network, During suicide debate Justice Minister says it's time for First Nations to shed Indian Act 'shackles', April 13, 2016, available at http://aptn.ca/news/2016/04/13/during-first-nation-suicide-debate-justice-minister-says-its-time-for-first-nations-to-shed-indian-act-shackles/

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TAB 2

Band Support Funding Program Policy

Table of contents

1. Summary

The purpose of the Band Support Funding (BSF) grant is to assist band councils to meet the costs of local government and administration of departmentally funded services. This support is intended to provide a stable funding base to facilitate effective community governance and the efficient delivery of services. BSF (Band Support Funding) allows First Nation communities the flexibility to allocate funds according to their individual needs and priorities and be responsive in an environment of growing complexity and as they move toward self-government.

BSF (Band Support Funding) recipients under the block funding approach must continue to meet the

terms and conditions of the BSF (Band Support Funding) program authority. Also, even if there is usually no reporting requirement attached to a Grant authority, BSF (Band Support Funding) recipients under block funding have to submit annually their Audited Financial Statement which covers all funding received through the block funding approach. The additional requirement is counterbalanced by the fact that block funded BSF (Band Support Funding) recipients have access to multi-year funding.

Effective on April 1, 2011, programs will use the additional fixed, flexible and block funding approaches for transfer payments to Aboriginal recipients, as described in the Directive on Transfer Payments (Appendix K: Transfer Payments to Aboriginal Recipients) and according to departmental guidelines for the management of transfer payments.

These terms and conditions are specifically targeted to Aboriginal people.

2. Legal and Policy Authority

Indian Act, RSC, 1985, c. I-5, ss. 74 to 90 on elections and the powers of the Council.

Department of Indian Affairs and Northern Development Act, RSC, 1985, c. I-6, s. 4

3. Purpose, Objectives and Results

BSF (Band Support Funding) is one of the key programming components of the departmental Program Activity Architecture (PAA) which ultimate goal aims at improving the quality of life and increasing self reliance of First Nations communities. As part of the PAA (Program Activity Architecture)'s Government pillar, BSF (Band Support Funding) plays a key role in strengthening effective local governments which are essential to communities socio-economic development.

BSF (Band Support Funding) is the cornerstone of First Nation governance and of continued devolution of federal services to First Nation communities' control. Thus, the main objective of BSF (Band Support Funding) grant is to provide a stable funding base to First Nation governments to facilitate both effective community government, which includes the formulation, implementation and enforcement of policies and regulations, selection of representatives, and efficient delivery of services to citizens in a way that enhances social and economic well-being.

In securing financially viable First Nation governments able to operate with predictable and flexible transfers, BSF (Band Support Funding) contributes to fostering First Nations governments that are reflective of and responsive to their communities' needs and values in an environment of growing complexity as they move toward self government. It also contributes to stable local governments, accountable and transparent to their citizens and to the government, and to empowered citizens.

In the Program Activity Architecture, this authority is listed under The Government / Governance and Institutions of Government.

4. Eligible Recipients

Indian bands as defined by the *Indian Act*, RSC, 1985 are eligible recipients of the Grant for BSF (Band Support Funding). Band councils of bands, as defined in the *Indian Act*, RSC, 1985, can apply on behalf of the band for the grant.

The elected representatives of Indian communities that have not yet been declared to be bands by order of the Minister, but are generally recognized as a federal responsibility and have concluded an agreement in principle concerning reserves of land and the establishment of bands, may be eligible for this grant subject to specific Treasury Board approval.

BSF (Band Support Funding) recipients are eligible for block funding approach. Although the block eligible recipients include Tribal councils, only Bands are eligible to receive BSF (Band Support Funding) funding.

5. Eligible Initiatives and Projects

This authority is specific to Band Support Funding.

6. Type and Nature of Eligible Expenditures

This provision does not apply to grants paid to a class of recipients.

7. Stacking Provisions

Band Support Funding is a grant towards the costs of local government of eligible Bands and therefore is not limited to specific expenditures.

8. Method for Determining the Amount of Funding

The Band Support Funding program formula is used to determine the amount of funding for Band Support Funding.

9. Maximum Amount Payable

The maximum amount payable is determined by the funding formula. The total amount of the grant may not exceed the sum of the amounts allocated to each of the seven components that comprises the formula. The maximum amount will not exceed the amount appropriated by Parliament for this purpose.

Band Support Funding recipients under the block funding approach:

Payments under the block funding approach shall not exceed the results given by the formula.

10. Basis on Which Payments will be Made

Grants are normally paid in instalments to correspond to the cash flow requirements of the recipient. Payments are made based on a cash flow forecast from the recipient and will not exceed the payment frequency as set out in the Cash Management Policy.

11. Application and Assessment Criteria

Potential recipients must complete an application form annually in the manner prescribed by the department, and must submit the form, duly filled out and signed, to the regional office.

The application form contains data used to establish the funding level and therefore must be reviewed for comparison with departmental records, including currently agreed to Person Year information, and approved by regional office.

The application form must be a document separate from the funding arrangement and must not be incorporated into the text of the arrangement.

Recipients must send an application in for each funding agreement renewal.

Recipients must submit a new application form to receive any increase in funding or if they are managing a new program.

Bands councils seeking grant funding must agree to make available to their members a budget for the expenditure for all funds to be received, and to maintain accounting and record systems consistent with their responsibility to account properly for the expenditure of public funds.

Recipients who are former public office holders must respect and comply with the Conflict of Interest and Post-Employment Code for Public Office Holders and the Conflict of Interest and Post-Employment Code for the Public Service (2012). Recipients who are former public servants must respect and comply with the Values and Ethics Code for the Public Service. Where an applicant employs or has a major shareholder who is either a current or former (in the last twelve months) public office holder or public servant in the federal government, compliance with the Code(s) must be demonstrated.

Band Support Funding recipients under the block funding approach:

Once a recipient has met specific block funding eligibility criteria, the application requirements of specific programs shall apply in order to establish the initial base budget for block funding and where block funding is to be re-established.

12. Monitoring and Reporting Mechanisms

The department has procedures and resources that enable it to observe due diligence in approving grant payments, in verifying their eligibility and in managing and administering programs.

The evaluation process or criteria to be used to assess the effectiveness of the grant program may

include, but is not limited to, program/initiative rationale, success, cost-effectiveness, and design and delivery, the results achieved and the nature of impacts and effects resulting from the implementation of programs.

13. Official Languages

DIAND (Department of Indian Affairs and Northern Development) will respect the requirements stipulated in the *Official Languages Act*, related regulations, and federal government policies. Compliance will be achieved by ensuring that all external communications and public consultations, programs, and associated documents will be in both official languages. In addition, employees will be encouraged to participate in interdepartmental meetings and working sessions in the official language of their choice. Services to the public will be available in both official languages. This will include services delivered by federal employees and contractors delivering services on behalf of departments and organizations.

14. Other Terms and Conditions

Intellectual Property: Where a grant is provided for the development of material in which copyright subsists, conditions for shared rights will be set out in the funding agreement.

Third Party Delivery: Where the recipient delegates authority or transfers program funding to an agency (e.g. (for example), a board, council, committee or other entity authorized to act on behalf of the recipient), the recipient shall remain liable to the Minister and to its members for the performance of its obligations under the funding agreement. Neither the objectives of the programs nor the expectations of transparent, fair and equitable service shall be compromised by this delegation or transfer of funds.

Appendix 1: *Indian Government Support* Program

1. Summary

As bands and Inuit communities have assumed primary responsibility for the provision of programs and services to their members over the past two decades, five distinct but related programs have evolved as sources of support to their governments and public institutions. Referred to as the *Indian Government Support programs*, they include: *Band Support Funding, Band Employee Benefits, Tribal Council Funding, Band Advisory Services* and *Professional and Institutional Development*. These programs constitute the foundation for the development and maintenance of community governments, institutions and regional delivery organizations. Band governments, through an array of institutions and organizations, now directly administer 85% of AANDC (Aboriginal Affairs and Northern Development Canada)-funded programs and services including education, social assistance and social support services, housing and community infrastructure (source: Basic Departmental Data, 2003, p.69).

2. Objectives

The goal of *Indian Government Support* programming is to provide bands with assistance for the establishment and maintenance of effective local governance and administrative systems and the provision of programs and services to their members. *Indian Government Support* is provided for a variety of functions, including: pension and benefit regimes for eligible band employees; capacity development and training; and, where feasible and desirable, the regional administration of programs and services through tribal councils.

Appendix 2: Definitions

Additional Cost (band service employees): Is the factor in the formula intended to be applied to the cost of providing office space, basic telephone and supervision within the band office for those specialist personnel necessary to deliver continuing services for which the Department provides funds. All other costs (salary, benefits, training, travel, long distance calls, purchase of furniture and equipment, etc (et cetera).) may be provided to the band by contribution from other departmental budgets.

Agreements with Federal / Provincial / Territorial governments or organizations: For the purpose of *Band Support Funding*, these agreements are defined as agreements between the federal government and a provincial/territorial organization; or agreements between three parties: the federal government, the band and a provincial/territorial organization; or agreements between the band and a provincial/territorial organization; e.g. (for example) a provincial school board, for the delivery of services to band members where the board or authority performs the detailed administration of the program. The number of agreements and amounts are to be certified by departmental program managers and recorded under major services. Agreements with the same board are not to be split into a number of component agreements solely for the purpose of securing additional funding for the band. Addenda to such agreements with a provincial/territorial organization will be considered an integral part of the agreement.

Audit and Professional Costs: An amount to offset the costs associated with the preparation of the annual band audit and with other occasional professional services (e.g. (for example) contracted professional evaluators, contracts for management development planning, comprehensive community planning, communications plans, etc (et cetera).). It is based on the sum of all other components, a multiplication factor, the band's total population and the geographical index. Accounting costs are not included.

***Band Support Funding* Grant Application:** Is the form to be completed by the applicant as prescribed by the Department.

Band Administrative Staff for the Purposes of *Band Support Funding*: Are those staff necessary to provide central support services to the band council and band delivered services, including the maintenance of accounts (Band Manager, Band Clerk, etc (et cetera).) and whose direct personnel costs are not related to program delivery. (See Band Service Staff).

Band Council or First Nation refers to the council of a band as defined in the *Indian Act*.

Band Membership Data: Band membership and community residence information will be supplied by the band on application form. Regions may, in some cases, wish to verify this information.

Band Profile: Is the term that describes the band demographic and other program information reported by the applicant on the "Application for Grant".

Band Service Staff: Are those staff who are necessary for the effective delivery of departmentally funded programs and services, and whose salary and other direct personnel costs are provided to the band by way of contribution from a departmental program budget.

Basic Overhead: Is the factor in the formula intended to be applied to the cost of maintaining an administrative and accounting capacity to accommodate the general business of the band and the overhead costs of delivering basic services funded by the Department (see definition of basic services). This includes the cost of staff to maintain the accounts of the band and perform normal clerical and supervisory functions which provide support and direction to the delivery of services. The cost of the operation of a band office including heat, light, utilities, general office supplies, postage, bank charges and communications for the purpose of general administration and accounting services is considered in arriving at this component.

Basic Services: Are those services funded by the Department and delivered by band councils on an ongoing basis. They have common characteristics related to the need for personnel management, payroll accounting, purchasing and general management support services.

Block Contribution: Block contribution funding is an option which allows funds to be reallocated within the block of programs during the agreement, as long as progress towards program objectives is being achieved. It is possible under this approach to allow recipients to keep any unspent funding provided that program delivery standards have been met and the recipient agrees to use the unspent funding for purposes consistent with the block program objectives or any other purpose agreed to by the department. The block contribution approach can be used where the recipient has met certain readiness assessment criteria (including results from the General Assessment (http://www.aadnc-aandc.gc.ca/prev-prev/eng/1322761862008/1322762014207).) This approach is based on AANDC (Aboriginal Affairs and Northern Development Canada)'s previous Alternative Funding Arrangement (AFA) authority and will be managed in a similar fashion.

Calculation Date: Is the predetermined calendar date (e.g. (for example) March 31) at which time each band's eligibility for *Band Support Funding* is calculated according to the approved formula.

Cost sensitive and non-cost sensitive: The purpose of this division is to facilitate the application of comparative cost indices which, for every First Nation, provide some adjustment for additional costs which are necessarily incurred as a result of location (see Location Costs) whether it is due to their mode of access to and distance from the nearest service centre (car, air) or the length and severity of the heating season (fall, winter and spring).

- **Cost sensitive** expenditures include travel, utilities, telephone and supplies.
- **Non-cost sensitive** expenditures are not directly affected by the geographical location of the community (salaries, allowances, postage, bank charges, etc (et cetera).).

Council Allowance: An amount intended to compensate members of council or other individuals at the discretion of council for time and effort spent in promoting the development of the band as a whole, and coordinating band activities. It is based on total band population, which refers to a number in a calculation table that differentiates between cost-sensitive (travel, utilities, postage, telephone and supplies) and non-cost sensitive expenses which are not directly affected by the geographical location of the community (salaries, allowances, bank charges, etc (et cetera).). This component includes chief and councilor salaries, travel costs and honoraria.

Departmentally Funded Programs and Services: Are the salary-based programs funded by the Department of Indian Affairs and Northern Development.

Eligibility Criteria: Are the conditions to be met by an applicant before funding can be issued.

Fixed Contribution: Fixed contribution funding is an option where annual funding amounts are established on a formula basis or where the total expenditure is based on a fixed-cost approach. Fixed funding is distributed on a program basis. It is possible under this approach to allow recipients to keep any unspent funding provided that program requirements set out in the funding agreement have been met and the recipient agrees to use the unspent funding for purposes consistent with the program objectives or any other purpose agreed to by the department. This approach is based on AANDC (Aboriginal Affairs and Northern Development Canada)'s previous Flexible Transfer Payment (FTP).

Flexible Contribution: Flexible contribution funding is an option which allows funds to be moved within cost categories of a single program during the life of the project/agreement. However, unspent funds must be returned to the department at the end of the project, program or agreement. The flexible contribution approach is used when:

- The recipient has met certain assessment criteria (including results from the General Assessment (http://www.aadnc-aandc.gc.ca/prev-prev/eng/1322761862008/1322762014207));
- A program requires a two or more year relationship with a recipient to achieve objectives and can be funded under a multi-year funding agreement; and
- The recipient can redirect funding among the various cost categories of that program as established in the agreement.

Funding Formula: Means the method used to determine the maximum funding level to be provided to a recipient.

Grant: A grant is a transfer payment that is subject to pre-established eligibility and other entitlement criteria. Recipients are not required to account for the grant, but they may be required to report on results. The grant funding approach can be used for any duration of time necessary to achieve program results. Grants are not normally subject to departmental audits but require specific Cabinet policy and Treasury Board of Canada Secretariat program spending authorities.

Income support funding per case month: An amount to cover certain administrative costs associated with the activities of the income support program, the calculation of which is based on the number of program recipients. It is based on the number of cases per month for which the band

receives a fixed amount. This factor distinguishes between bands which issue welfare cheques monthly and those that issue cheques twice a month, the latter requiring increased staff time. The support provided for monthly issuance is $35 per case month; $69 per case month is provided for semimonthly cheque issuance. This factor in the formula includes the cost of writing cheques and maintaining accounts related to the program but does not include the cost of salary, benefits and travel for specialist personnel necessary to deliver the service. Office space for such personnel, or specialized materials, supplies or equipment which may be necessary to the effective discharge of the program service are also not included. (See Appendix 4, Table 3).

Indian Government Support System: the authoritative source for *Indian Government Support* program data.

Location Costs: Is the factor in the formula intended to be applied to those extra costs which individual bands may incur by virtue of their location and means of access and are applied on the basis of a comparative cost index to those items particularly susceptible to differences in freight, travel and utility costs.

Major Capital: Capital projects with a value in excess of $1.5 million.

Major Services: Major services for most bands are restricted to income support, non-federal tuition, and major capital. Due to their high dollar value and readily defined overhead requirements, funds for support are allocated on a unit cost basis or, in the case of major capital projects, included as part of the overall project budget.

Operational Procedures: Are instructions that describe the necessary steps to follow in the provision and administration of the *Band Support Funding* program.

Remoteness and Environmental Indices: Factors used in the *Band Support Funding* formula to generate an amount intended as an offset against the additional expenditures attributable to the geographic location of a band. The factors are based on a remoteness index and on an environmental index. Both indexes refer to factors in a table that are used to adjust the cost-sensitive costs for Council Allowance and Basic Overhead components (remoteness) and for Service Staff (environmental). The remoteness factor addresses such things as increased transportation and shipping costs of remote bands (e.g. (for example) distance from service centres or where is no year-round road access and air planes or ice-roads are needed); the environmental factor relates the geographic location of the band to the local climate and addresses such things as the increased costs (e.g. (for example) light, heating) of service delivery for staff to provide services to band members.

Service Staff: An amount to partially cover the cost associated with providing space and facilities for the specialists responsible for delivering the services funded by the department. It is based on the number of specialists that the department recognizes as necessary for delivering the services funded by the department. An amount per employee differentiates cost-sensitive and non-cost sensitive expenses. This factor in the formula is intended to be applied to the cost of providing office space, basic telephone and supervision within the band office for those specialist personnel. All other costs (salary, benefits, training, travel, long distance calls, purchase of furniture and equipment, etc (et cetera).) may be provided to the band by contribution from other departmental budgets.

Table of Calculation: Contains the rates and levels that are used to determine band entitlements.

Travel Expenses for Council Members and Administrative Staff: Are those expenses incurred when authorized to travel on business related to the band.

Unit Cost (major services): Is the overhead cost incurred in the delivery of certain major services for which AANDC (Aboriginal Affairs and Northern Development Canada) provides funds. It includes the cost of writing cheques and maintaining accounts related to the service but does not include the cost of salary, benefits and travel for specialist personnel necessary to deliver the service. Office space for such personnel, or specialized materials, supplies or equipment which may be necessary to the effective discharge of the program service are also not included.

Appendix 3: Responsibilities and Procedures

1. Responsibilities

The band council is responsible for the provision of accurate information on the "Band Support Funding Grant Application".

The Regional Director General, Regional Director or his/her delegate is responsible for the delivery, maintenance, monitoring and support functions associated with the timely and efficient provision of resources.

District/regional finance officers are responsible for confirming that the amount of departmental contributions indicated on the Band profile refers to signed agreements with the Band as of March 31st, unless otherwise directed by the Headquarters program director.

It is the responsibility of other departmental program managers to advise the region at least six months in advance whenever changes in band services are proposed.

Director General, Governance, is responsible for the overall administration of the *Band Support Funding* program. The Director General, Governance, or his/her delegate, develops, prepares and circulates all policy directives and operational procedures related to the activity.

The Director, Corporate Information and Management Directorate (CIMD) in Headquarters is responsible for the overall administration of the National Indian Government Support System (IGSS) which is used to determine eligible funding levels and performance reporting. The Director, CIMD (Corporate Information and Management Directorate), or his/her delegate, provides regional database support and training. The regions are responsible for gathering the relevant data and entering it in the system.

Headquarters Finance is responsible for managing the allocation process for the program and will ensure that the total departmental *Band Support Funding* grant level is not exceeded.

2. Procedures

Recipients must submit their application for the grant to the region prior to the new fiscal year. The data on their application form will be reviewed and approved by the region to determine their maximum eligible funding level for the new fiscal year. The recipient may be funded up to the maximum level, as defined under the *Band Support Funding* formula. Regions will input the application data into their IGSS (Indian Government Support System) databases and submit the electronic data to Headquarters, Corporate Information and Management Directorate, for national analysis, roll-up and reporting.

Regions will be responsible for ensuring that individual recipients do not exceed their maximum grant funding level as defined under the *Band Support Funding* formula. Any adjustments to the grant amount due to unexpected circumstances throughout the year (for example to adjust upward or downward due to changes in programming), will be sourced from within existing regional budgets. Headquarters (Finance) will ensure that the total departmental *Band Support Funding* grant level is not exceeded.

Funding

The amount of funds which bands may be eligible to receive is determined by application of a formula which takes into account:

a. total status band membership on and off reserve;

b. status population on reserve;

c. type and value of program services delivered; and

d. number of program specialists necessary to deliver departmentally funded services, whose salary are derived from AANDC (Aboriginal Affairs and Northern Development Canada)'s contributions, and who require space in the band office to discharge their duties.

Due to variations in the particular circumstances of each band, it is not possible to provide a definitive list, by position, of such employees. For your guidance, the following program employees will not be considered when calculating *Band Support Funding*:

a. teachers and other education staff who are provided with facilities in education buildings, including band-operated schools;

b. employees whose main duties do not include a substantial amount of office work or record keeping;

c. employees on staff only for the duration of a project; and

d. entire detachments of band police forces (although consideration may be given to providing space for one employee if it is not otherwise available within other facilities).

Calculation of funding to cover the cost of office space for such employees requires that the appropriate departmental manager certify the need, the number of employees necessary to deliver the service effectively, that they occupy space in band office facilities, that salary, travel and other costs directly related to the service are being provided to the band.

Subject to the availability of funds, each band is to be granted up to the maximum eligible funding amount of Band Support Funding to which it is eligible on the prescribed "calculation date".

Third Party Manager Policy

Third Party Manager Policy [1] indicates that, in a situation where a third party manager is required, the additional costs incurred related to the administration of programs and services by this individual shall normally be drawn from the *Band Support Funding* provided to that band. [2] Section 13.1 further states that: according to the Third Party Manager Agreement, the third party manager is required to retain necessary personnel to continue to deliver programs and services, and any resulting costs should be drawn either from *Band Support Funding* or from the appropriate program funding provided to that band.

Third Party Manager Remuneration

When a Third Party Manager is in place, because the band government is no longer administrating departmental-funded services, *Band Support Funding* is redirected to cover the Third Party Manager's fees for managing the delivery of these programs and services in the community. These payments are managed as a contribution because the Third Party Manager's remuneration is paid on the basis of the receipt of invoices, not on the basis of an application. [3] To simplify the payment of Third Party Manager remuneration, specific financial coding titled "Band Support Funding for Third Party Manager Services" under the Comprehensive Funding Arrangement – Contribution authority, under Budget Activity G4102 and Transaction Activity 01012 should be used. Payments will be made as a contribution.

Dispute Resolution

Disputes regarding the accuracy of stated populations and programs administered will be adjudicated by the Regional Director General.

Disputes regarding the application of policy or formulae will be adjudicated by, in the first instance, the Regional Director General. If a satisfactory resolution is not achieved, the matter must be referred to the Director General, Governance, at Headquarters.

Appendix 4: Funding Formula

Band Support Funding is based on a nationally applied formula intended to ensure relative equity in the resourcing of bands. The funding formula, developed in 1983 and last revised in 2005 takes into account the following factors:

- population according to place of residence (on-reserve and off-reserve population) as of December 31 of each year;
- total number of cases per month in the income security program;
- number and value of federal, provincial, and territorial agreements;

- value of major capital projects [4];
- number of specialists required to deliver the services funded by the department (person years);
- type and value of the basic services funded by the department (e.g. (for example) lands and trust services, education, income support, economic development, infrastructure, minor capital projects, band management, advisory services); and
- geographic index (location based on remoteness and environmental conditions).

The formula originally was based on the premise that bands required adequate levels of administrative support to properly discharge local government responsibilities. Such support was seen to be essential to the success of AANDC (Aboriginal Affairs and Northern Development Canada)'s devolution policy to encourage the transfer of direct program administration from the department to Indian bands. The formula took into account: total band membership; on-reserve band population; band location; and the type and value of federally-funded services administered by the band. The formula was updated in 1989 to: increase the minimum level of funding available to very small bands to enable them to recruit and retain essential program staff; increase the maximum level of funding for bands managing very large programs to enable them to hire adequate numbers of program staff; and increase funding to extremely isolated bands to take into account unique cost factors related to program delivery. The formula was updated in 2005 to reflect changes in the Final Domestic Demand Implicit Price Index (FDDIPI).

The funding formula is comprised of seven components. Each component refers to an activity performed by the band council for which costs are determined. The band councils of bands, as defined in the *Indian Act*, are eligible to apply for a grant for administrative support. The formula is intended to ensure relative equity in the resourcing of bands. It is not possible for the funding formula to fully account for each band's actual administrative costs of delivering federally-funded programs; certain costs are discretionary and the efficiency and effectiveness of program delivery will vary from band-to-band. For some components, the factors refer to numbers in calculation tables. The sum of all seven components represent the maximum *Band Support Funding* level for each band.

- Council Allowance
- Basic Overhead
- Income Support Funding Per Case Month
- Federal / Provincial Agreements Funding Variables
- Service Staff
- Audit and Professional Funding Variables
- Remoteness and Environmental Indices

These components are used to determine the funding level and not intended to specify the nature of the permitted expenditure under the grant.

To establish funding in situations where bands have sub-offices in other communities administered by the band, three criteria must be met:

a. "subsidiary" communities must be recognized Indian communities in which the department, and therefore the band, has the responsibility to deliver services;

b. they must be located on-reserve or be authorized to locate on Crown land; and

c. there must be a demonstrable need for the presence of a band administrative capacity in the community which cannot be provided by the home office of the band. In cases where these three conditions are met, *Band Support Funding* will be provided to the band for sub-office(s) for: basic administration according to the resident population of the sub-community; program staff supplements according to the number of staff requiring office space; and isolation factors according to the existing situation.

The *Band Support Funding* formula is complementary to the other *Indian Government Support* programs. For example, as tribal councils assume management and delivery of AANDC (Aboriginal Affairs and Northern Development Canada) funded programs and services (e.g. (for example) education or social development) on behalf of member First Nations, administration cost elements in the formula such as person year costs and income support administration increase to reflect the additional responsibilities and workload. Since the First Nations no longer directly administer the programs, their support through the *Band Support Funding* formula (e.g. (for example) basic overhead, service staff, and income support administration) is reduced accordingly. The Tribal Council and *Band Support Funding* funding formulas are complementary to ensure that no duplication or overlap occurs.

Calculation Tables

Table 1 – Council Allowance

Status Members Total Band Population				
Lower	**Upper**	**Cost Sensitive ($)**	**Non-Cost Sensitive ($)**	**Total Funding ($)**
0	99	$6,079 + $360 per person (Cost Sensitive fraction 0.26)		
100	199	11,987	32,569	44,556
200	299	13,709	40,395	54,103
300	399	16,239	47,412	63,651
400	499	17,196	50,200	67,395
500	599	18,152	52,998	71,151
600	699	19,108	55,792	74,900
700	799	20,064	58,586	78,649
800	899	21,020	61,378	82,399
900	999	21,976	64,172	86,148
1,000	1,099	22,933	66,966	89,899

Status Members Total Band Population		Cost Sensitive ($)	Non-Cost Sensitive ($)	Total Funding ($)
Lower	Upper			
1,100	1,199	23,888	69,757	93,646
1,200 and over		24,845	72,551	97,396

Table 2.1 – Basic Overhead – Program range: Cost of basic services up to $67,158

Status Members: On-Reserve Population		Cost Sensitive ($)	Non-Cost Sensitive ($)	Total Funding ($)
Lower	Upper			
0	99	$12,157 + (0.35 x Basic Services (Cost Sensitive fraction 0.36667) = Maximum $38,904		
100	199			
200	299			
300	399	14,976	27,636	42,612
400	499	15,396	28,415	43,811
500	599	15,818	29,191	45,009
600	699	16,239	29,968	46,270
700	799	16,661	30,748	47,408
800	899	17,081	31,524	48,606
900	999	17,502	32,301	49,803
1,000	1,099	17,924	33,078	51,002
1,100	1,199	18,346	33,857	52,203
1,200	1,299	18,766	34,634	53,401
1,300	1,399	19,188	35,411	54,599
1,400	1,499	19,610	36,188	55,798
1,500	1,599	20,031	36,967	56,998
1,600	1,699	20,453	37,744	58,197
1,700	1,799	20,873	38,521	59,394
1,800	1,899	21,294	39,298	60,592
1,900	1,999	21,716	40,077	61,793
2,000	2,099	22,136	40,854	62,990
2,100	2,199	22,558	41,631	64,189
2,200 and over: Increment for every additional 100		422	777	1,199

Table 2.2 – Program range: Cost of basic services between $67,159 and $269,698

Status Members: On-Reserve Population		Cost Sensitive ($)	Non-Cost Sensitive ($)	Total Funding ($)
Lower	Upper			
0	99	12,294	32,389	44,682
100	199	14,199	37,407	51,606
200	299	16,092	42,394	58,486
300	399	19,543	49,265	68,808
400	499	20,536	51,763	72,299
500	599	21,528	54,264	75,792
600	699	22,519	56,763	79,283
700	799	23,513	59,263	82,776
800	899	24,505	61,763	86,267
900	999	25,495	64,262	89,758
1,000	1,099	26,488	66,762	93,249
1,100	1,199	27,480	69,262	96,742
1,200	1,299	28,472	71,761	100,232
1,300	1,399	29,464	74,260	103,724
1,400	1,499	30,456	76,761	107,217
1,500	1,599	31,448	79,261	110,709
1,600	1,699	32,439	81,759	114,198
1,700	1,799	33,432	84,260	117,692
1,800	1,899	34,424	86,760	121,184
1,900	1,999	35,415	89,259	124,674
2,000	2,099	36,408	91,759	128,167
2,100	2,199	37,399	94,258	131,657
2,200 and over: Increment for every additional 100		992	2,500	3,492

Table 2.3 – Basic Overhead – Program range: Cost of basic services between $269,699 and $675,844

Status Members: On-Reserve Population		Cost Sensitive ($)	Non-Cost Sensitive ($)	Total Funding ($)
Lower	Upper			

Status Members: On-Reserve Population		Cost Sensitive ($)	Non-Cost Sensitive ($)	Total Funding ($)
Lower	Upper			
0	99	11,027	33,654	44,681
100	199	15,514	47,346	62,860
200	299	19,053	58,093	77,147
300	399	23,521	71,721	95,242
400	499	24,383	74,349	98,732
500	599	25,244	76,976	102,220
600	699	26,106	79,604	105,709
700	799	26,968	82,231	109,199
800	899	27,830	84,858	112,688
900	999	28,690	87,485	116,176
1,000	1,099	29,552	90,114	119,666
1,100	1,199	30,416	92,740	123,155
1,200	1,299	31,276	95,367	126,643
1,300	1,399	32,138	97,996	130,134
1,400	1,499	32,999	100,623	133,622
1,500	1,599	33,862	103,249	137,111
1,600	1,699	34,723	105,877	140,600
1,700	1,799	35,585	108,504	144,089
1,800	1,899	36,446	111,132	147,577
1,900	1,999	37,309	113,759	151,068
2,000	2,099	38,171	116,386	154,557
2,100	2,199	39,032	119,013	158,045
2,200 and over: Increment for every additional 100		862	2,627	3,489

Table 2.4 – Program Range: Cost of basic services between $675,845 and $1,350,622

Status Members: On-Reserve Population		Cost Sensitive ($)	Non-Cost Sensitive ($)	Total Funding ($)
Lower	Upper			
0	99	11,035	33,647	44,682
100	199	16,635	50,550	67,185

Status Members: On-Reserve Population		Cost Sensitive ($)	Non-Cost Sensitive ($)	Total Funding ($)
Lower	Upper			
200	299	22,371	67,982	90,353
300	399	28,681	87,155	115,835
400	499	29,469	89,857	119,326
500	599	30,331	92,483	122,814
600	699	31,192	95,111	126,303
700	799	32,053	97,739	129,792
800	899	32,915	100,366	133,281
900	999	33,777	102,992	136,769
1,000	1,099	34,639	105,621	140,260
1,100	1,199	35,501	108,248	143,749
1,200	1,299	36,362	110,874	147,236
1,300	1,399	37,225	113,502	150,727
1,400	1,499	38,086	116,130	154,215
1,500	1,599	38,948	118,757	157,705
1,600	1,699	39,809	121,384	161,193
1,700	1,799	40,672	124,011	164,683
1,800	1,899	41,532	126,639	168,171
1,900	1,999	42,394	129,267	171,661
2,000	2,099	43,256	131,893	175,149
2,100	2,199	44,118	134,520	178,639
2,200 and over: Increment for every additional 100		862	2,627	3,489

Table 2.5 – Program Range: Cost of basic services between $1,350,623 and $2,701,244

Status Members: On-Reserve Population		Cost Sensitive ($)	Non-Cost Sensitive ($)	Total Funding ($)
Lower	Upper			
0	99	11,035	33,647	44,682
100	199	19,499	62,118	81,617
200	299	29,250	93,175	122,425
300	399	38,999	124,234	163,233

Status Members: On-Reserve Population		Cost Sensitive ($)	Non-Cost Sensitive ($)	Total Funding ($)
Lower	Upper			
400	499	39,829	126,878	166,707
500	599	40,658	129,522	170,181
600	699	41,489	132,165	173,654
700	799	42,318	134,810	177,127
800	899	43,148	137,454	180,602
900	999	43,977	140,097	184,074
1,000	1,099	44,808	142,741	187,549
1,100	1,199	45,637	145,384	191,021
1,200	1,299	46,467	148,030	194,497
1,300	1,399	47,296	150,673	197,969
1,400	1,499	48,127	153,317	201,444
1,500	1,599	48,956	155,961	204,917
1,600	1,699	49,786	158,604	208,390
1,700	1,799	50,615	161,249	211,864
1,800	1,899	51,446	163,892	215,337
1,900	1,999	52,275	166,536	218,811
2,000	2,099	53,105	169,181	222,286
2,100	2,199	53,936	171,824	225,760
2,200 and over: Increment for every additional 100		829	2,643	3,472

Table 2.6 – Cost of basic services equal or greater than $2,701,245

Status Members: On-Reserve Population		Logarithmic		Population	
Lower	Upper	Factor	Exponent	Factor	Adjustment ($)
0	99	0.0010300519	7.00	1.00	0
100	199	0.0010300519	7.00	0.50	0
200	299	0.0010300519	7.00	0.75	0
300	399	0.0010300519	7.00	1.00	0
400	499	0.0010300519	7.00	1.00	3,263
Cost Sensitive Fraction = 0.2389					

Status Members: On-Reserve Population		Logarithmic		Population	
Lower	Upper	Factor	Exponent	Factor	Adjustment ($)
500	599	0.0010300519	7.00	1.00	6,526
600	699	0.0010300519	7.00	1.00	9,789
700	799	0.0010300519	7.00	1.00	13 05
800	899	0.0010300519	7.00	1.00	16,315
900	999	0.0010300519	7.00	1	19,578
1,000	1,099	0.0010300519	7.00	1.00	22,842
1,100	1,199	0.0010300519	7.00	1.00	26,105
1,200	1,299	0.0010300519	7.00	1	29,368
	1,300 and over	0.001030052	7	1	32,631
Cost Sensitive Fraction = 0.2389					

Table 3 – Income Support Funding Per Case Month

Monthly Support Funding per Case Month ($)	Semi-Monthly Support Funding per Case Month ($)
35	69

Table 4 – Federal/Provincial Agreements Funding Variables

Value of agreement ($)	Funding per Agreement ($)
Up to 10,000	277
10,000 to 50,000	697
Over 50,000	1,396

Table 5 – Service Staff

Cost Sensitive (per employee) ($)	Non-Cost Sensitive (per employee) ($)
4,440	1,480

Table 6 – Audit and Professional Funding Variables

Geographic Zone	Base Amount ($)	Factor	Offset ($)	Approved Funding Adjustment ($)
1	2,431	0,005	0	2,431
2	2,431	0,005	0	2,431
3	3,647	0,005	1,216	2,431

Geographic Zone	Base Amount ($)	Factor	Offset ($)	Approved Funding Adjustment ($)
4	3,647	0,005	1,216	2,431

Table 7 – Remoteness and Environmental Indices
Band Classification Table

Remoteness Index							Environmental Index					
	A	B	C	D	E	F	A	B	C	D	E	F
Zone 1	0.00	0.08	0.12	0.20	0.25	0.29	0.00	0.40	0.60	1.00	1.30	1.60
Zone 2	0.10	0.18	0.22	0.30	0.35	0.40	0.00	0.40	0.60	1.00	1.30	1.60
Zone 3	0.40	0.48	0.52	0.60	0.66	0.72	0.05	0.47	0.68	1.10	1.42	1.73

Zone 4 Special Access (S.A.) Sub-zones

Remoteness Index							Environmental Index					
	A	B	C	D	E	F	A	B	C	D	E	F
0	0.10	0.18	0.22	0.30	0.44	0.59	0.00	0.40	0.60	1.00	1.30	1.60
1	0.35	0.45	0.50	0.60	0.66	0.72	0.20	0.68	0.92	1.40	1.76	2.12
2	0.45	0.55	0.63	0.74	0.81	0.87	0.40	0.96	1.24	1.80	2.22	2.63
3	0.65	0.75	0.82	0.95	1.03	1.10	0.60	1.24	1.56	2.20	2.68	3.16
4	0.80	0.92	1.00	1.04	1.23	1.30	0.80	1.52	1.88	2.60	3.15	3.68
5	0.95	1.10	1.18	1.35	1.44	1.53	1.00	1.80	2.20	3.00	3.60	4.20
6	1.10	1.25	1.35	1.65	1.75	1.85	1.20	2.08	2.52	3.40	4.06	4.72

Note: A remoteness index and an environmental index are required for calculating the level of funding for Indian Government Support, Education and Social Development. Both indices are derived based on a combination of the remoteness classification and the environmental classification of a First Nation. Table 7 lists the remoteness and environmental indices for all possible combinations of remoteness and environmental classifications. Definitions are provided below.

Remoteness Classification

Zone 1: same definition as Geographic Zone 1 (First Nations located within 50 km (kilometer) of a service centre).

Zone 2: same definition as Geographic Zone 2 (First Nations located between 50-350 km (kilometer) of a service centre).

Zone 3: same definition as Geographic Zone 3 (First Nations located over 350 km (kilometer) from a service centre).

Zone 4: same definition as Geographic Zone 4 (First Nations with either air, rail or boat access to the service centre). This geographic zone is divided into the following sub-zones, according to their distance directly measured from the service centre: Sub-Zones of Zone 4: 0: distance < 50 km (kilometer) (classified as Zone 2)

- 1: 50 < distance < 160 km (kilometer)
- 2: 160 < distance < 240 km (kilometer)
- 3: 240 < distance < 320 km (kilometer)
- 4: 320 < distance < 400 km (kilometer)
- 5: 400 < distance < 480 km (kilometer)
- 6: distance < 480 km (kilometer)

Environmental Classification: relates the geographic location of a First Nation to the local climate.

- A: geographic location < 45° latitude
- B: 45° latitude < geographic location < 50° latitude
- C: 50° latitude < geographic location < 55° latitude
- D: 55° latitude < geographic location < 60° latitude
- E: 60° latitude < geographic location < 65° latitude
- F: geographic location < 65° latitude

Appendix 5: Frequently Asked Questions

Does *Band Support Funding* contribute towards salaries?

Yes. For example, it can be used to support the salary costs of administrative staff.

Can *Band Support Funding* be used to cover election costs?

Yes. *Band Support Funding*, as a grant, affords bands the flexibility to allocate funds according to their individual needs and priorities in meeting the cost of local government and the administration of AANDC (Aboriginal Affairs and Northern Development Canada)-funded services. Elections are considered to be a key element of effective local governments.

Are there any overlaps in funding between *Band Support Funding* and the Tribal Council Funding program?

No, the funding formulas for the two programs are designed to complement each other. Tribal council administration or "overhead" funding increases as the level and range of programming managed on behalf of member bands grows and as bands relinquish program management responsibilities to tribal councils, their levels of *Band Support Funding* are reduced accordingly, particularly in the basic overhead and service staff components of the formula. Therefore, the *Tribal Council Funding* and

Band Support Funding formulas are complementary to ensure that no duplication or overlaps occur.

When are *Band Support Funding* application forms due into the regional office?

For each funding agreement renewal, applicants must submit an application before the end of the previous fiscal year in accordance with the *Band Support Funding* program application requirements. The deadline date will vary from region to region as determined by each regional office's funding management cycle.

What are some examples of activities that might be supported by *Band Support Funding*?

The *Band Support Funding* grant is intended to provide a financial base for the conduct of band government. Councils may utilize funds provided to defray expenses incurred such as: allowance for Chief and elected members of council; travel expenses for chief and elected members; salaries and travel for administrative staff; office supplies, utilities, rent and equipment; basic telephone rental and installation; long distance telephone costs for council and administrative purposes; postage and bank charges; band office janitorial and maintenance services; or annual audit and other professional fees.

Is the *Band Advisory Services* program related to the *Band Support Funding* and *Tribal Council Funding* programs?

Yes, the determination of the funding level of the Band Advisory Services program is associated with the funding formulas of both the *Band Support Funding* and the Tribal Council Funding programs.

The overhead costs associated with *Band Advisory Services* are provided through the *Band Support Funding* program. This is accomplished by including the amount of *Band Advisory Services* funding and the associated "advisory units," as determined by the *Band Advisory Services* funding formula, in the *Band Support Funding* formula calculation. These amounts are added to the Basic Services section of the *Band Support Funding* Service Profile, thus increasing the Total Basic Services funding and Person-Year totals which are elements of the *Band Support Funding* formula.

Footnotes

1 The Third Party Manager Policy can be found in the AANDC (Aboriginal Affairs and Northern Development Canada) *Financial Management Manual, Volume 3: Financial Policies and Procedures Manual, Part 5 – Transfer Payments, Chapter 5.8 on Funding Arrangements: Third Party Manager*. The policy may be amended from time-to-time.

2 The *Financial Management Manual, Volume 3: Financial Policies and Procedures Manual, Part 5 – Transfer Payments, Chapter 5.8 on Funding Arrangements: Third Party Manager, sections 7.1 and 7.2 state:* "The terms and conditions of the Funding Arrangement shall provide that the Minister may appoint a Third Party Manager ... in a default situation." Appointments of Third Party Managers are made in accordance with the Intervention Policy in Chapter 5.11 which states that Band Support Funding should be the source of funding to cover the Third Party Manager's fees."

3 The reporting requirements related to the Third Party Manager invoicing process are specified in the Financial Management Manual, Volume 3: Financial Policies and Procedures Manual, Part 5 – Transfer Payments, Chapter 5.8 on Funding Arrangements: Third Party Manager, Section 23, Appendix A – Model Third Party Manager Agreement, Schedule B – Manager Remuneration Terms as follows:

1.1 The Manager shall provide the Minister, at a minimum, quarterly, with a detail of fees for services provided on behalf of the Recipient ("Quarterly Account"), within thirty (30) calendar days of the end of each calendar quarter.

1.2 The Quarterly Account shall include the time expended, work performed, persons who performed the work and the cost of disbursements made in respect of same pursuant to this Agreement by the Manager.

1.3 The Manager must also provide the Minister with interim monthly invoice for services provided on behalf of the Recipient, within thirty (30) calendar days of each month end. The Minister will, within fourteen (14) calendar days of such receipt, make payment in accordance with the terms set out herein.

1.4 The Minister will review the Quarterly Account received in accordance with 1.1 and if in accordance with section 2.0 herein [on Rates of Remuneration], and otherwise reasonable, will adjust the next payment paid out to the Manager in accordance with 1.3, if necessary.

1.5 The Manager shall provide the Minister with a final account of fees for services provided ("Final Account"), within thirty (30) calendar days of the termination or expiration of this Agreement.

1.6 The Minister will review the Final Account and if reasonable, make payment of the amount of all remaining fees and disbursements due to the Manager, subject to the hold-back provisions in this Agreement, within forty-five (45) calendar days of receiving the Final Account.

4 "Major Capital" is defined in Annex 2 as "capital projects with a value in excess of $1.5 million." Since capital projects costing in excess of $1.5 million could take more than one year to complete, the cash flow information over the estimated life of such projects provided in a First Nation's Long Term Capital Plan should be examined and only the total dollar value of all AANDC (Aboriginal Affairs and Northern Development Canada) contributions/transfer payments in the current fiscal year should be included in the BSF (Band Support Funding) formula. This amount could be less than $1.5 million in any given year of a multi-year project; however, the sum of the amounts included in consecutive BSF (Band Support Funding) Applications over the life of a major capital project would always be in excess of $1.5 million.

For example, for a $3 million project costing $1 million per year over three years, $1 million would be entered in the application for each of the three years. In the case of a three-year $6 million project costing $1 million in the first year, $3 million in the second year and $2 million in the third year, only the $1 million, $3 million and $2 million would be included in the BSF (Band Support Funding) formula calculation in each of those years. Cash flow projections should be reviewed and updated where necessary to take into account any AANDC (Aboriginal Affairs and Northern Development Canada)-approved cost adjustments.

Date modified:

2016-01-15

TAB 3

Accessibility-Remoteness (A-R) Index Summary Paper

Newfoundland & Labrador Statistics Agency

February 2014

The Accessibility-Remoteness (A-R) index was developed by the Newfoundland and Labrador Statistics Agency (NLSA) as means to classify communities within the province according to accessibility to government and community services. Accessibility is an important factor in the development and implementation of government policies and plans to provide services to the general public. With a fragmented settlement pattern of isolated coastal outports and interior regional service hubs, the concept of accessibility in Newfoundland and Labrador is a complicated location-based measurement of the spatial distribution of public services throughout the province.

Classification of accessibility is a geographical approach that is defined in terms of the road distance between an origin community and a set of services. The focus is on the manner in which distance impedes the opportunities for interaction between people and these services. For government policy making, accessibility can play a secondary role as a replacement for the ambiguous rural-urban classification, with the highest accessible localities being the urban service hubs and the lower accessible localities the embodiment of rural Newfoundland and Labrador.

The A-R index is a statistical measure that allows communities to be evaluated in comparison to each other in terms of accessibility. Through consultation with numerous government departments the following variables were deemed important in community-service interactions:

Table 1: Community-Service Variables

Feature Variable
Travel time to primary health care
Travel time to secondary health care
Travel time to tertiary health care
Travel time to quaternary health care
Travel time to nearest supermarket
Travel time to nearest pharmacy
Travel time to nearest primary school
Travel time to nearest junior high school
Travel time to nearest high school
Travel time to nearest university-college
Travel time to nearest gas station
Daytime population of communities

All of the variables, with the exception of daytime population, are calculated based on the distance of each community to the nearest respective service. The distance measurement is based on shortest travel time between both locations using the Road Distance Database (NL-RDDb) developed by the NLSA. Figure 1 shows an example of the shortest travel route between the communities of Codroy and Channel-Port aux Basques, which contains the nearest primary health care facility. The daytime population variable is the estimated population of a community during normal business (daytime) hours. It includes increases/decreases in a community population due to daily commutes and short-term migration events, such as hospital visits.

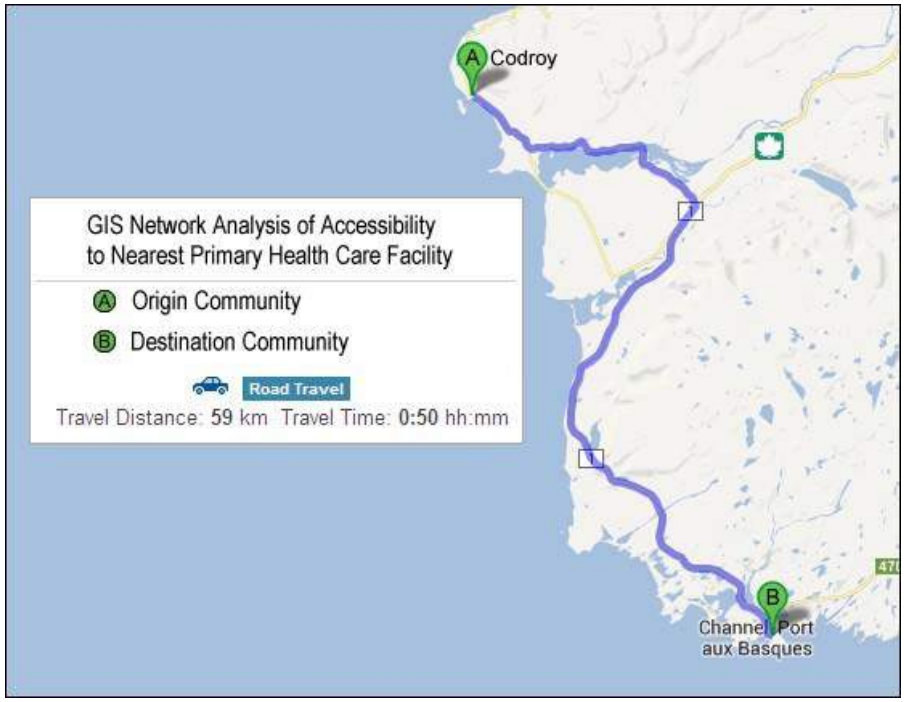

Figure 1: Example Travel to Service

An exploratory spatial data analysis was conducted to reduce the preliminary listing to a smaller set of statistically significant predictor variables. Using statistical classification techniques seven variables were selected that can be used to measure spatial accessibility in Newfoundland and Labrador (see Table 2).

Table 2: Predictor Variables

Variable
Travel time to nearest primary health care center (Hospital or Clinic)
2012 Daytime Population for Communities
Travel time that children are bussed to assigned high school
Travel time to nearest supermarket
Travel time to nearest pharmacy
Travel time to nearest dental clinic (Both fixed and mobile clinics)
Travel time to nearest secondary health care facility (referral care)

The number of variables was reduced, however there was no inherent ranking assigned to the variables at this stage of the analysis. This was accomplished through a moderated session with a group of stakeholders, in which each variable was compared to each other to determine which variables are more important. This information was evaluated using a technique called Multiple Criteria Evaluation (MCE) that determines mathematically the weight of each variable's importance relative to each other. The result of this analysis is shown in Table 3.

Table 3: Variable Weight

Rank	Variable	Weight
1	Travel time to nearest primary health care center (Hospital or Clinic)	0.393
2	2012 Daytime Population for Communities	0.232
3	Travel time that children are bused to assigned high school	0.153
4	Travel time to nearest supermarket	0.104
5	Travel time to nearest pharmacy	0.058
6	Travel time to nearest dental clinic (Both fixed and mobile clinics)	0.039
7	Travel time to nearest secondary health care facility (referral care)	0.021

The results show that the distance to the nearest primary health care centre was the most important factor in determining accessibility-remoteness of a community. This was followed by daytime population and travel time to nearest high school. To complete the A-R index each of the variables were standardized to ensure that the data ranges of the predictor variables are the same. Dividing the individual value of the community by the highest travel time in the province generates a ranking from 0 to 1 for each of the associated variables.

The next step is the computation of a single accessibility-remoteness index value for each community in the province by combining each variable value with their weights followed by a summation of the results. Mathematically, the accessibility index is calculated as:

$$A_i = \sum_{j=1}^{n} w_j a_{ij}, \text{ for } i = 1,2,3\ldots,n \quad (1)$$

where A_i is the accessibility-remoteness index value, w_j is the weight of criteria variable j, and a_{ij} is the value for community i when it is evaluated according to each criteria variable j. Each community was assigned an A-R index value that ranged from 0 to 1. The A-R index value was then categorized using natural breaks partitioning into 6 classifications, ranging from 'Highly Accessibilty' to 'Very Remote' (See Table 4).

Table 4 - Accessibility-Remoteness Classifications

Classification	*Access to Goods and Services*	*Percentage of Total 2011 Population*	*Example*
Highly Accessible	Unrestricted	68.3%	Corner Brook
Accessible	Some Restriction	15.6%	Rocky Harbour
Somewhat Accessible	Considerable Restriction	8.6%	Ferryland
Moderately Remote	Significant Restriction	4.9%	Trepassey
Remote	Very Restricted	1.5%	Port Hope Simpson
Very Remote	Little / No Access	1.2%	Nain

Communities with the highest accessibility are generally regional service centres with many government services, such as a health care centre. They also tend to have substantial increases in daytime population. Very remote communities, on the other hand, are isolated and must utilize ferry or aircraft to get to regional and provincial service centres. On a provincial scale only a small percentage (2.6%) of the total population resides in the remote and very remote areas, while 83.9% live in accessible and highly accessible localities.

The last step in the A-R index was the creation of a thematic map to aid in the visualization of accessibility and remoteness. To create the map the A-R index values were used to interpolated a continuous surface for the province. This surface would then be reclassified

according to the natural breaks used to categorize the communities in the previous step. The resulting maps are shown in Figure 2 and Figure 3.

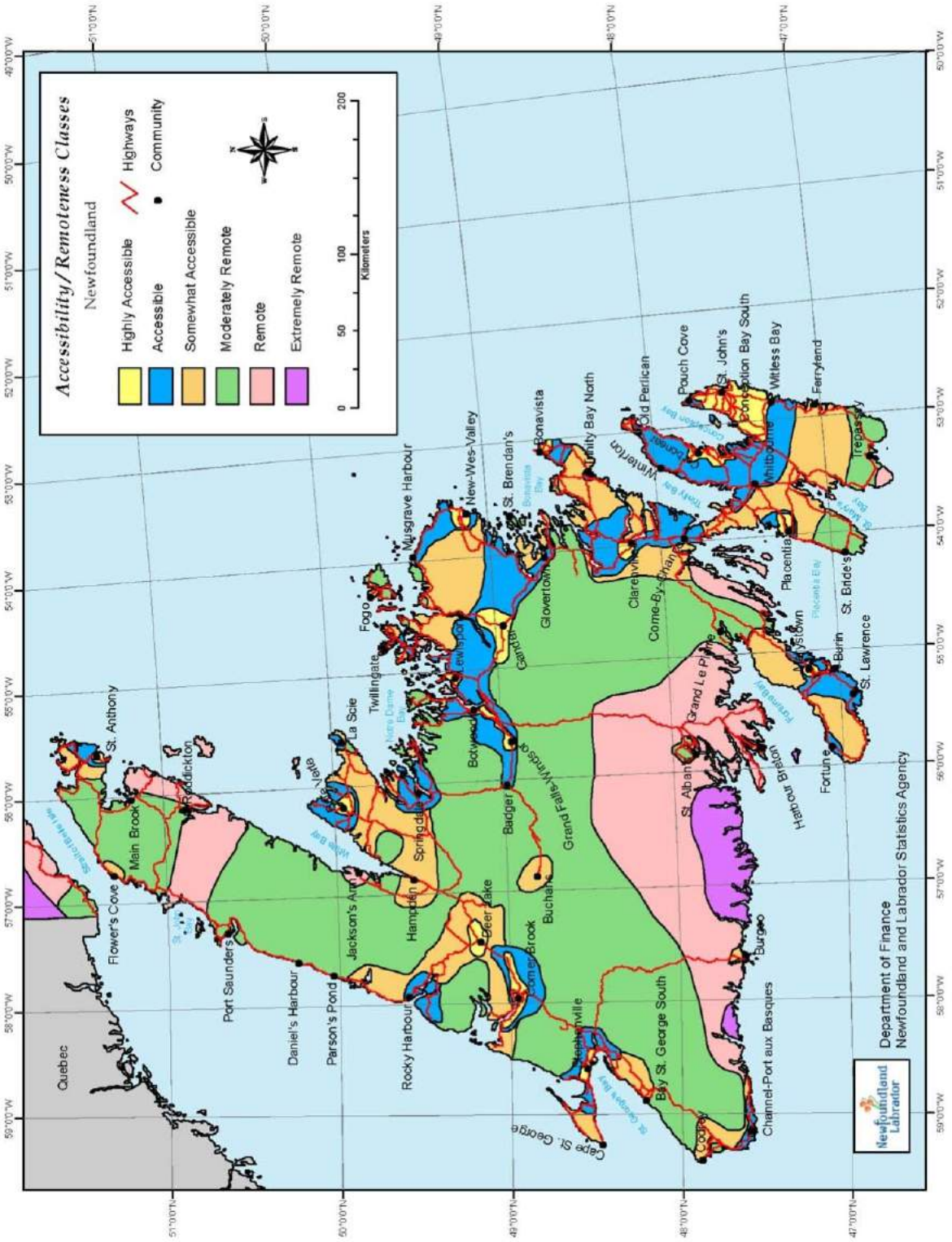

Figure 2: Accessibility-Remoteness Map for Newfoundland

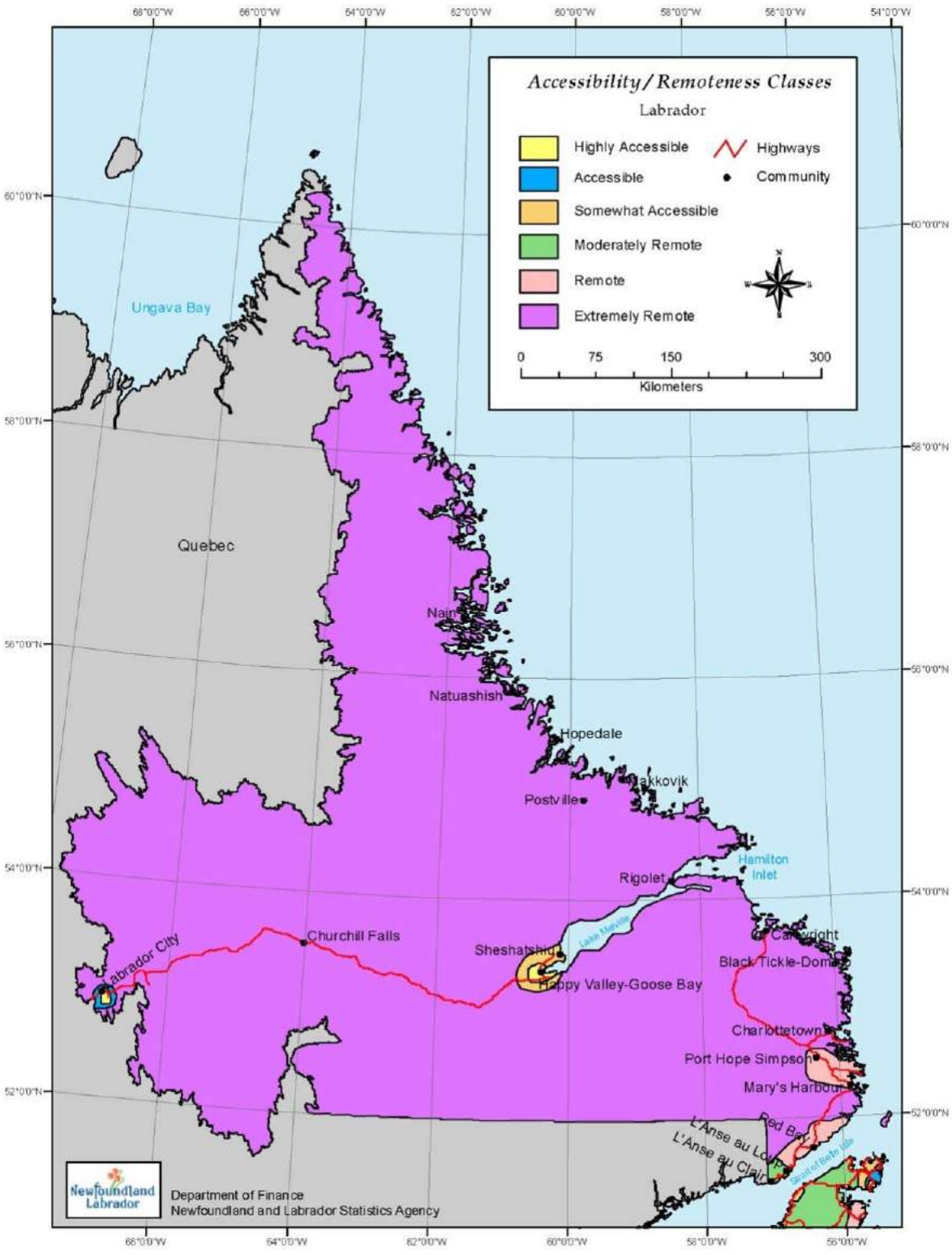

Figure 3: Accessibility-Remoteness Map for Labrador

TAB 4

Nishnawbe Aski Nation
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100 Back Street, Unit 200 Thunder Bay, ON P7J 1L2
Tel: (807) 623-8228 Fax: (807) 623-7730

NEWS RELEASE

Wednesday January 20, 2016 **FOR IMMEDIATE RELEASE**

NAN ISSUES CALL TO ACTION ON SUICIDE CRISIS

THUNDER BAY, ON: Nishnawbe Aski Nation (NAN) Grand Chief Alvin Fiddler issued a call to action today to the governments of Ontario and Canada to establish a Special Emergency Task Force to address the growing suicide epidemic across NAN First Nations.

"Leaders from across NAN territory stand united today in their call for a focused task force to take immediate action to stop the growing epidemic of suicide that continues to devastate so many of our communities," said NAN Grand Chief Alvin Fiddler. "Hundreds of our young people, some as young as 10 years old, are taking their lives while living in poverty, hopelessness and despair and without immediate action there will be no end in sight. This crisis is a national tragedy and the time for action is now."

Several NAN First Nations were thrown into crisis this Christmas season following the suicides of a 10-year-old girl in Bearskin Lake First Nation, a 20-year-old woman in Fort Albany First Nation, and a 14-year-old girl in Neskantaga First Nation.

"Nothing is as shocking as the death of a child, and the continued loss of our youth and community members has a devastating impact on the health of our communities and our members," said Bearskin Lake First Nation Chief Rosemary McKay. "The loss of every child affects the entire community but we lack the resources to prevent this crisis and help our members heal from their grief."

Neskantaga First Nation declared a State of Emergency in 2013 after seven youth took their own lives. Described as living in "fourth world living conditions" the community, which has not had access to clean drinking water since 1995, is overwhelmed by crippling health and social issues.

"Today my community is in a state of crisis because of the loss of another one of our young people. We need to see immediate action at the community level to properly address the needs of our families," said Neskantaga First Nation Chief Wayne Moonias. "Our children deserve a future and we need the political will of the leaders of Ontario and Canada to make this a priority."

NAN's call to action follows today's launch of The People's Inquiry on Suicide by the Mushkegowuk Council Grand Chief Jonathan Solomon during the NAN Winter Chiefs in Assembly (January 19-21) in Thunder Bay. The comprehensive report documents the ongoing suicide pandemic in the Mushkegowuk communities along the James Bay coast (NAN's eastern border) and identifies key solutions and recommendations.

NAN is looking for both the Government of Ontario and the Government of Canada to commitment resources for the development of crisis response teams to immediately begin to assist communities as well as developing a long-term strategy for suicide prevention including physical and mental health services, counselling and addiction treatment.

For more information please contact: *Michael Heintzman, Director of Communications – Nishnawbe Aski Nation (807) 625-4965 or cell (807) 621-2790 or by email mheintzman@nan.on.ca*

TAB 5

NON-INSURED HEALTH BENEFITS (NIHB) PROGRAM

First Nations and Inuit Health Branch

Health Canada

MEDICAL TRANSPORTATION POLICY FRAMEWORK

Ce document est aussi offert en français sous le titre :

CADRE DE TRAVAIL SUR LE TRANSPORT POUR RAISON MÉDICALE

Effective date: July 2005

TABLE OF CONTENTS

INTRODUCTION

Foreword

The Non-Insured Health Benefits (NIHB) Program provides a limited range of medically necessary health-related goods and services not provided through private insurance plans, provincial/territorial health or social programs or other publicly funded programs to eligible registered First Nations and recognized Inuit. The benefits provided under the NIHB Program supplement private insurance or provincial/territorial health and social programs, such as physician and hospital care and community health programs. The benefits funded include prescription drugs, over-the-counter medication, medical supplies and equipment, crisis intervention mental health counselling, dental care, vision care and medical transportation to access medically necessary health services not provided on the reserve or in the community of residence. The NIHB Program also funds provincial health premiums for eligible clients in British Columbia.

Framework Objective

The NIHB Medical Transportation Policy Framework defines the policies and benefits under which the NIHB Program will fund eligible registered First Nations and recognized Inuit (clients) with access to medically necessary health services not provided on the reserve or in the community of residence. Medical transportation benefits are funded in accordance with the mandate of the NIHB Program, which includes providing non-insured health benefits that are appropriate to the needs of the clients and sustainable. The NIHB Medical Transportation Policy Framework sets out a clear definition as to the eligibility of clients, the types of benefits to be provided and criteria under which they will be funded.

The NIHB Medical Transportation Policy Framework applies to the funding of medical transportation benefits by the First Nations and Inuit Health Branch (FNIHB) Regional Offices or by First Nations or Inuit Health Authorities or organizations (including territorial governments) who, under a contribution agreement, have assumed responsibility for the administration and funding of medical transportation benefits to eligible clients.

1. GENERAL PRINCIPLES

1.1 Medical transportation benefits are funded in accordance with the policies set out in this framework, to assist clients to access medically necessary health services that cannot be obtained on the reserve or in the community of residence, when access would otherwise be denied. Exceptions may be granted, with justification and FNIHB approval, to meet exceptional needs.

1.2 Access to medically necessary health services may include financial assistance to the client or arranging for the provision of services from the reserve or community of residence when the following conditions are met:

a) The client has exhausted all other available sources of benefits for which they are eligible under provincial/territorial health or social programs, other publicly funded programs (e.g., motor vehicle insurance, Workers Compensation) or private insurance plans;

b) Travel is to the nearest appropriate health professional or health facility (when health professionals are brought into the community to provide the service, the community facility is considered the nearest appropriate facility);

c) The most economical and efficient means of transportation is used, taking into consideration the urgency of the situation and medical condition of the client;

d) A FNIHB or First Nations or Inuit Health Authority or organization representative or on-site medical professional has determined that medically necessary health services are not available on the reserve or community of residence;

e) Transportation to health services is coordinated to ensure maximum cost-effectiveness;

f) Transportation benefits are provided when prior approved by FNIHB or a First Nations or Inuit Health Authority or organization or post approved upon medical justification if consistent with the framework;

g) In emergency situations, when prior approval has not been obtained, expenses may be reimbursed by FNIHB or a First Nations or Inuit Health Authority or organization when appropriate medical justification is provided to support the medical emergency and approved after the fact; and

h) When public transit is not available.

1.3 Medical transportation benefits may be provided for clients to access the following types of medically necessary health services:

- medical services defined as insured services by provincial/territorial health plans (e.g., appointments with physician, hospital care);
- diagnostic tests and medical treatments covered by provincial/territorial health plans;
- alcohol, solvent, drug abuse and detox treatment;
- traditional healers; and
- Non-Insured Health Benefits (vision, dental, mental health).

1.4 Medical transportation benefits include ground, water and air travel, meals and accommodation. For more information, refer to Sections 3 (Modes of Transportation), 4 (Emergency Transportation) and 9 (Meals and Accommodation).

1.5 Medical transportation benefits may be provided for an approved escort. Refer to Section 5 (Client Escorts).

1.6 In cases where a client is required to travel repeatedly on a long term basis to access medical care/treatment, medical transportation benefits will be provided for up to four months. During this time, an assessment will be conducted involving the treating physician, other relevant health professional(s) and the client to determine the provision of further benefits, taking into consideration the client's medical condition.

1.7 Medical transportation benefits may be provided when the client is referred by the provincial/territorial health care authority for medically necessary health services to a facility outside of Canada when such services are covered by a provincial/territorial health plan and the medical transportation benefits are not covered by provincial/territorial health or social programs, other publicly funded programs or private insurance.

1.8 When a request for medical transportation is denied, an appeal process is available. Appeals must be initiated by the client or by a designate acting on their behalf. For more information, refer to Appendix E (Appeal Process), or contact the NIHB Regional Office.

2. COORDINATED TRAVEL

2.1 When more than one client is travelling to the same location, where practical and economical, appointments and travel arrangements will be coordinated to ensure optimum cost-effectiveness.

2.2 When more than one medically necessary service is required in a week and/or more than one family member needs to access a medically necessary service in the same week, where practical and economical, appointments and travel arrangements will be scheduled for the same day to ensure optimum cost-effectiveness.

2.3 When more than one client is travelling in the same vehicle, the rate reimbursed will be for one trip only. Where applicable, an appropriate schedule of fixed rates will be established.

3. MODES OF TRANSPORTATION

3.1 The most efficient and economical mode of transportation consistent with the urgency of the situation and the medical condition of the client is to be utilized at all times as approved by FNIHB or a First Nations or Inuit Health Authority or organization. Clients who choose to use another mode of transportation will be responsible for the difference in the cost between the two.

3.2 When scheduled and/or coordinated medical transportation benefits are provided by FNIHB or a First Nations or Inuit Health Authority or organization, clients who choose to use another mode of transportation will be responsible for the full cost. For more information please refer to Section 2 (Coordinated Travel).

3.3 The following modes of transportation (including special needs vehicles) may be utilized for medical transportation benefits:

Ground travel

- Private vehicle
- Commercial taxi
- Fee for service driver and vehicle
- Band vehicle
- Bus
- Train
- Snowmobile taxi
- Ground ambulance

Water travel

- Motorized boat
- Boat taxi
- Ferry

Air travel

- Scheduled flights
- Chartered flights
- Helicopter
- Air ambulance
- Medevac

Private Vehicles

3.4 a) When it has been determined by FNIHB or a First Nations or Inuit Health Authority or organization that a private vehicle is the most appropriate, efficient and economical means of transportation, the payment of a per kilometre allowance may be authorized for the use of a private vehicle by a client to access medically necessary health services. For more information, refer to Appendix C (Meal, Accommodation and Kilometre Allowances).

b) The payment of a private vehicle per kilometre allowance will not be approved when scheduled and/or coordinated medical transportation is available from FNIHB or a First Nations or Inuit Health Authority or organization.

c) Reimbursement of the per kilometre allowance for the use of a private vehicle will be issued to the client. With the authorization of the client, Band or community nursing personnel, reimbursement can be issued to the driver or the Band if applicable.

d) When public transportation is available and the client chooses to use his/her own private vehicle, reimbursement will be made at either the equivalent public transportation rate or at the established private vehicle per kilometre allowance rate, whichever is the lesser.

Fee for Service Driver and Vehicle, Commercial Taxi

3.5 a) The use of fee for service drivers and vehicles or commercial taxis may be authorized when they have been determined by FNIHB or a First Nations or Inuit Health Authority or organization to be the most appropriate, efficient, and economical mode of transportation. Where applicable, an appropriate schedule of fixed rates will be established.

b) The use of fee for service drivers and vehicles or commercial taxis will not be approved when scheduled and/or coordinated medical transportation is available from FNIHB or a First Nations or Inuit Health Authority or organization.

c) Fee for service drivers and vehicles who are not regulated by a regulatory body, FNIHB or a First Nations or Inuit Health Authority or organization must ensure that a copy of the appropriate driver licenses, vehicle registration and certificate of insurance as a public carrier are kept on file with FNIHB or a First Nations or Inuit Health Authority or organization.

Indemnification

3.6 Whether Band vehicle and drivers or fee for service drivers are used to provide medical transportation benefits, FNIHB or a First Nations or Inuit Health Authority or organization shall ensure:

a) All medical drivers carry and maintain a valid provincial/territorial driving permit and appropriate liability insurance in relation to the carriage of passengers by vehicle or other motorized conveyances;

b) All medical drivers undergo a screening process, including background checks and references, whereby the general trustworthiness of the driver is assessed, bearing in mind that the driver will not only be operating a motor vehicle, but also entrusted with the transport of medical patients and will frequently be alone with such persons for extended periods;

c) All vehicles carry and maintain a valid license, registration and appropriate liability insurance in relation to the carriage of passengers by vehicle or other motorized conveyances;

d) All vehicles used for medical transportation are in good working order, including seat belts and child safety seats, and that all laws applicable to transportation are adhered to by all drivers.

Public Transportation (air, bus, train, ferry)

3.7 The use of public transportation may be authorized when it has been determined to be the most appropriate, efficient, and economical means of transportation, consistent with the urgency of the situation and the medical condition of the client, and it is provided to access the nearest appropriate facility.

Charter Flights

3.8 In the case of air travel, when a group of clients is travelling to the same location, where applicable and when more economical, charter flights will be arranged rather than individual scheduled flights. Clients may not opt to use the regularly scheduled flight unless they assume the full cost of the air travel.

4. EMERGENCY TRANSPORTATION

4.1 Assistance with the cost of ambulance services will be provided when such services are required for emergency situations.

4.2 Salaries for doctors or nurses accompanying clients on the ambulance are not covered.

4.3 Licensed ambulance operators will be reimbursed according to the terms, conditions and rules of the regionally negotiated payment schedules.

Ground Ambulance

4.4 Medical transportation benefits for emergency ground ambulance include only the portion of the services not covered by provincial/territorial health or social programs, other publicly funded programs, or private health insurance plans (equivalent amount billed to other provincial/territorial residents).

Air Ambulance/Medevac

4.5 Medical transportation benefits for emergency air ambulance/medevac services include only the portion of the services not covered by provincial/territorial health or social programs, other publicly funded programs or private health insurance plans (equivalent amount billed to other provincial/territorial residents).

4.6 Medical transportation benefits include air ambulance/medevac transportation for a client in emergency situations when:

a) A medical assessment has been conducted by an on-site nurse or physician and the need for emergency transportation to a hospital for either immediate or emergency treatment has been established and transportation by a commercial scheduled flight could compromise the client's condition;

or

b) The emergency occurs in a remote location and neither an on-site nurse nor physician is available to conduct a medical assessment and the air ambulance/medevac has been authorized by a representative of FNIHB or of a First Nations or Inuit Health Authority or organization.

5. CLIENT ESCORTS

5.1 Medical transportation benefits may include the provision of transportation, accommodation and meals for medical or non-medical escorts for clients travelling to access medically necessary health services.

5.2 The use of an escort must be preauthorized by FNIHB or a First Nations or Inuit Health Authority or organization. The length of time for which the escort is authorized will be determined by the client's medical condition or legal requirements.

5.3 Medical transportation benefits do not include the payment of a fee, honorarium or salary to medical or non-medical escorts.

Medical Escorts

5.4 Medical escorts, either a physician or registered nurse, may be approved in cases which involve a client with a health condition where monitoring and/or stabilization are required during travel and such services are not covered by the provincial/territorial health or social program, other publicly funded program or private insurance.

Non-Medical Escorts

5.5 The provision of a non-medical escort may be approved, following a doctor's or community health professional's request, only when there is a legal or medical requirement such as:

a) Where the client has a physical/mental disability of a nature that he or she is unable to travel unassisted;

b) Where the client is medically incapacitated;

c) Where the client has been declared "mentally incompetent" by a court of competent jurisdiction and assistance to access medically necessary health services, legal consent or help with activities of daily living is required;

d) When there is a need for legal consent by a parent or guardian;

e) To accompany a minor (as determined by provincial/territorial legislation) who is accessing medically necessary health services;

f) When a language barrier exists to access medically necessary health services and these services are not available at the referred location; or

g) To receive instructions on specific and essential home medical/nursing procedures that cannot be given to the client only.

5.6 When an escort has been authorized, the following criteria should be considered in selecting the escort:

a) A family member who is required to sign consent forms or provide a patient history;

b) A reliable member of the community;

c) Physically capable of taking care of themselves and the client and not requiring assistance or an escort themselves;

d) Proficient in translating from local language to English/French;

e) Able to share personal space to support client;

f) Interested in the well being of the client; and

g) Able to serve as driver when client is unable to transport him/herself to or from appointment.

5.7 Unless there is a medical or legal requirement for an escort to stay longer, or it is more practical financially to have the escort stay longer, the escort shall return to the community by the earliest and most economical reasonable means.

6. APPOINTMENTS

6.1 When accessing medical transportation benefits, confirmation that the client has accessed a medically necessary health service must be obtained from the health care professional or his/her representative and submitted to FNIHB or a First Nations or Inuit Health Authority or organization.

6.2 When a client does not attend a scheduled appointment and medical transportation benefits have been provided, the client may have to assume the cost of the return trip or of the next trip to access medically necessary health services unless proper justification is provided to explain why the client was unable to attend or to notify the appropriate public carrier of the cancellation.

7. ADDICTIONS TREATMENT TRAVEL POLICY

7.1 Travel will be funded to the closest appropriate NNADAP funded/referred facility in the home province only. Exceptions are made to travel outside the province only when the required treatment is not available in the home province or when a neighbouring province's treatment centre is the closest centre and approved by the NIHB Regional Office.

7.2 Clients are required to meet all treatment centre entry requirements prior to medical transportation benefits being authorized.

7.3 Only the most efficient and economical method of transportation will be authorized, taking into account the medical condition of the client.

7.4 An escort is only provided for a client as defined in Section 5 (Client Escorts).

7.5 Trips home during the course of treatment will not be authorized unless part of the treatment plan as established by the facility and approved prior to starting treatment.

7.6 Family trips to the treatment facility will not be authorized unless it is a documented part of the treatment program and approved prior to starting treatment.

7.7 Transportation to return the client to the community will not be provided for clients who discharge themselves from treatment, against advice from the treatment centre counsellor, before completing the program; exceptions may be considered for clients who are minors or in cases when proper justification is provided and approved by the NIHB Regional Office.

7.8 Travel to access additional treatment within a one year period requires approval from the NIHB Regional Office.

7.9 Medical transportation benefits will only be provided for clients while in the care of the treatment centre when approved by the NIHB Regional Office.

7.10 Exceptions may be authorized, with appropriate justification, when approved by the NIHB Regional Office.

8. TRADITIONAL HEALER SERVICES TRAVEL POLICY

8.1 Medical transportation benefits, within the client's region/territory of residence, may be provided for clients to travel to see a traditional healer or, where economical, for a traditional healer to travel to the community.

8.2 Medical transportation benefits to access traditional healer services must be preauthorized by FNIHB or a First Nations or Inuit Health Authority or organization. On an exception basis, authorization may be granted after the fact by FNIHB or a First Nations or Inuit Health Authority or organization when appropriate medical justification is provided and approved.

8.3 When the traditional healers selected by the client are outside of the client's region/territory of residence, travel costs will be reimbursed for travel to the region/territorial border only.

8.4 The following criteria must be considered prior to approving medical transportation benefits for traditional healer services:

- The traditional healer is recognized as such by the local Band, Tribal Council or health professional;
- The traditional healer is located in the client's region/territory of residence;
- A licensed physician, or if a licensed physician is not routinely available in the community, a community health professional or FNIHB representative has confirmed that the client has a medical condition.

8.5 The NIHB Program does not pay for any associated honoraria, ceremonial expenses or medicines. These costs remain the sole responsibility of the client.

9. MEALS AND ACCOMMODATION

9.1 Medical transportation benefits may include assistance with meals and accommodation when these expenses are incurred while in transit for approved transportation to access medically necessary health services. For more information, refer to Appendix B (Client Eligibility).

9.2 Where the trip includes an overnight or extended stay away from the client's residence, the most efficient and economical type of accommodation will be chosen, taking into consideration the client's health condition, location of accommodation and travel requirements to access medically necessary health services.

9.3 Accommodation arrangements will be made by FNIHB or a First Nations or Inuit Health Authority or organization. Clients who choose to make different accommodation arrangements will be responsible for the difference in the cost between the two.

9.4 When available, meals and accommodation must be obtained from the boarding homes or commercial establishments with which FNIHB or a First Nations or Inuit Health Authority or organization have a negotiated Standing Offer or other contractual agreement.

9.5 Where special arrangements have not been made (e.g., boarding homes), meals taken in commercial establishments will be reimbursed as per established regional rates, in accordance with this framework.

9.6 Assistance with meals may be provided where the time away from home to attend the medically necessary appointment is more than 6 hours in one day. The assistance will be provided as per the regional rates for either a lunch or a dinner, depending on the time of day the travel is occurring. Breakfast is not payable for same day trips. Assistance with a meal when the time away is less than 6 hours may be provided in circumstances where meals are a required component of the medical treatment and a meal is not provided by the facility.

9.7 Assistance with overnight accommodation may be provided on a case by case basis, which may include the review of the medical justification, time of appointment, distance travelled and scheduled and/or coordinated medical transportation.

9.8 When accommodation is provided in a private home, assistance not to exceed the regional rate set out for private accommodation may be reimbursed. Reimbursements will only be issued to the client. For more information, refer to

Appendix C (Meal, Accommodation and Kilometre Allowances).

9.9 Other expenses are the responsibility of the client (e.g., telephone charges, room damage, movie rentals, game rentals, room service, tips, gratuities, etc.) and will not be reimbursed.

9.10 In cases where a client is required to reside close to medical treatment outside their reserve or community of residence for an extended period, the cost of meals, accommodation and in-city transportation to access the medical care/treatment, when they are not covered by provincial/territorial health or social programs, other publicly funded programs or private insurance plans, may be covered for up to a three month transition period only. A weekly food allowance as per the regional rate may be provided.

10. REIMBURSEMENT OF TRAVEL EXPENSES

10.1 Reimbursement to clients, approved escorts and service providers will be in accordance with the transportation policies and benefits of the NIHB Program and based on:

a) Negotiated rates;

b) Rates set out in the terms and conditions of the relevant contribution agreement;

c) Published FNIHB rate(s);

d) The actual expense of a commercial carrier/service with the submission of original itemized receipts.

10.2 Only service providers who have a negotiated contractual arrangement or who have been approved by FNIHB or a First Nations or Inuit Health Authority or organization will be reimbursed for medical transportation benefits they have provided.

10.3 All invoices submitted for payment for the reimbursement of expenses for medical transportation benefits must be submitted within 1 year of the service being provided. Requests for reimbursements submitted more than 1 year after the service is rendered will be rejected.

10.4 Medical transportation benefits include coverage for some or all of the travel expenses incurred by clients to access medically necessary health services at the nearest appropriate facility. If clients wish to access equivalent services elsewhere, they will be responsible for the difference in the cost of such travel. In cases where scheduled and/or coordinated medical transportation benefits are provided by FNIHB or a First Nations or Inuit Health Authority or organization, the clients will be responsible for the full cost.

10.5 Reimbursement to the client for meal allowances and private accommodation will be as per the regional rates. For more information, refer to Section 9 (Meals and Accommodation) and Appendix C (Meal, Accommodation and Kilometre Allowances).

10.6 When private vehicles are used, reimbursement to the client will be as per the regional rate. For more information, refer to Appendix C (Meal, Accommodation and Kilometre Allowances).

11. EXCEPTIONS

11.1 Certain types of travel may be considered on an exceptional basis with the appropriate justification. These types of travel include, but are not limited to the following:

a) Diagnostic tests for educational purposes, such as hearing tests for children required by the school;

b) Speech assessment and therapy when coordinated with other medical travel and cost of treatment is covered under the provincial/territorial health plan or educational institution;

c) Medical Supplies and Equipment benefits where a fitting is required and these fittings cannot be made on the reserve or in the community of residence;

d) Transportation for clients to visit a pharmacy for pharmacist-supervised methadone ingestion may be provided for up to four months for methadone patients in order to allow stabilization for carries (e.g., where the patient takes doses home) or alternate arrangements to be made. Extensions with justification be considered;

e) Provincially/territorially supported preventative screening programs when coordinated with other medical travel and the cost of the testing is covered under the provincial/territorial health plan;

f) Other requests for travel will be reviewed on a case by case basis with appropriate justification.

12. EXCLUSIONS

12.1 Certain types of travel, benefits and services will NOT be provided as benefits under the NIHB Program under any circumstances and are not subject to the NIHB appeal process. These include assistance with:

a) Compassionate travel;

b) Appointments for clients in the care of federal, provincial or territorial institutions (e.g., incarcerated clients);

c) Court-ordered treatment/assessment, or as a condition of parole, coordinated by the justice system;

d) Appointments while travelling outside of Canada, other than as outlined in Section 1 (General Principles);

e) Travel for clients residing in an off-reserve location where the appropriate health services are available locally;

f) Travel for the purposes of a third-party requested medical examination;

g) The return trip home in cases of an illness while away from home other than for approved travel to access medically necessary health services;

h) Travel only to pick-up new or repeat prescriptions or vision care products;

I) Travel to access health related services that are not identified in section 1.3, unless coordinated;

j) Payment of professional fee(s) for preparation of doctor's note /document preparation to support provision of benefits;

k) Transportation to adult day care, respite care and/or interval/safe houses.

APPENDIX A

DEFINITIONS

"Appeal Process" is a three level process which allows clients to appeal a decision when they have been denied a medical transportation benefit.

"**Band Driver and Vehicle**" means a driver who is hired by a Band and who drives vehicles owned/leased and operated by a Band to drive clients to medically necessary health services.

"Boarding Home" means an establishment providing board, accommodation and associated support services while in transit.

"**Client"** means a recognized Inuit or registered Indian according to the *Indian Act* who is eligible to receive medical transportation benefits under the NIHB Program.

"Commercial Establishment " means for-profit commercial accommodation, such as hotels and motels, which provide overnight lodging.

"Community Health Professional" means a health professional who is a member in good standing of a professional association.

"Community of Residence" means the geographic or urban area in which the client resides.

"Exception" means goods, services and/or travel which are not defined benefits but which may be approved with appropriate justification.

"Exclusion" means goods, services and/or requested travel which will not be provided as benefits under the NIHB Program under any circumstances and are not subject to the NIHB appeal process.

"**Fee-for-service Driver and Vehicle"** means a driver who is recommended by Chief and Council, who is approved and recognized by FNIHB or a First Nations or Inuit Health Authority or organization and who uses their own vehicle to drive clients to medically necessary health services not available on the reserve or in the community of residence.

"**First Nations or Inuit Health Authority or organization**" means a First Nations or Inuit Health Authority or organization (including territorial government) who is accountable for the provision of medical transportation benefits to eligible clients and who receives funds from Health Canada in accordance with the terms and conditions of a signed Contribution Agreement.

"FNIHB" means the First Nations and Inuit Health Branch of Health Canada.

"**Insured Service"** means health care services and treatment as defined by the *Canada Health Act* and Provincial/Territorial Health Care program for the province/territory in which the client resides.

"Meal Allowance" means an allowance that is provided to assist with meal costs for clients travelling away from home.

"**Medevac**" means a medical evacuation by air charter for clients in emergency situations.

"Medical Escort" means either a physician, registered nurse, paramedic or any other health professional (e.g., nurse practitioner).

"**Medical Transportation Benefits**" means the travel expenses incurred by clients and escorts for ground, water and air travel, meals, and accommodation to access medically necessary health services not available on the reserve or in the community of residence.

"Medically Incapacitated" means a client who is travelling immediately prior to or after medical treatment and the physician or medical institution has indicated he/she is unable to travel without an escort.

"**Medically necessary Health Services**" means those services that are required for medical reasons and are covered under a provincial/territorial health insurance plan and are not available on the reserve or in the community of residence.

"**Nearest Appropriate Facility**" means the facility located closest to the client's place of residence which is capable of providing the medically necessary health service appropriate to the client's medical condition. When health professionals are brought into the community to provide the service, the community facility is considered the nearest appropriate facility.

"**NIHB**" means the Non-Insured Health Benefits Program of the First Nations and Inuit Health Branch of Health Canada.

"Private Accommodation" means overnight accommodation that is not in a commercial establishment but rather at the home of a family relative, friend or acquaintance.

"Private Vehicle Kilometre Allowance" means a kilometre rate that is payable for the use of privately owned vehicles to transport clients to medically necessary health services.

"**Reserve"** means land set aside by the federal government for the use and occupancy of an Indian group or band.

"Scheduled and/or Coordinated Medical Transportation Benefits" means medical transportation services that are provided on a regular basis from the community by FNIHB or First Nations or Inuit Health Authorities or organizations for the client to access services.

"**Service Providers**" means individuals or companies who provide medical transportation benefits and are reimbursed by FNIHB or First Nations or Inuit Health Authorities or organizations for the services they provide. They may include band and fee-for-service drivers, public transportation carriers, hotels, motels, boarding homes and restaurants.

APPENDIX B

CLIENT ELIGIBILITY

To be eligible to receive medical transportation benefits under the Non-Insured Health Benefits Program, a person must be:

a) A registered Indian according to the *Indian Act*; or

b) An Inuk recognized by one of the Inuit Land Claim organizations - Nunavut Tunngavik Incorporated, Inuvialuit Regional Corporation, Makivik Corporation or Labrador Inuit Association. For Inuit residing outside of their land claim settlement area, a letter of recognition from one of the Inuit claim organizations and a long form birth certificate are required; or

c) An infant up to one year old of an eligible parent; and

d) Currently registered or eligible for registration, under a provincial or territorial health insurance plan.

APPENDIX C

MEAL, ACCOMMODATION AND KILOMETRE ALLOWANCES

Approved medical transportation benefits may include meal, accommodation and kilometre allowances when these expenses are incurred while in transit to access medically necessary health services at the nearest appropriate facility. For more information, refer to Section 9 (Meals and Accommodation).

Daily Meal Allowances

When no commercial establishments or boarding homes with negotiated arrangements are available, meals are to be taken in commercial establishments and a meal allowance as per the regional rates may be provided.

Weekly Food Allowance for Extended Stays

In cases where a client is required to be close to medical treatment for extended periods of time for ongoing medical care/treatment and is residing in a self-catering accommodation, a weekly allowance as per the regional rate may be provided to assist with the purchase of food items while away from home.

Accommodation Allowance

The most efficient and economical accommodation consistent with the medical condition of the client and the costs incurred to travel to and from the accommodation to the medically necessary health services is to be utilized at all times.

When an approved boarding home is available, accommodation in a commercial establishment will not be authorized. When a boarding home is not available or it is full, commercial accommodation will be authorized and reimbursement will be at the rate negotiated with the establishment. Clients who choose alternate accommodation will be responsible for the difference in costs between the two or the full cost if accommodation is not reimbursable.

When staying in private accommodation, to assist the host for the costs incurred in providing overnight accommodation, an allowance as per the regional rate may be provided.

In cases where an extended stay, up to a three month period, is required, every effort must be made to utilize the most efficient and economical medical transportation benefits, including self-catering accommodation.

Private Vehicle Kilometre Allowance

The most efficient and economical mode of transportation consistent with the urgency of the situation and the medical condition of the client is to be utilized at all times. This includes scheduled and/or coordinated medical transportation benefits provided by FNIHB or a First Nations or Inuit Health Authority or organization. When this mode of transportation is the use of a private vehicle, an allowance may be paid as per the regional rate to cover the operating costs of the owner's vehicle. Clients who choose to use their private vehicle when a more efficient and economical mode of transportation is available will be responsible for the difference in cost between the two.

Exceptions to the foregoing allowance may be considered by FNIHB, where it can be demonstrated that due to extreme conditions or unique community location the private vehicle kilometre allowance is clearly inadequate.

APPENDIX D

PRIVACY

The Non-Insured Health Benefits (NIHB) Program of Health Canada is committed to protecting an individual's privacy and safeguarding the personal information in its possession. When a benefit request is received, the NIHB Program collects, uses, discloses and retains an individual's personal information according to the applicable privacy legislation. The information collected is limited only to information needed for the NIHB Program to administer and verify benefits.

As a program of the federal government, NIHB must comply with the *Privacy Act*, the *Canadian Charter of Rights and Freedoms*, the *Access to Information Act*, Treasury Board policies and guidelines including, the Treasury Board of Canada Government Security Policy, and the Health Canada Security Policy. The NIHB Privacy Code addresses the requirements of these acts and policies.

Objectives of the NIHB Privacy Code:

- to set out the commitments of the NIHB Program to ensure confidentiality through responsible and secure handling of personal information collected for program delivery, administration and management; and
- to foster transparency, accountability, increased awareness of the NIHB Program's privacy procedures and practices.

The NIHB Privacy Code is based on the ten principles set out in the Canadian Standards Association, *Model for the Protection of Personal Information* (The CSA Model Code), which is also Schedule 1 to the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. This is commonly regarded as the national privacy standard for Canada.

The Privacy Code can be found on the Health Canada website at www.hc-sc.gc.ca/fnihb/nihb, or obtained from First Nations and Inuit Health Branch Regional Offices.

The Non-Insured Health Benefits Privacy Code will be reviewed and revised on an ongoing basis as Federal Government privacy policies, legislation and/or program changes require. The Program would be pleased to receive stakeholder advice on the Code at anytime.

APPENDIX E

APPEAL PROCESS

A client has the right to appeal a denial of a medical transportation benefit under the Non-Insured Health Benefits (NIHB) Program. There are three levels of appeal available. Appeals must be submitted in writing and can be initiated by the client, legal guardian or interpreter. At each stage, the appeal must be accompanied by supporting information to justify the exceptional need.

At each level of appeal, the information will be reviewed by an independent appeal structure that will provide recommendations to the program based on the client's needs, availability of alternatives and NIHB policies.

Level 1 Appeal

The first level of appeal is the NIHB Regional Manager, First Nations & Inuit Health Branch.

Level 2 Appeal

If the client does not agree with the Level 1 Appeal decision and wishes to proceed further, the second level of appeal is the Regional Director, First Nations & Inuit Health Branch. Joint regional review structures may be in place.

Level 3 Appeal

If the appeal is denied at Level 2 and the client does not agree with the decision, they may take their request to the final appeal level. The third and final level of appeal is the Director General, Non-Insured Health Benefits, First Nations and Inuit Health Branch, Jeanne Mance Building, Address Locator 1919A, Room 1909A, Tunney's Pasture, Ottawa, Ontario K1A 0K9

At all levels of the appeal process, the client will be provided with a written explanation of the decision taken.

APPENDIX F

NIHB AUDIT PROGRAM

Medical transportation benefit audits are performed to meet program accountability and verify compliance with program requirements and the terms and conditions of applicable contribution agreements.

The objectives of the NIHB Audit Program are to:

- detect billing/claim irregularities, whether through error or fraudulent claims;
- ensure that the services paid for were received by the NIHB client;
- ensure that appropriate documentation in support of each claim is retained, in accordance with the terms and conditions of the Program.

The audit activities are based on accepted industry practices and accounting principles and may be carried out up to a maximum of two years from the date of service. Providers must retain a copy of the original authorizing voucher/warrant and receipt in accordance with provincial or territorial requirements, and any other information to support a claim on file for two years from the date of service for audit purposes. Claims for which the original authorizing voucher/warrant and receipt or supporting documentation is not available for review, including those with prior approvals, may be recovered through the audit program.

Records relating to NIHB clients must be maintained and the authorizing voucher/warrant and receipt for all the services provided in accordance with all applicable laws. All records shall be treated as confidential so as to comply with all applicable provincial/territorial and federal privacy legislation.

TAB 6

Ontario pledges $100 million to help end violence against indigenous women

Premier Wynne says indigenous women three times more likely to face violence

By Keith Leslie, The Canadian Press Posted: Feb 23, 2016 12:19 PM ET Last Updated: Feb 23, 2016 6:29 PM ET

Ontario will spend $100 million over the next three years on a long-term strategy to end violence against indigenous women, most of it on support for families.

Indigenous women are three times more likely to experience violence and to be murdered than other women in Ontario, Premier Kathleen Wynne said Tuesday.

"This is devastating families and entire communities, and it's a problem our entire province needs to face," Wynne said.

Indigenous people make up 2.4 per cent of Ontario's population, but they account for 26 per cent of the children in care. Indigenous women make up six per cent of the province's homicide victims.

"Behind these grim statistics lies violence," said Wynne. "Behind these grim statistics lie the heartbreaking stories of mothers, sisters, daughters, aunts and grandmothers that we've lost."

For decades, governments across Canada "shamefully" neglected the deep wounds inflicted upon indigenous communities, added Wynne.

"An entire society looked the other way, or worse, shrugged our shoulders as too many First Nations, Métis and Inuit women continued to experience violence, go missing or be murdered," she said.

The provincial strategy, called Walking Together, is part of the Liberal government's broader action plan to end sexual violence and harassment.

It will include $80 million for a family well-being program to support indigenous families in crisis and help communities deal with the effects of inter-generational violence and trauma.

Sylvia Maracle of the Ontario Federation of Indigenous Friendship Centres said the provincial strategy has all the parties rowing in the same direction.

"We're going to leave a different legacy for our children and our grandchildren," she said. "There will be space to talk, to heal, to remember and to develop their indigenous identity, and for that we are grateful."

'We're going to leave a different legacy for our children and our grandchildren.'- *Sylvia Maracle, Ontario Federation of Indigenous Friendship Centres*

There will also be $15.75 million to ensure indigenous women and communities have effective support when dealing with the justice system and to help develop a survivor-oriented plan to prevent human trafficking.

Another $2.32 million will be used to help police investigate missing person cases, improve training for police and Crown attorneys and provide new tools for First Nations police forces.

NDP Leader Andrea Horwath welcomed the initiatives, but said she also wants action to address some systemic issues in First Nations communities, including drinking water, education and poverty.

"When you have a situation where populations are hopeless, then I'm sure it creates circumstances that lead to more violence," said Horwath.

Progressive Conservative women's critic Laurie Scott — who has a bill before the legislature to combat human trafficking — said she hoped the government's efforts to help First Nations' women would be expanded to all potential victims.

"This is money targeted towards indigenous women, which is great, a first step," said Scott. "I'm just hoping the government continues and puts forward a human trafficking strategy for the province."

The provincial strategy also incorporates a number of the Calls to Action from the national Truth and Reconciliation Commission, including mandatory indigenous cultural competency and anti-racism training for all civil servants.

"(It) is a step toward creating dialogue and building more positive relationships between Ontario and its indigenous peoples," said Metis president Gary Lipinski.

It'll take some time to organize a national inquiry into missing and murdered indigenous women and girls, so Ontario will move forward in the interim, said Wynne, who will attend a roundtable on the issue in Winnipeg this week.

"The work that's been done in Ontario has informed the discussion in terms of where we might go at that national level," she said. "What happens next after the work that we've just laid out as this strategy, I hope, will be dovetailed at the national level, but it's not going to stop us doing what needs to be done in Ontario."

TAB 7

SEARCHING FOR HOME

REIMAGINING RESIDENTIAL CARE

Provincial Advocate
for Children & Youth

SEARCHING FOR HOME

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OFFICE OF THE PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH

TORONTO OFFICE
401 BAY STREET, SUITE 2200
TORONTO, ONTARIO M7A 0A6
PHONE: 416-325-5669
TOLL-FREE: 1-800-263-2841

THUNDER BAY OFFICE
435 BALMORAL STREET
THUNDER BAY, ONTARIO P7E 5N4
TOLL-FREE: 1-888-342-1380

OOVOO PROVINCIAL-ADVOCATE (ASL/LSQ USERS)
WEBSITE WWW.PROVINCIALADVOCATE.ON.CA
EMAIL ADVOCACY@PROVINCIALADVOCATE.ON.CA
TWITTER @ONTARIOADVOCATE
FACEBOOK OFFICE OF THE PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH

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"I'M BEGGING FOR THE CONNECTIONS. I WANT THE CONNECTIONS, I WANT THE FAMILY TIES THERE. BUT NOBODY IS HELPING ME MAKE THOSE CONNECTIONS. BECAUSE FAMILY IS REALLY IMPORTANT... IT'S JUST... IT'S VITAL"

–YOUTH IN CARE

LETTER FROM THE PROVINCIAL ADVOCATE

DEAR FRIENDS,

Recently, my Office published a memoir by a former resident of an orphanage run by Dr. Janus Korczak in 1930s-40s Poland. Dr. Korczak is known as the founder of modern children's rights. The orphanage was operated in a manner he referred to as a "children's republic." It was a place where children were considered "human beings today, not tomorrow", had rights and were encouraged to reach their full potential. The orphanage operated in dark and tragic times — World War II and the holocaust — but offered children love and respect grounded in a framework of rights. The memoir was published by my Office as an example for the government of Ontario — and all Canadians — of what is possible when children and youth are treated as full citizens and rights bearers.

Fast forward to Ontario today where the government has selected three "experts" to form a "panel" to review residential care in Ontario and are expected to report back at the end of February, 2016. We are pleased and hopeful that the panel decided to base their work in the voices of young people living in residential care. Holding a review was a recommendation made in the ***Blueprint for Fundamental Change in Child Welfare.***[1] The blueprint was produced by a working group of youth in and from care and professionals; its development was led by the Ministry of Children and Youth with support from our Office. The need to form this youth working group was a recommendation contained in a report written by young people — ***My REAL Life Book,***[2] and also published by my Office.

1 "The Blueprint for Fundamental Change in Child Welfare" can be found here: http://www.children.gov.on.ca/htdocs/English/topics/childrensaid/childrensaidsocieties/reports/youthleavingcare.aspx

2 "My REAL Life Book" can be found here: http://www.provincialadvocate.on.ca/documents/en/ylc/YLC_REPORT_ENG.pdf

In keeping with the vision for reforming child welfare brought forward by the young people who wrote or helped prepare these documents, and inspired by work of Dr. Korczak, we wanted to ensure that the Review Panel's work was informed by the same young people who brought these documents to fruition. Their thoughts are contained in the pages of this report and remind us of what is possible when young people are provided with an opportunity to contribute as equal partners in creating change.

We are indebted to our two Youth Amplifiers, Chelsea and Sheldon, who took on the responsibility for listening to young people in meetings we held across the province and who helped lead the development of this report. I am always struck by the remarkable strength young people exhibit in returning to difficult experiences and times in their lives, to reflect, glean the wisdom there, and use that wisdom to create change for others. We are honoured by those who shared so willingly.

We were fortunate to have a former Youth Amplifier from our Office travel with us to a meeting with young people that was held at a mental health residential treatment centre. He shared with us that he had once lived there more than eight years ago. This young man asked to facilitate the meeting and discussions at this facility.

His courage and strength was a beacon. When he told the young people from the facility that he once lived in that same place, they were stunned, slack-jawed and silent. At the end of the meeting, after a great deal had been shared, the most articulate boy in the group looked at the facilitator and, choking back tears, said, "You don't know what this means to us. That you would bother to come back here, despite what it did to you…to listen to us and to show you care about us…no one cares about us. You changed my life."

It is true that there are many caring individuals both leading and working in residential settings in Ontario. I believe that there is good practice happening in residential care settings in the province. However, I also believe there is need and a desire for change and improvement. As one staff put it, "I wish I could do the work that I went to school to learn how to do". I believe we can do better.

Sincerely,

IRWIN ELMAN
PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH

LETTER FROM THE YOUTH AMPLIFIERS

As Youth Amplifiers on the Our Voice Our Turn project, working with young people on this project has been eye-opening. Having our own personal familiarity with Ontario's residential care system, we know that individual experiences differ among youth. Our mission was to amplify the voices of young people in these settings who all too often find themselves silenced. This report is for these youth.

Having an opportunity to take part in this report has been both amazing and difficult. We met so many young people who openly shared their experiences in Ontario's residential care system and their thoughts on how things can be better. We heard the voices of young people from as far north as Kenora and in communities across southern Ontario and in Toronto.

Everywhere we went, we heard one key message: change is needed and it is needed now.

The report is a reflection of what we heard in our meetings with these young people. By producing this report with the support of the team from the Advocates Office, we hope that we have created an accurate and heartfelt reflection of the voices of the young people we met. It is our hope that the young people who spoke with us will see their voices have been accurately represented.

We went into each meeting nervous about what we would hear and not knowing what to expect. However, when it was time to go — none of us wanted to leave. Leaving was the hardest part for us because we knew that at the end of our session we would be going back to our lives and the young people who participated in the group discussions would have to go back to the difficult situations they spoke about.

We want to extend a personal "thank you" to every young person who participated. This report and our conversations with all of you have reminded us just how important listening is. Without your voices, none of this would have been possible. For everyone who works with young people, we ask you to stop and take the time to really listen to young people because they truly are the experts in their own lives.

Thank you,

SHELDON AND CHELSEA
YOUTH AMPLIFIERS[1]

1. Youth Amplifiers are unionized staff of the Office of the Provincial Advocate for Children and Youth. They have diverse backgrounds and provide unique insights, lived experiences and skills that enrich the Office's advocacy and project work. Youth Amplifiers work as part of advocacy teams, mobilizing youth to join youth advisory committees, participate in dialogue sessions and work with our adult project staff.

RESIDENTIAL CARE FOR CHILDREN AND YOUTH IN ONTARIO INCLUDES FOSTER CARE, KINSHIP CARE, GROUP HOMES, RESIDENTIAL SECURE TREATMENT FACILITIES AND YOUTH JUSTICE FACILITIES.

It's difficult to obtain precise numbers for young people in residential care in Ontario. A 2010 study estimated that in March 31, 2007, there were 67,000 children in residential care across Canada, and that this number was increasing steadily.[1]

1. Mulcahy, Megan, and Trocmé, Nico, "Children and Youth in Out-of-Home Care in Canada", Centres of Excellence for Children's Well-Being Information. www.cecw-cepb.ca/infosheets

GROUP HOMES

are staffed residences that provide a supervised living environment for young people.

FOSTER PARENTS

provide day to day care for children who are in the care and custody of a children's aid society (CAS).

FORMAL KINSHIP

care is provided by a biological relative or significant person in the child's life who has been approved by the CAS to provide care for a child.

YOUTH JUSTICE FACILITIES

are places of custody and/or detention to which young people up to the age of 18 are sentenced, or held awaiting sentencing, in youth criminal court matters.

CHILDREN'S MENTAL HEALTH RESIDENCES

are institutions run directly by the province or by non-profit or for-profit organizations. They are home to young people who have mental health needs that require them to live in a less intrusive environment where they can receive specialized care.

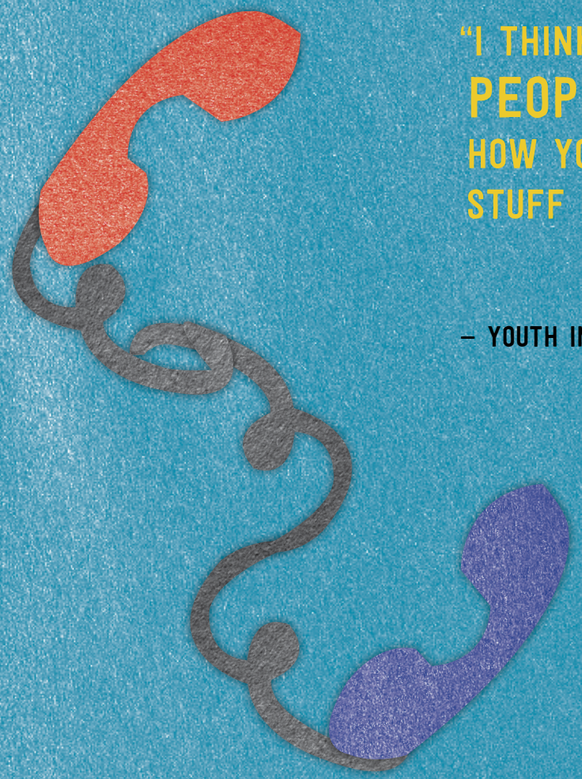
DEMONSTRATION SCHOOLS

are operated directly by the Ministry of Education and provide educational support for children with severe learning disabilities and who need to live in residence.

In 2013, there were 23,000 children and youth in residential care in Ontario, including 7,000 living in foster care or group homes, according to a freedom of information request conducted by the *Toronto Star*. [2]

2. Contenta, Sandro, Laurie Monsebraaten and Jim Rankin, "Shedding light on the troubles facing kids in group homes", *Toronto Star*, July 3, 2015.

OUR FINDINGS



"I THINK IT STARTS OFF WITH **PEOPLE JUST CARING** HOW YOUR DAY WENT, AND STUFF LIKE THAT."

– YOUTH IN CARE

Over a period of several months, the Residential Care Project team travelled across the province to hear from young people directly about their experiences in residential care.

We met young people where they were at —literally; in mental health secure treatment settings, custody facilities, mental health treatment centres, group homes, youth shelters and youth group sessions in children's aid societies and children's mental health centres. Some meetings were attended by a few young people while at others as many as 45 youth showed up to participate in discussions. We asked young people at each meeting if they wanted staff from the hosting organization to be present; some said "yes", but often they wanted to meet with us alone. We asked the Provincial Advocate for Children and Youth to sit in and listen at each meeting.

Each meeting was facilitated by a Youth Amplifier or former Amplifier. We appreciated the support we received from Child and Youth Advocates at the Advocate's Office and saw the initiative as a real working partnership.

We chose the theme of 'searching for home' for our report because everywhere we went we heard young people talk about wanting more supportive connections with those who worked in the settings that were providing their care. Many expressed wanting to experience a sense of belonging and to feel respected, safe, seen and heard. Others expressed a desire for real and lasting relationships with caregivers with whom they were placed, more stability in their lives and the opportunity to put down some roots and make friends. Some expressed wanting to feel genuinely loved. What we heard in all the wishes expressed by participants was for the kind of lasting, supportive or caring connections that many youth felt provided a sense of home. Even for those in youth justice settings there was a desire on the part of young people for more respectful, caring and supportive relationships with staff.

Young people's search for these closer ties or feelings of connection and belonging was strongly evident but it was often hard for them to find. We heard stories from young people about staff who they thought perhaps had chosen a career that was not for them. Young people often pointed out that the internal culture of organizations and residences prevented staff from working with youth in a manner that would create the kinds of supportive connections and sense of belonging or stability they sought.

Government says that it cannot legislate love. While this may be true, we believe that government can help create the policies, standards and practices through which services can be made more human and responsive to the physical, mental and emotional needs of young people and that create the experience of belonging and connection, improve safety and provide more stability for young people. That is the hope of this report.

HOME MEANS ROOTS

"FAMILY CAN MEAN DIFFERENT THINGS TO DIFFERENT PEOPLE."

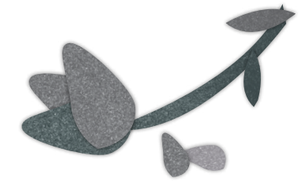
– YOUTH IN CARE

Everywhere we went on the residential care listening tour young people shared how they felt about not having roots or stability, being far from family or having no sense of home.

When the journey to residential care begins abruptly, and the chance to make connections of any kind is prevented by the constant moving and change, young people do not develop the opportunity to establish roots of their own, even after leaving residential care. Rootlessness, even in adulthood, seems to be a lasting legacy of involvement with Ontario's residential care system.

TORN OUT BY THE ROOTS

Many young people spoke about being placed in residential care without any explanation and not knowing why they were taken from their home or who made the decision to place them in care. Some mentioned that they thought it was because they did something wrong or that there was something wrong with them — that it was their fault that they were taken away. Regardless of why they entered residential care, many felt they were violently and abruptly torn away from everything that was familiar to them. Some said that knowing the reasons why they were placed in residential care or being offered some kind of choice would have made these abrupt changes easier to cope with.



Young people spoke about yearning to be part of a family, though some said that, "Family can mean different things to different people." Family is not limited to biological relatives. Depending on their lives and circumstances, a family can take many forms. Some young people define family as the people around them who care about them. For others, it might be their foster mother, their biological family or the family of people they have created around them.

A recent study comparing placement stability in kinship and non-kin foster care in Ontario showed that kin placements were significantly more stable than non-kin placements and were much more likely to end successfully by discharge to parents.[1]

For some young people no attempt was made to explore possible extended family connections or connections to other meaningful individuals in their lives before placement decisions were made. They spoke about what they thought could have been options that offered stability and familiarity, but that were never explored. A number of young people talked about people in their lives who were not biological family members, but who might have taken them in even temporarily. Had they been asked, these young people might have offered more beneficial options to explore as an alternative to being placed in residential care.

1. Perry, Gretchen et al., "Placement stability in kinship and non-kin foster care: a Canadian study", *Children and Youth Services Review*, Vol. 34, Issue 2 (February 2012) Pages 450-465.

A lot of the young people in residential care talked about having siblings that either remained at home or were placed elsewhere. They worried about the well-being of their brothers and sisters and mourned the loss of relationships with their siblings, some of which were severed completely. Many missed having ongoing contact with their brothers and sisters. If interaction with siblings was possible, it never seemed to happen often enough to maintain any close relationship or took place only by phone or Skype. A lot of the youth we spoke with were housed in placements that were a great distance from their homes, which hindered contact with brothers and sisters. Most young people wished for more frequent and less formal ways of making contact with siblings, contacts they felt would help maintain bonds between the only remaining family members they felt close to. They feared losing any connection to their last remaining family members.

A number of young people spoke about the importance of understanding their life stories. Many explained that they were not really aware of the history that brought them into residential care. Some were in custody just being held on remand. Some who were in children's mental health residences felt they'd just been "dumped off" because there was "nowhere else to go." Some in child welfare care felt swept up in a system that just pushed and pulled them to and fro for no apparent reason. Many felt that if they had some understanding about why this was happening it might help them build a healthier sense of self. This understanding needed to come through dialogue with someone who knew them and with whom they felt trust. A trusting relationship can be hard to find in residential care settings because young people often don't spend long enough in the placement or the policies or rules of the home are based on controlling young people — not on forming positive supportive relationships.

"I WAS UPROOTED AND BROUGHT INTO THE WHOLE SYSTEM AND EVERYTHING CHANGES FOR YOU AND IT'S SO CRAZY HOW MUCH CHANGE YOU GO THROUGH IN A MATTER OF DAYS. WE'RE NOT TRAINED TO GO THROUGH THAT, LET ALONE THE GROUP HOME STAFF THAT HAVE TO TAKE CARE OF A TEENAGER THAT'S LITERALLY, PROBABLY OFF THE RAILS BECAUSE THEIR PARENTS HAVEN'T BEEN AROUND OR THEY'VE BEEN LIVING ON THE STREETS OR WHATEVER, RIGHT?"

–YOUTH IN CARE

One youth spoke about how his past accomplishments played a huge role in determining where he was today in life. He felt that documenting a young person's achievements, accomplishments and positive life experiences would help them feel as if they had a history with roots and memories to look back on. It's important that such practices include having photographs and videos or other things that can be shared and spoken about in conversations with others. These accomplishments then become part of the young person's ongoing narrative and history — not something superficial in a file or official book that someone had to create in order to just check off a box on a list.

We heard a lot about how moves and changes within residential care were frequent and confusing, often happening without warning. In many instances young people were asked to move with no preparation, sometimes in the middle of the day, interrupting school or other life activities, with no chance to say goodbye to anyone. Sometimes they didn't even know why the move was happening and no one would tell them the reason.

Numerous youth talked about the number of foster care placements or moves they had endured. It was not unusual to hear that they had lived in as many as ten homes over the course of their time spent within the residential care system. There was a prevailing belief that moves appeared to be based on what was convenient for the organization and system, rather than on what would most benefit the young person. The young people often mentioned that they felt rootless as a result of such changes, without stability or a chance of any degree of permanence.

"FAMILIES ALWAYS HAVE FIGHTS. IT'S JUST LIFE. BUT FAMILY IS WHERE EVERYBODY WELCOMES YOU INTO THE HOUSE. A FAMILY IS PEOPLE WHO LOVE YOU. A FAMILY IS WHO KEEPS YOU WARM."

– YOUTH IN CARE

"I'VE BEEN HERE FOR 13 YEARS. REGARDLESS OF WHAT YOU THINK IS BETTER FOR ME OR NOT, MAYBE YOU SHOULD LOOK INTO SOME OTHER ALTERNATIVES BEFORE RIPPING ME OUT OF MY HOME."

– YOUTH IN CARE

"IT'S PRETTY ROUGH WHEN YOU LOSE SOMEONE. I LOST SOMEONE AND CAN'T DO ANYTHING ABOUT IT, OR WHEN YOUR FAMILY CAN'T COME SEE YOU CAUSE IT'S THREE HOURS AWAY FROM HERE, WASTING GAS AND WASTING THEIR MONEY, IT'S NOT WORTH IT. PHONE CALLS AND VISITS ARE PRETTY SHORT AND IT'S NOT ENOUGH."

–YOUTH IN CARE

ISOLATION

Without any feelings of permanency or stability in relationships, community, or even where you sleep at night, it's difficult to make any enduring connections; it's isolating. Many of the youth, sometimes quite young, told us that they were living in residential care far from family and community, sometimes from out of province, and rarely received family visits. Family contact depended not only on proximity but on the shifting rules of the residential care placement.

Some young people said that they felt unsafe because residential care was inconsistent. The rules changed, sometimes without explanation. In some residential care facilities, the rules appeared to vary depending on who was working or how a particular staff interpreted their behaviour. In many residences, young people had to negotiate very confusing point systems that monetized good behaviour in return for privileges, sometimes in seemingly arbitrary ways. Their 'level' of points would determine such privileges as access to an iPod or the number of phone calls to family that could be made.

In some cases rules for phone use were inflexible, regardless of who they were contacting - family member, social worker or lawyer - and the young people were only allowed to call back in the late afternoon, regardless of family or professional availability, with a limit on the minutes they could talk or the number of calls they could make. In some residential facilities, extra calls were not granted even in cases of the death of a family member.

Sometimes family were only allowed to visit on one particular day, regardless of the distance they needed to travel or the weather. We heard that family visits were sometimes cancelled as a form of punishment, even if the visits were only permitted every three months.

"I KNOW FOR MYSELF, THEY'RE FAMILY, BUT THEY WOULDN'T INVITE US... THEY WOULD DO FAMILY REUNIONS, BUT WE WOULD NEVER BE INVITED. **WE WOULD HAVE TO BE SENT TO A PLACE,** TO AN EMERGENCY OR TEMPORARY HOME **WHILE THEY WERE AWAY ON THEIR FAMILY REUNION OR FAMILY TRIP.**"

–YOUTH IN CARE

Increasing isolation from family or community made no sense to the young people. Without these outside connections, many felt they were without roots or lacked stability and a feeling of permanence in their relationships. The profound insecurity created when links to family and community were denied contributed to feelings of instability for many youth within the residential care system. As well, through the experience of constant and unpredictable changes while in residential care, children learned to abandon positive relationships without warning and without looking back.

Young people in justice facilities outside of main urban areas also talked about the isolation of being incarcerated, particularly youth who were on remand, often for many months, without seeing their charges go to court for trial. If they were found guilty, the time already served was counted toward their sentence. If they were acquitted, or the case was withdrawn, those months were lost to them. They felt abandoned within the system, without rights, and told us that it was very difficult to find out why their case did not go to court.

"I KNOW IT'S HARD FOR A LOT OF YOUTH IN CARE, BECAUSE FAMILY TIES ARE BROKEN VERY QUICKLY WHEN APPREHENSIONS HAPPEN. MY MOTHER INSTITUTIONALIZED ME WHEN I WAS 12, AND AT THAT POINT I REALIZED THAT MY PARENTS WEREN'T REALLY THERE FOR ME BECAUSE THEY WERE REALLY USING THE INSTITUTION AS A BABYSITTER."

–YOUTH IN CARE

"I GUESS AT MY TREATMENT HOME THEY DEFINITELY DIDN'T NURTURE THE FAMILY CONNECTIONS THAT WERE ALREADY THERE. OVER TIME, I HAD BUILT NEW ONES, AS MUCH AS **IT'S DIFFICULT TO BUILD CONNECTIONS WITH STAFF IN GROUP HOMES.** I BECAME REALLY CLOSE WITH THE CLINICAL DIRECTOR AND ONE OF THE STAFF. I STILL VIEW THE CLINICAL DIRECTOR AS A FATHER FIGURE. HE'S GOING TO WALK ME DOWN THE AISLE."

–YOUTH IN CARE

It was striking and heartbreaking to us to see the number of First Nations youth living in homes or residential care settings so far from their communities. Severed from their culture, community, family and friends, it was almost impossible to imagine the courage and strength it took for them to cope with their life circumstances. We feel that First Nations children and youth need to be closer to their communities and that they deserve a support and intervention strategy of their own.

Some youth spoke about the need for more or better connections to outside services such as support groups, social services, the Advocate's Office or other organizations that help young people make decisions about their care. They wanted more information about their specific cases, rights, available grants and access to any information about themselves. They wanted anything that would reduce the isolation and feelings of invisibility or that provided them with a sense of empowerment.

YOU CAN'T MAKE PHONE CALLS AT 9:00 PM. IF YOU CALL AND HAVE TO LEAVE MESSAGES THEY COUNT AS CALLS AND YOU CAN'T MAKE NO MORE CALLS AFTER LEAVING THAT MESSAGE, UNTIL THE MESSAGE IS RETURNED BACK."

– YOUTH IN CARE

"A LOT OF THE STAFF GIVE YOU MIXED MESSAGES. ONE SHIFT YOU HAVE AN 8:30 BED TIME, ANOTHER SHIFT YOU HAVE A 9:00. IT'S JUST LIKE 'WHAT DO I HAVE? AN 8:30 OR A 9:00?' THEY GIVE YOU MIXED MESSAGES, THEY CONTRADICT EACH OTHER."

– YOUTH IN CARE

"I DON'T GET TO SEE MY PARENTS BECAUSE THEY PASSED AWAY WHEN I WAS YOUNGER, BUT I HAVE SIBLINGS AND THEREFORE I'D EXPECT THE CAS TO LET ME SEE MY SIBLINGS MORE OFTEN. BUT I ONLY SEE MY SIBLINGS THREE TIMES A YEAR. I DON'T FIND THAT'S FAIR BECAUSE THAT'S THE ONLY THING I HAVE LEFT OF MY FAMILY, OF ANYTHING."

– YOUTH IN CARE

1. Youth Court Statistics, 2013/2014, Released in "The Daily", Monday, Sept. 28, 2015. www.statcan.gc.ca/daily-quotidient/150928/dq150928b-eng.pdf

"I'VE BEEN INVOLVED MY WHOLE LIFE SINCE I WAS TWO AND THE LONGEST I'VE BEEN AT A PLACEMENT IS TWO YEARS, AND THAT'S ONLY HAPPENED ONCE. I MOVE EVERY YEAR, AND I JUST FEEL THEY EXPECT US TO BE GOOD, THEY EXPECT US TO GET ALONG WITH PEOPLE, AND NOT GO INTO CRISIS AND STUFF, BUT I JUST DON'T UNDERSTAND HOW THEY CAN EXPECT THAT FROM US WHEN WE'RE GETTING MOVED SO OFTEN AND YOU DON'T GET TIME TO SETTLE IN."

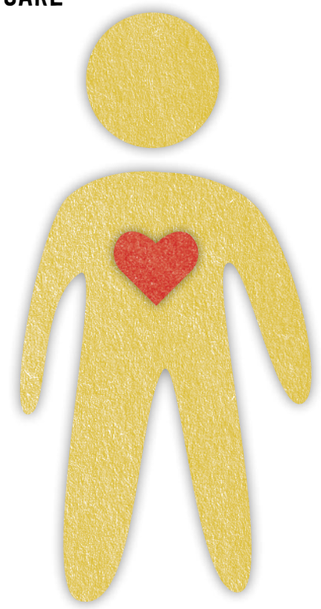
– YOUTH IN CARE

"THEY DIDN'T GIVE ME A SENSE OF FAMILY FOR MY MOTHER. WHEN I WOULD TALK ABOUT HER, THEY WOULD ESSENTIALLY BE LIKE 'WELL, SHE'S A CRACKHEAD, YOU SHOULDN'T TRUST HER.' THAT'S THE IMPRESSION OF MY FAMILY THAT THEY GAVE ME."

– YOUTH IN CARE

"THIS IS A REMAND PLACE. YOU GET SENTENCED, YOU COME HERE... FOURTEEN MONTHS IN. ON REMAND. IT'S NOT THAT BAD. WHEN YOU'RE STUCK IN HERE IT STILL COUNTS AS TIME, RIGHT?"

–YOUTH IN CARE



WE HAVE NO CHANCE TO SHOW THEM OUR MATURITY LEVELS, BECAUSE THEY ARE DOING EVERYTHING FOR US. WE'RE BEING TREATED LIKE WE'RE NINE YEARS OLD, WHICH ISN'T FAIR TO US

– YOUTH IN CARE

NO CHANCE TO GROW

Young people talked to us about the ways in which they felt disconnected and isolated being in care. They talked about ways they felt could help them grow roots or establish connections with the world outside of residential care. Some talked not just about the frequent moves without notice, but also that their belongings would just be stuffed in a garbage bag and they were given no time to say goodbye to anyone. Frequent moves taught them to avoid getting too close to anyone and that relationships were dispensable. They learned to burn bridges and became desensitized to letting go. They did not have an opportunity to acquire the skills they needed to build relationships with others, grow roots or form connections with other people they cared about in the residence or in a community.

There was a tremendous desire among youth in residential care to be better supported so they could remain in their living situation instead of constantly being moved and being forced to cut any roots they felt they were starting to put down.

The youth we met in our travels were articulate and capable. They demonstrated a remarkable level of courage and strength. We saw great potential in all of them but sometimes felt they did not see that potential in themselves. Few received any encouragement in the environments in which they lived, encouragement that would help them see the strengths that we were seeing in them. Young people told us that they had little chance to build skills or make decisions. In many places, food was prepared for them and choice was not an option. Clothes were provided without input, school goals were chosen for them and house rules were created without their input or consultation. They felt they had no opportunity to make decisions about their own lives. Most had never held a job. Some worried about what their lives would be like when they had to leave the system at age 18. Others just seemed resigned to living a difficult life and numb to the sense of hopelessness that they lived with on a daily basis.

"A GROUP HOME IS LIKE AN INSTITUTION. WELL, THAT'S BASICALLY WHAT IT IS. IF THE GOVERNMENT IS GOING TO APPREHEND YOU AND TAKE YOU FROM YOUR HOME, FROM YOUR PARENTS, THEN THEY SHOULD PROVIDE YOU WITH PARENTS, NOT STAFF. THAT'S NOT A PLACE FOR A CHILD TO GROW UP, THAT'S NOT A PLACE WHERE A CHILD WILL BE LOVED OR NURTURED."

—YOUTH IN CARE

"THEY APPREHENDED ME, THEY DIDN'T APPREHEND MY TWO LITTLE SISTERS. THAT WAS WHAT I WAS WORRIED ABOUT MOST, BECAUSE FOR ME, MY SISTERS WERE LIKE MY CHILDREN, BECAUSE I HAD TO TAKE CARE OF THEM."

—YOUTH IN CARE

When asked about goals, some said that they wanted to be a social worker or a youth care worker. These young people were often able to point to workers who inspired them to make this choice. Others pointed to a need for change in the system and that because they understood the experience of living in residential care, they would be in a good position to create the change that was necessary. When a young person has been separated from family and community, it is often difficult to return or rejoin either easily. Additionally, young people in residential care are often not raised within their own culture and have no associations with their identified ethnicity. This makes it difficult to find acceptance and belonging in their particular cultural group, so they struggle to find a sense of identity and belonging.

Numerous young people expressed a desire to receive more support once they left care, support that would help them return home or to their communities and create new roots. Of course practical resources were important too: money, housing, access to education and opportunities for personal growth; but it was not just that. They did not want to be alone. They wanted to continue relationships that they formed and considered important while in care and they wanted an opportunity to feel that they belonged somewhere. Some youth mentioned re-entering the residential care system because that was the environment in which they felt they progressed in life.

"IT'S LIKE A TREE. HAVE YOU EVER SEEN A TREE GROW WITH NO ROOTS? DO YOUR BEST NOT TO MOVE THE KIDS SO THEY CAN MAKE THE FRIENDS THAT THEY ARE GOING TO NEED FOR THE REST OF THEIR LIFE. IT'S HARD ENOUGH LIVING IN A SITUATION WHERE YOU DON'T HAVE A FAMILY."

— YOUTH IN CARE

"WHAT IS MY FAMILY NOW, I FIND IT HARD TO NAME ANYONE. I'VE ONLY JUST RECENTLY REKINDLED MY RELATIONSHIP WITH MY BROTHER AND HE'S MORE LIKE A SON TO ME. SO THAT'S WHAT IT COMES DOWN TO, A FAMILY IS REALLY JUST WHOEVER'S IN YOUR LIFE AT THE CURRENT TIME, AND WHOEVER SHOWS YOU LOVE. IT'S DIFFICULT BECAUSE THERE'S NO PERMANENCY BEING IN CARE."

—YOUTH IN CARE

"I'VE BEEN HERE FOR SO LONG. YOU'RE SO USED TO EVERYONE DOING THINGS FOR YOU, COOKING MEALS, CLEANING UP THIS AND THAT. HOW DO YOU MANAGE THAT ON YOUR OWN WHEN YOU GET OUT OF HERE, JUST LIKE WHO'S GOING TO COOK FOR ME NOW, I'M ON MY OWN?"

— YOUTH IN CARE

"YOU'RE SUPPOSED TO BE ABLE TO DO THINGS IN A MANNER THAT A TEEN OR CHILD REALLY WOULDN'T NORMALLY. IT'S IMPORTANT TO HAVE STRUCTURE, BUT WHEN YOU'RE SAYING, OKAY, YOU ONLY HAVE TWO HOURS OF COMMUNITY TIME, WHEN ARE THEY EXPECTED TO LEARN SOCIAL SKILLS? WHEN ARE THEY EXPECTED TO GO OUT AND ACTUALLY SEE THINGS FOR THEMSELVES?"

– YOUTH IN CARE

"THERE'S THE OTHER STAFF THAT JUST DON'T REALLY CARE. THEY'RE LIKE JUST THERE TO MAKE SURE YOU'RE NOT DOING ANYTHING WRONG. THEY'RE NOT THERE TO HELP YOU. I'VE HAD STAFF TELL ME, "I'M NOT HERE TO HOLD YOUR HAND"

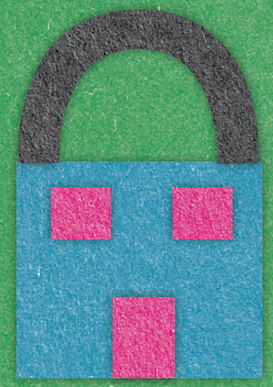
– YOUTH IN CARE

"YOU START OUT WITH GOALS. YOU WANT TO GO TO SCHOOL, YOU WANT TO LOOK FOR WORK, YOU WANT TO MAKE FRIENDS, YOU WANT TO KEEP FRIENDS, AND THEN THEY MOVE YOU. AND THEN IT SLOWLY TRANSFORMS FROM DECENT WHOLESOME GOALS TO WANTING TO JUST "SCREW SCHOOL, I'M GOING TO GO GET DRUNK", I'M GOING TO HANG OUT WITH FRIENDS, GOING TO TRY NOT TO GO TO JAIL. ALL OF A SUDDEN, THE MOVING STOPS. THEY PICK YOU UP AND THEY DROP YOU IN LIFE. IT'S LIKE THEY LITERALLY PICK YOU UP, DROP YOU ON AN ISLAND, SURROUNDED BY ALL THE SHIT YOU HAVE TO DO FOR THE REST OF YOUR LIFE, AND THEY NEVER TAUGHT YOU HOW TO SWIM."

– YOUTH IN CARE

"THERE'S NO TRAINING TO INTEGRATE SOME OF THE PREVIOUS LIFE OF THE CHILD INTO LIFE IN CARE, OR INTO THAT GROUP HOME. IT'S A WHOLE NEW SETTING."

– YOUTH IN CARE



HOME MEANS RESPECT

"I THINK WE NEED SOME MORE PATIENT STAFF, ESPECIALLY FOR THE YOUNGER GUYS AND STUFF LIKE THAT. PEOPLE WHO WILL ACTUALLY DO ACTIVITIES WITH US. EVEN SMALL THINGS LIKE GOING FISHING AND WHATEVER. I THINK THAT WOULD ACTUALLY IMPROVE HOW WE BEHAVE, I THINK."

– YOUTH IN CARE

Everywhere we went, we heard from young people who desperately wanted to be respected as individuals, to be informed, able to make their own decisions and have some measure of control over their lives. Many young people were extremely articulate about the changes that they would like to see in a system that they felt both supported and trapped them.

INDIVIDUALITY IS LOST

Many youth told us that they were perceived through the lens of the singular event that brought them to the home in which they were "placed," not as the whole person whom they are. They urgently wanted people to look past their previous experiences in residential care, see them in the present moment and take a positive approach in interactions with them. Everyone we spoke with wanted to be recognized as an individual. They wanted to be treated as a unique person, rather than one of many. They did not want to feel dehumanized.

A lack of being treated as an individual came up in every location that we visited. Young people talked about everyone being treated exactly the same, regardless of need or personal circumstances. They spoke about staff using overly rigid approaches in running the homes where they lived, approaches that left no room for individuality. For many, a generalized plan of care was developed for each young person by staff, regardless of young people's individual needs, just so they could "check off all of the boxes."

Some young people told us that their personal positive coping strategies were not allowed, in favour of generalized strategies preferred by staff, who never considered their effectiveness on a youth. In some locations, if one individual broke the rules, all of the young people would lose privileges or suffer punishment.

"IT REALLY DOES COME DOWN TO HAVING THAT ONE PERSON THAT LOVES YOU, AND THAT YOU CAN SAY IS ALWAYS THERE BECAUSE FOSTER PARENTS ARE GREAT, BUT I DON'T KNOW IF SOME OF YOU HAVE CHILDREN, BUT BEING A PARENT DOESN'T END WHEN YOUR CHILD REACHES 21, OR WHEN YOUR CHILD LEAVES YOUR HOME. YOU KNOW, THAT CHILD NEEDS THAT PARENT WHETHER IT'S TO BE WITH THEM WHEN THEY GET MARRIED, OR YOU KNOW, JUST TO TALK TO THEM ABOUT LIFE."

– YOUTH IN CARE

We also heard from young people who felt they had just been "dumped" at a children's mental health setting as a last resort. Many said that if they weren't placed there, they would have ended up dead, on the street or in jail. They also said clearly that, "This place stole my childhood." They felt as if they were being warehoused. In fact, one young person overheard a youth worker referring to her residence as being "storage". Given these types of experiences, many youth found it hard to find inspiration for their futures or even to imagine a better life outside of the facility. Young people were concerned with fairness and being treated by staff as people rather than "clients." They simply wanted to be treated humanely. There were many stories about staff or foster parents arbitrarily changing rules or not taking the time to consider their needs. On a positive note, there were also stories shared about staff or foster parents really taking the time to get to know each young person, to see them as an individual deserving of respect and to build the trust necessary for an authentic human connection.

"I'VE BEEN IN A LOT OF OPEN CUSTODY AND PLACES LIKE THAT WHERE STAFF HAVE BEEN WORKING FOR A LONG TIME AND IT'S JUST LIKE THEY BASICALLY FEEL LIKE THEY'VE HEARD IT ALL, SO THEY DON'T EVEN WANT TO CARE, THEY DON'T WANT TO HEAR ANYTHING BECAUSE THEY THINK THEY KNOW HOW YOU ARE; BUT THEY DON'T. YOU ARE YOU, AN INDIVIDUAL, NOT THE HUNDRED KIDS BEFORE YOU."

– YOUTH IN CARE

"ESSENTIALLY MY FOSTER MUM IS MY FAMILY. MY FOSTER BROTHER, I'VE LIVED WITH FOR SEVEN YEARS, AND HE IS MY BROTHER. WE HATE EACH OTHER, BUT WE'RE BROTHERS. SHE DIDN'T FORCE THIS ON US. SHE REALLY KIND OF LET US DEVELOP OUR OWN RELATIONSHIP. IF YOU WERE IN CONTACT WITH YOUR BIRTH FAMILY, SHE WOULD SUPPORT YOUR CHOICE TO STAY IN TOUCH. SHE ABSOLUTELY SUPPORTED US 100%, NO MATTER WHAT. SHE WAS SUPER BIG ON LETTING YOU MAKE YOUR OWN CHOICES."

– YOUTH IN CARE

"SOMETIMES WHEN YOU TRY AND SUGGEST A CHANNEL AND STAFF ARE WATCHING FOOTBALL BUT YOU WANT TO WATCH HOCKEY THEY SAY 'NO, I'M WATCHING THIS.' LIKE EVEN BASEBALL, TOO, LIKE WHEN THE BLUE JAYS ARE PLAYING AND WE ASK 'CHECK ON CHANNEL 2 REALLY QUICK' AND THEY GO 'NO, WE'RE WATCHING THIS.' IT'S NOT EVEN THEIR TV. THEY'RE SUPPOSED TO BE WORKING. WE'RE THE ONES STAYING IN HERE AND WE'RE LIVING IN HERE, EATING HERE, SLEEPING HERE. THEY CAN WATCH THEIR OWN TV BEFORE THEY COME TO WORK."

– YOUTH IN CARE

"IN GROUP HOMES, YOU'VE GOT STAFF THAT COME IN FOR EIGHT HOURS, GET THEIR PAYCHEQUE, GO HOME, AND DON'T CARE WHAT HAPPENS TO YOU FOR THE REST OF THE DAY, UNTIL TOMORROW WHEN THEY HAVE TO DEAL WITH YOU AGAIN."

– YOUTH IN CARE

INFORMATION IS WITHHELD

Young people in every location we visited talked to us about needing to know what was happening to them, about the decisions being made concerning their lives. They often felt that they were uninformed about their rights or weren't provided with the resources they needed to discover them on their own.

Many young people did not understand the details or significance of their plans of care, and there did not seem to be any follow up or focus to make the plan of care relevant to their lives beyond the present moment. In some cases, plans of care were generalized for all of the youth or created without the input or the involvement of the young person for whom it was designed. One young person said that the plan was just brought out for her to sign. Another young woman said that her parent, with whom she had no contact whatsoever, was brought in to meet with her and the worker and allowed to arbitrarily change her plan of care into something she didn't recognize or want.

A number of young people mentioned that things in their plan were explained so quickly, especially when they first came into residential care, that they did not really understand what they were being told or why it was significant. It was as if the information was just rattled off or thrown at the young person just to say that the task had been completed. They either had no idea what they were agreeing to or had to fight for the time to read what they were about to sign.

We were also told that some youth had not been informed about how or where to reach out for help to obtain better understanding of their situation. They were not given an opportunity or any information about how to file a complaint. In a couple of instances the youth as a group said that when they asked to call the Advocate's Office's 1–800 number the staff would laugh at them. In another, a young woman stated that the staff of her group home would hide the phone so that she couldn't call our office.

Numerous youth expressed anger about being moved without notice or explantion, especially when the move involved changing schools as well. Not only was it incredibly difficult to move to another living situation, the difficulty was intensified by having to start over again at yet another school, making new friends and adjusting to new teachers and different classes.

"I'VE BEEN IN A BUNCH OF OTHER TREATMENT CENTRES, BUT THIS IS KIND OF THE END OF THE LINE. YOU'RE HERE UNTIL YOU LEAVE TREATMENT COMPLETELY."

– YOUTH IN CARE

"I HAD NEVER HEARD OF THE CHILD ADVOCATE'S OFFICE UNTIL TONIGHT. WHO DO YOU COMPLAIN TO WHEN YOU DON'T KNOW WHO TO COMPLAIN TO? I CALLED THE OMBUDSMAN, AND THEY SENT THE REPORTS, AND THAT WAS IT. THAT'S ALL THAT HAPPENED, AND I JUST GOT HATED ON FOR THE REST OF MY THREE MONTHS IN THAT GROUP HOME. SO THERE NEEDS TO BE MORE AWARENESS, NOT ONLY OF THE CHILD ADVOCATE'S OFFICE BUT THE PROGRAMS AVAILABLE TO KIDS."

– YOUTH IN CARE

The young people would have preferred to know the issues behind the need for them to be moved and to have had an opportunity to work through those issues rather than being forced to change their living situation yet again. They felt that every time an issue came up they were just moved. These sudden moves felt like punishment and that they were being moved because they had done something wrong.

We learned from many youth that trying to keep up their education while in residential care was difficult. Frequent moves during the school year affected their marks, educational achievement and relationships with teachers and peers, and often put successful completion of their school year at risk. We also heard that school performance could be seriously affected because at some group homes, treatment and custody facilities there was no support for an Individual Education Plan (IEP) or anyone to help them with their individual learning needs. In some locations, teachers were supportive but made no effort to create interest in the curriculum or show youth how it might be relevant to their lives.

Young people, particularly older youth, felt that being taught life skills was very important and would help them be successful when leaving residential care. However, because everything is done for them in residential care, they do not learn even the most basic life skills. Being informed about available services as well as their rights while in care was considered extremely important.

Young people said that their files were difficult to obtain or information about their cases was often withheld leaving them feeling discouraged and hopeless.

Many youth wanted information about issues concerning sexual health and sex education. Not only did many young people feel uninformed, they felt that asking staff questions about sex or sexuality would stigmatize them or get them kicked out of their foster home or residence. Some did not feel comfortable disclosing anything about their sexual health or asking any sex-related questions.

Without information about their rights, services or life histories, the youth told us they could not self-advocate or feel that they owned their own lives. They wanted to be taken seriously and they wanted their efforts to advocate for themselves to be treated seriously and with respect. Withholding information not only disempowered young people it dehumanized them.

"PUNISHMENTS ARE UNREALISTIC IN THE GROUP HOME. IF YOU DON'T EAT YOUR BREAKFAST, YOU'RE NOT ALLOWED TO GO TO SCHOOL. I DON'T KNOW ABOUT YOU GUYS BUT I CAN'T EAT BREAKFAST AS SOON AS I OPEN MY EYES IN THE MORNING. I USED TO EAT BREAKFAST AT 10:30 ON MY FIRST LUNCH BREAK AT SCHOOL. I WOULD BRING MY OATMEAL TO SCHOOL WHEN I WAS LIVING WITH MY FAMILY, MY REAL FAMILY."

– YOUTH IN CARE

"I ALWAYS HAD TO ASK FOR THE CLOTHING MONEY. I REMEMBER I DIDN'T ACTUALLY KNOW THAT I HAD CLOTHING ALLOWANCE THE FIRST TIME. IT WAS TO THE POINT WHERE I HAD SUCH MASSIVE HOLES IN MY SHOES THAT I COULDN'T WALK ANYMORE ANYWHERE BECAUSE THEY WOULD TEAR UP MY SOCKS, SO ALL MY SOCKS HAD HOLES IN THEM. ALL MY PANTS WERE RIPPED UP FROM WORKING. MY WINTER JACKET RIGHT NOW DOESN'T EVEN FIT ME AND I'M FREEZING OUTSIDE AND IT'S NOT EVEN COLD YET."

– YOUTH IN CARE

"I WAS CROWN WARD EXTENDED CARE, WHICH MEANS I GOT SUPPORT WITH THE APARTMENT UNTIL I WAS 21, AND JUST RECENTLY I FOUND OUT THAT I'M A YEAR OLDER THAN THE REQUIRED SUPPORT WHERE THEY PAY FOR FOUR SEMESTERS OF COLLEGE. I WOULD HAVE LOVED THAT. I'M NOT A STUPID PERSON."

– YOUTH IN CARE

"WHEN I TRY TO CALL MY LAWYER AND HAVE TO LEAVE A MESSAGE, I GET TOLD THAT WAS MY CALL AND I WILL HAVE TO WAIT TO GET CALLED BACK. BUT THEY NEVER PHONE BACK; EVEN PROBATION OFFICERS. WE'RE ALWAYS CALLING THEM AND LEAVING A MESSAGE, BUT IT MIGHT BE A MONTH LATER OR AFTER WE GO TO COURT, BEFORE WE HEAR BACK OR MY PROBATION OFFICER WILL ASK, 'SO HOW'D COURT GO?'"

– YOUTH IN CARE

"THERE SHOULD BE A TRIAL PERIOD FOR PLACEMENTS WHERE YOU CAN COME AND STAY HERE FOR A WEEK AND SEE IF YOU LIKE IT OR NOT AND HAVE THE CHOICE TO LEAVE OR STAY, LIKE YOU DON'T JUST DROP SOME KID OFF AND THEN EXPECT THEM TO KNOW WHAT IT'S LIKE. YOU SHOULD LET THEM TRY IT FOR A WEEK. IT'S LIKE IF YOU WERE GOING TO BUY A NEW CAR, YOU GET TO HAVE IT FOR THE WEEKEND."

– YOUTH IN CARE

"WHEN I FIRST CAME INTO CARE I WAS APPREHENDED AND BROUGHT TO THE YOUTH HOME. NOBODY ASKED ME ANYTHING, HOW I WAS DOING, IF I WAS OKAY, AND I WAS READY TO HAVE A PANIC ATTACK. THEY JUST THREW A BIG HUGE BOOK OF PAPERWORK IN FRONT OF ME THAT I HAD TO READ, ABOUT MY RIGHTS IN THE GROUP HOME. THEY'RE LIKE 'OH, JUST SIGN THE BACK'. THEY DIDN'T EVEN ENCOURAGE ME TO READ IT. THEN WHEN I TRIED TO READ THROUGH IT, AND I WAS ASKING QUESTIONS, THEY GOT ANGRY WITH ME. TIME TO READ THIS?' BECAUSE EVERY KID THAT CAME IN AFTER ME THAT I WATCHED THEM GIVE THIS BOOK TOO – THEY WOULD JUST GIVE THE BOOK TO THEM, AND THE KID WOULD JUST GO TO THE LAST PAGE AND SIGN IT OFF, SIGN THEIR LIFE AWAY. NOBODY ACTUALLY KNEW WHAT THEIR RIGHTS WERE IN THE GROUP HOME. I WOULD CONSTANTLY BE LIKE 'NO, YOU CAN'T DO THAT TO THAT KID. THAT'S IN THE BOOKLET. 'YOU CAN'T TALK TO THEM LIKE THAT' OR 'YOU SHOULD BE CALLING THE ADVOCACY OFFICE ON THE STAFF BECAUSE THEY'RE NOT TREATING US RIGHT HERE'."

– YOUTH IN CARE

DECISIONS THAT AFFECT US ARE MADE WITHOUT US

In all areas of residential care, we heard that decisions are often made without the young person's involvement, or that young people feel they do not have the ability or opportunity to make informed decisions about their own lives.

We heard many times that the system does not foster the ability to think independently or make decisions, resulting in young people who cannot direct their own lives when they leave care. Poor decision-making skills contribute to young people returning to some form of residential care.

One major area of concern with respect to decisions being made on behalf of a young person was in the administering of medications. While a young person might be told the names of the medications they were taking, they were not provided with enough information about the medications themselves. They were not empowered to make decisions about whether or not they should take certain medications, nor were they given the choice to do so. Often there was little or no follow up once the young person left care to see if they were managing their medications properly.

Young people also felt that they needed to be given a proper period of time to adjust to being in residential care. If there was such an adjustment period provided, it was often too short and did not give them enough time to get to know all the rules. They felt that it was unrealistic to expect them to abide by the setting's rules whether they knew them or not. The young people also felt that the choice of where they went in the system was always made for them, not with them, with no effort to match them with the best placement option. When the placement failed to work out, they would just be quickly moved to the next place, again, without choice or discussion.

When speaking about this issue of decisions being made without their involvement, young people felt that it was difficult to ask for help without feeling vulnerable. They also did not know who to ask for help. In many cases we were told that staff were not supportive and did not seem open to providing the young person with knowledge about their rights with regard to decision-making on their own behalf.

It is incredibly difficult to grow into adulthood without the capacity or ability to make decisions. There is need to create more rights-based environments within systems of care and to place equal importance on young people's wants and needs in discussions about their care.

Young people were clear in saying that they have no voice. They desired not only the right to be heard, but to participate regularly in the creation of services designed to assist them.

"MY FOSTER HOMES THAT I WAS SET UP WITH WERE VERY, VERY CONSERVATIVE ABOUT THE LGBTQ COMMUNITY, AND I IDENTIFY WITH THAT COMMUNITY AS WELL. LIVING IN THAT HOUSEHOLD, BEING LGBTQ, WOULD HAVE BEEN NICE TO KNOW BEFORE I WAS TOLD THAT I HAD TO GO LIVE THERE. "

– YOUTH IN CARE

"WHAT ALWAYS FRUSTRATED ME WITH THE PLAN OF CARE PROCESS WAS THAT STAFF AT THE FACILITY WOULD DRAFT A PLAN THEN BRING IT TO ME TO REVIEW AFTERWARDS. I WAS NEVER ACTUALLY INCLUDED IN THE DEVELOPMENT PROCESS. I WAS JUST KIND OF THERE FOR THE REVIEW PIECE AT THE END."

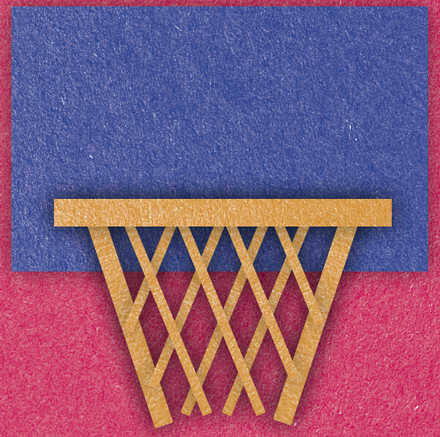
– YOUTH IN CARE

"I FIND IT'S HARD FOR THE STAFF TO RELATE TO THE YOUTH. I THINK THE STAFF TRAINING IS VERY IMPORTANT FOR STAFF. YOU HAVE TO REALLY CHANGE YOUR PERSPECTIVE BECAUSE IT'S NOT JUST A REGULAR JOB. **YOU REALLY HAVE TO LEARN TO CONNECT WITH THE YOUTH** AND SOME STAFF MAYBE ARE WORKING THERE JUST THERE TO GET A SCHOOL PLACEMENT DONE. WHETHER STAFF REALIZE IT OR NOT, THEY HAVE A HUGE IMPACT ON YOUNG PEOPLE AROUND THEM AND THE YOUTH REALIZE THAT."

– YOUTH IN CARE

"MY FIRST PLAN OF CARE MEETING WAS IN THE GROUP HOME AND **THEY INVITED MY FATHER, WHO HAD BEEN BRUTALLY BEATING ME FOR YEARS.** I HAD GONE THROUGH THE PLAN OF CARE ALREADY AND DECIDED WHAT I WANTED TO LOOK FORWARD TO IN MY TIME IN CARE. BUT AFTER THAT MEETING, THE PLAN CHANGED COMPLETELY BECAUSE MY DAD ENDED UP SCOFFING AT EVERYTHING THEY READ OFF OF MY LIST AND SO THEY DECIDED TO CHANGE IT BASED ON WHAT MY FATHER WANTED. I WASN'T EVEN IN HIS CUSTODY ANY MORE. **I DIDN'T WANT TO BE IN HIS CUSTODY. I DIDN'T WANT ANYTHING TO DO WITH HIM OR MY FAMILY AT THAT POINT ANYMORE AND HERE THEY WERE STILL MAKING DECISIONS ABOUT MY LIFE EVEN THOUGH I'D BEEN TAKEN AWAY."**

– YOUTH IN CARE



"DECISIONS... OH MAN. YOU DON'T GET TO MAKE ANY FOR YOURSELF."

– YOUTH IN CARE

"I CAME BACK FROM SOME TRIP OR SOMETHING FEELING SUPER EXCITED BECAUSE WE HAD JUST GOT OUR ROOM PAINTED, WE GOT NEW SHEETS AND A NEW VIDEO GAME. EVERYTHING WAS SUPER AWESOME, THEN I GET SAT DOWN AND TOLD, 'YOU'RE GOING TO BE MOVING IN THE NEXT THREE DAYS, YOU'RE GOING TO LIKE THIS NEW PLACEMENT, YOU'RE GOING TO BE CLOSE TO YOUR SCHOOL, YOU'RE GOING TO MAKE NEW FRIENDS.' SO I GOT TO BE IN THAT NEW ROOM FOR THREE DAYS, BUT **DIDN'T GET TO SAY GOODBYE TO MY BROTHER OR ANYTHING.** EVENTUALLY, WHEN I GOT OLDER, I HAD A DISCUSSION ABOUT THIS TRANSITION WITH MY FIRST FOSTER MOTHER, WHO SAID, 'YEAH, I ORIGINALLY JUST WANTED YOU PICKED UP AND BROUGHT STRAIGHT THERE.' MY NEW FOSTER MOTHER SAID, 'ABSOLUTELY NOT, YOU'RE GOING TO SAY GOODBYE TO YOUR KID, AND THEN I'LL TAKE HIM.' I JUST REACTED TO THIS STATEMENT 'TAKE HIM' WITHOUT REALIZING THAT **TRANSITIONING IS KIND OF A BIG DEAL, AND THAT IF YOU DO IT BADLY, IT CAN REALLY MESS A KID UP.** I'M STILL NOT PARTICULARLY FOND OF THAT (FIRST) FOSTER PARENT."

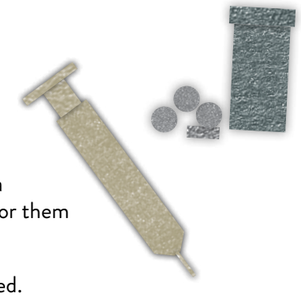
– YOUTH IN CARE

HOME MEANS A SAFE PLACE

"IN OUR ESTIMATION THE ISSUE OF THE USE OF RESTRAINTS AND WHAT THE SYSTEM CALLS 'SERIOUS OCCURRENCES' SAYS MORE ABOUT THE CULTURE OF A RESIDENTIAL SETTING AND THE LEVEL OF SKILL OF STAFF THAN IT DOES ABOUT THE YOUNG PEOPLE THEMSELVES."

Safety and feelings of not being safe were echoed by young people everywhere. Some spoke of feeling unsafe physically, while others added that they felt unsafe in less tangible ways. These expressions of feeling vulnerable were communicated across a number of areas of the young people's lives.

VIOLENCE IS AROUND US



Many of the youth in residential care talked to us about the violence in their lives. They told us about living with and witnessing violence on a daily basis. Bullying, fighting and the use of restraints, both physical and chemical, were common. Whether they were a victim, a witness or a perpetrator, or all three, they recognized that it could be traumatic for them and others on many levels.

A number of young people felt that they had come into residential care already traumatized. They felt that their issues were either made worse or that they were re-traumatized while in the residence. Some younger children were housed with older youth who often displayed anger management issues or mental health needs.

Many young people felt that positive interactions with staff seemed to be conditional on their behaviour and, as a result, there was no consistency in their interactions with staff. In some instances they felt that staff had not been properly screened or that new hires did not have the appropriate training to take a therapeutic approach in their interactions with young people who were struggling. In addition, punishment seemed to be applied without explanation or any attempt to understand the reasons for the young person's behaviour. We were told that in many cases staff never asked "why" and just administered punishment.

We heard stories of staff using restraints to manage the behaviour of young people in ways that seemed arbitrary. In many cases the young people said that the use of restraints or isolation was warranted, but that sometimes staff used restraints in a punitive way, just because they were in a bad mood or felt provoked by the young person. One youth said that if he was angry and acting out, touching him made everything worse, so the staff had learned to help him calm himself without needing to resort to restraints. Other young people talked about the traumatic effect of witnessing young people being restrained.

In Toronto in 2013, one in three serious occurrence reports filed by group homes and residential treatment centres was for use of a physical and/or chemical restraint, according to an analysis conducted by the Toronto Star.[1]

All of the uncertainty, the arbitrary application of punishment and a lack of consistency in terms of staff behaviour contributed to young people feeling unsafe in many residential care settings. They worried about bullying and staff were often unaware of what was happening on the floor. They talked about the need for staff to help build better relationships among peers in residential care settings.

In our estimation the issue of the use of restraints and what the system calls "serious occurrences" says more about the culture of a residential setting and the level of skill of staff than it does about the young people themselves.

1. Monsebraaten, Laurie and Sandro Contenta, "Physical restraint common in Toronto group homes and youth residences", Toronto Star, July 3, 2015.

"MOST OF THE TIME WHEN YOU DO A REVIEW OR A CHILD MAKES A COMPLAINT IT GOES NOWHERE. OR IT'S FOUND UNFOUNDED, YOU'RE NOT BELIEVED, BY WHICHEVER LEVEL OF POWER, WHETHER IT'S THE STAFF THEMSELVES, A POLICE OFFICER OR A WORKER. IT DOESN'T MATTER IF OTHER KIDS AGREE WITH YOU. EVEN IN FOSTER HOMES, OR GROUP HOMES. THERE'S NO ACCOUNTABILITY TO BELIEVING THE CHILD."

–YOUTH IN CARE

"WHEN I'M IN MY ROOM, WHEN I'M HEARING THESE KIDS GETTING RESTRAINED, THEY'RE SCREAMING LIKE THEY'RE DYING AND THEY'RE SAYING 'PLEASE, PLEASE STOP', IT'S REALLY MESSED UP. YOU'RE HEARING THEM BEGGING FOR THE STAFF TO STOP."

–YOUTH IN CARE

WE HAVE NO CONTROL

Regardless of the setting, many youth told us that they felt unsafe specifically because they had little or no control over what was happening in their residential care environment. A lack of information about their rights, decisions made without their involvement and a lack of control over even small elements of their day to day life all contributed to their feelings of helplessness and vulnerability.

We heard that when young people felt unsafe, they often wouldn't speak up out of fear. Reasons given for feeling fear included: feeling that nothing would change; worry that they would be moved again; or uncertainty because there was no clear procedure in the residential setting for reporting their concerns. In many cases they learned it was just better to keep a low profile rather than calling attention to themselves and risking retaliation from staff or other youth.

We heard a number of stories where the young people said that they were unaware of any advocates in their lives. They were not just unaware of the Office of the Provincial Advocate for Children and Youth, but unaware of any individual who would be interested in speaking up for them or acting on their behalf. We also heard stories from young people about staff laughing at them or actively preventing or delaying them from calling the Advocate's Office.

"WHEN I FIRST GOT HERE AND **SAW A KID BEING RESTRAINED, I LITERALLY ALMOST RAN TO MY ROOM AND STARTED CRYING.** IT WAS A BIG SHOCK. I WAS SHOCKED, AND THEN ONCE I GOT INTO A RESTRAINT, I WAS LIKE, THIS IS FOR MY OWN SAFETY, I GET THAT, BUT THEY COULD GO ABOUT THIS IN SUCH A DIFFERENT WAY."

–YOUTH IN CARE

"I THINK IN AN EFFORT TO TRY AND PROTECT YOUTH, THEY DEPRIVE THEM OF NORMAL CHILDHOOD EXPERIENCES. I REMEMBER I HAD TO GET MY FRIENDS TO GET A POLICE CHECK TO HAVE A SLEEPOVER. IT'S NOT THE END OF THE WORLD. IT'S JUST NORMAL CHILDHOOD EXPERIENCES THAT SHOULD BE REGULAR FOR EVERYONE, BUT THEY'RE NOT HERE."

– YOUTH IN CARE

"I THINK CAS SHOULD WORK HARDER TO HELP KEEP THE FAMILIES TOGETHER, INSTEAD OF JUST APPREHENDING THE CHILDREN. I THINK THEY DON'T TRY AND HELP THE PARENTS GET THEIR CHILDREN BACK ENOUGH. THEY DON'T TRY AND HELP THEM WITH THEIR PROBLEMS."

–YOUTH IN CARE

"THEY ENDED UP GIVING ME THESE SHEETS OF PAPER, SAYING I HAD TO SIGN IT SO THAT I COULD BE IN THE GROUP HOME. I TOLD THEM I WASN'T GOING TO SIGN IT. I DON'T WANT TO BE THERE. I DON'T UNDERSTAND WHY YOU'RE FORCING ME TO DO SOMETHING LIKE THIS. THE WORKER I HAD AT THE TIME SAID, "IF YOU DON'T SIGN IT, I'M GOING TO MAKE YOU GO SOMEWHERE FARTHER FROM YOUR FOSTER HOME, WHERE YOU DON'T NEED TO SIGN ANYTHING." SO THEY ACTUALLY THREATENED ME."

– YOUTH IN CARE

"I WAS JUST RESTRAINED SATURDAY, AND WHEN THEY WERE RESTRAINING ME, I WASN'T MOVING AT ALL, I WASN'T TRYING TO GET OUT, BUT THEN WHEN I SAID A SNOTTY COMMENT, THEY LITERALLY TIGHTENED UP THEIR GRIP AND TWISTED MY ARM DURING THE RESTRAINT. THAT'S NOT RIGHT."

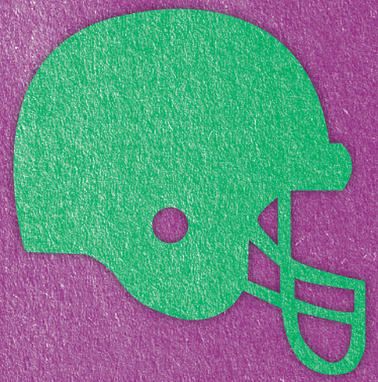
–YOUTH IN CARE

"SOME STAFF, **INSTEAD OF JUMPING INTO RESTRAINT AND GETTING YOU ON THE GROUND RIGHT THERE, THEY WOULD TRY TO TALK TO YOU FIRST, AND SEE WHAT THE HECK THE PROBLEM IS.** I PREFER THAT TO BEING THROWN ON THE DAMN GROUND."

– YOUTH IN CARE

"YOU TAKE A KID WHO'S UPSET WITH HIS PARENTS, AND YOU TAKE HIM AWAY FROM THAT, AND DROP HIM IN, ESSENTIALLY, KIDDIE JAIL, WITH A BUNCH OF OTHER PISSED OFF KIDS, AND YOU EXPECT HIM NOT TO CHANGE. THE ONE PERSON THEY COULD COMPLAIN TO IN THEIR HOME JUST GOT REPLACED BY THE ONE PERSON WHOSE JOB IS SPECIFICALLY TO MAKE THEIR LIFE MISERABLE. WHO HERE HASN'T HAD THAT ONE STAFF WHO WAS SPECIFICALLY OUT TO GET YOU?"

– YOUTH IN CARE



"I WAS IN A VERY GOOD HOME WITH LONG TERM CARE WITH PEOPLE THAT WERE GOING TO TAKE CARE OF ME UNTIL I GRADUATED FROM COLLEGE. THEN **JUST OUT OF THE BLUE THEY WERE HAVING THIS BIG FIGHT WITH MY AGENCY AND THEN THEY DIDN'T WANT ME ANYMORE. I DID NOTHING TO THEM.** THEY WERE MAD AT THE AGENCY SO **THEY THREW ME TO THE CURB."**

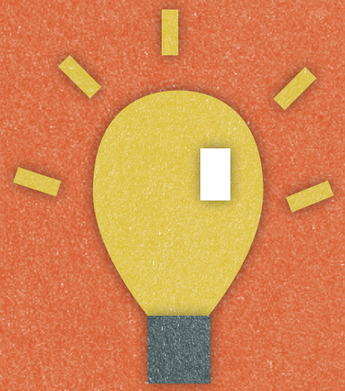
– YOUTH IN CARE

"I HAVE PROBLEMS OF MY OWN, BUT I COULD NEVER DISCLOSE ANY OF THEM BECAUSE I WAS SCARED TO LEAVE MY FAMILY. I LOVED MY FAMILY MEMBERS. BUT THERE WERE TIMES WHERE I THOUGHT THINGS WERE UNFAIR. I DIDN'T WANT TO TALK ABOUT IT BECAUSE I DIDN'T WANT TO GET ANYONE IN TROUBLE. SO **YOU'RE KIND OF STUCK IN A POSITION WHERE YOU THINK THINGS CAN BE BETTER, AND YOU WANT TO DO SOMETHING BETTER, BUT YOU CAN'T, BECAUSE YOU'RE SCARED TO. YOU DON'T WANT TO BE GOING FROM HOME TO HOME, BECAUSE THIS IS THE ONLY KIND OF PLACE THAT YOU FEEL SAFE."**

– YOUTH IN CARE

"ONE OF THE THINGS I DEALT WITH WHEN I WAS YOUNGER **I CONSTANTLY HAD TO TAKE DIFFERENT TYPES OF MEDS TO SEE WHAT WOULD FIX THE PROBLEM.** THEY SHOULD ACTUALLY LOOK INTO THE KID'S PSYCHOLOGY, SEE WHAT HAPPENED IN THEIR LIFE TO THIS POINT, MAYBE THE KID JUST HAS ADHD, MAYBE THAT'S WHY HE'S HAVING THESE ISSUES. REALIZING THAT AND ACTUALLY LOOKING INTO POSSIBLE TREATMENT AND SEEING HOW THE FOSTER PARENT OR GROUP HOME CAN USE OTHER WAYS TO HELP THE KID AS A FIRST STEP BEFORE JUMPING INTO MEDICATION. **IF MEDICATION IS NEEDED THAT SHOULD ALWAYS BE CHECKED, ESPECIALLY WHEN MAKING ANY TRANSITIONS OR AFTER LEAVING CARE."**

– YOUTH IN CARE



HOME MEANS UNDERSTANDING

"THE OTHER THING IS, DON'T TREAT US ANY DIFFERENTLY THAN ANYBODY ELSE OUT THERE. JUST BECAUSE WE HAVE THE FOSTER KID LABEL OR THE GROUP HOME KID LABEL, DOESN'T MAKE US BAD PEOPLE."

– YOUTH IN CARE

Young people spoke to us about gaps they saw in the system, including a lack of availability or access to supports and services they needed and a lack of skill and training on the part of staff.

WE FEEL LABELED

We spoke to a number of young people who felt that staff or other young people looked at them solely through the lens of their diagnosis or the reason they were brought into residential care. In some cases they felt that they had been misdiagnosed and that the inaccuracy of their diagnosis harmed them in some way. Many youth told us that they felt this focus on their diagnosis or the issue that brought them into residential care made them feel stigmatized and labeled. They felt that staff or peers would focus on this label and it became their identity while in care.

Some young people said that they and other youth deliberately identified themselves with these labels and acted out accordingly. They felt that the labels sometimes reinforced certain behaviours that they wouldn't otherwise manifest, simply because of the expectation that went with that label. In many cases the younger children diagnosed themselves, and referred to themselves and others with their clinical labels.

"I ONCE HEARD THAT THE RCMP APPARENTLY SAYS THAT ABOUT ONLY 20% OF THE CALLS THAT GROUP HOME STAFF MAKE WHEN THEIR YOUTH ARE MISBEHAVING ARE LEGITIMATE. SO THEY MAKE THESE CALLS BECAUSE THEY DON'T HAVE THE PROPER TRAINING TO HANDLE YOUTH WHEN THEY'RE UPSET OR IF THEY PUNCHED A WALL. IF YOU WERE IN YOUR NORMAL FAMILY, YOUR PARENTS WOULDN'T CALL THE COPS ON YOU FOR LASHING OUT WITH SUCH ANGER OR TALKING BACK."

– YOUTH IN CARE

"IN MY EXPERIENCE, I ENJOYED BEING IN A SECURE CUSTODY SETTING MORE THAN OPEN CUSTODY, BECAUSE WHEN WE WOULD GO TO THE YMCA OR BLOCKBUSTER. ANYTIME WE WENT OUT INTO THE COMMUNITY WE WERE ALMOST OSTRACIZED. LIKE IF THERE WERE OTHER TEENS AT THE YMCA WE WEREN'T ALLOWED TO COMMUNICATE WITH THEM, WHICH COULD GET EMBARRASSING. WHILE IN SECURE CUSTODY WE WERE ALWAYS IN THE FENCE BUT WE STILL HAD A GYM, SPORTS OR MOVIE NIGHTS."

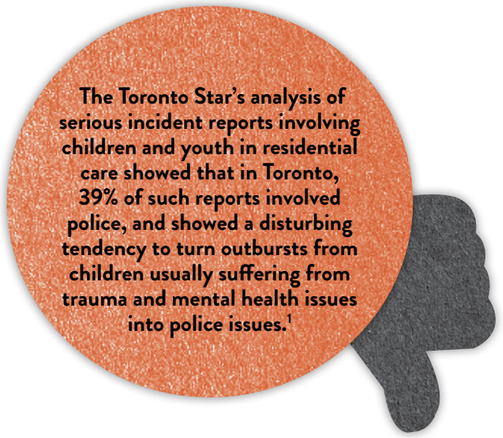
– YOUTH IN CARE

GAPS IN THE SYSTEM HARM US

Many of the young people worried that they had no connections to people who understood their circumstances or could help them manage their lives while in the system. They also worried about falling through the many cracks in the system that became apparent the longer they remained in care.

A number of young people talked about the huge gaps between clinical staff and nursing or front-line staff. They felt that clinical staff did not take the time necessary to understand their situation and simply imposed plans of care that were meaningless, had no relation to their actual needs or that had no connection to their day to day reality.

In some cases the young people felt that once the plan of care was established, it was put on the shelf and abandoned until the next time they met to discuss it. In the interim, no actions were taken towards implementing the actual goals of the plan of care.



"EVEN WITH THE PARENT TRAINING[2] THEY GET, LOTS OF FOSTER PARENTS ARE NOT REALLY PREPARED FOR THE SITUATIONS THEY'RE GOING TO BE HANDLING WITH KIDS. THEY DON'T KNOW WHAT TO DO, BECAUSE THEY'RE STUCK WITH THIS KID, THEY HAVE NO IDEA, THEY DON'T UNDERSTAND HIM, THEY'RE GOING OFF THE WALL, AND THEY CAN'T RELATE TO HIM AT ALL. IF THEY HAD A MENTORSHIP WITH SOMEONE WHO HAS DEALT WITH THESE SITUATIONS, THEN MAYBE BURNOUT RATES WOULD FALL AND THE FOSTER PARENTS WOULD ACTUALLY CONTINUE SUPPORTING YOUTH."

– YOUTH IN CARE

THE NEED FOR MORE PROFESSIONALISM

A number of young people mentioned a lack professionalism on the part of the staff they saw every day. They felt that some staff lacked any skill to work with young people while others were "just in it for the pay cheque". They worried that some foster parents or staff working in residential care settings saw their work as being "just a job". They wanted to see consistency and caring on the part of those who interacted with them every day, not someone who they felt was just "going through the motions." To the young people, professionalism meant being able to demonstrate caring and supportive behaviour toward young people in care.

Some young people, especially those who had been in the system for long periods, felt that staff and/or foster parents sometimes had the wrong kind of training to do their jobs. In one location staff in a therapeutic facility had been hired almost exclusively from a correctional program where no therapeutic skills were taught. The youth worried that in many cases staff or foster parents were not being properly screened for their skills and abilities. They also worried about staff who did not know how to do restraints properly or when to use them.

1. Contenta, Sandro and Jim Rankin, "Toronto group homes turning outbursts from kids into matters for police", Toronto Star, July 3, 2015.
2. Also known as PRIDE training. PRIDE is a nine part training program used to educate families interested in providing kinship care, fostering, and adoption care to children and youth. It is provided free of charge by a children's aid society.

"A LOT OF TIMES I FOUND IN GROUP HOMES THAT A MAJORITY OF STAFF ARE WOMEN. I THINK IT'S IMPORTANT FOR YOUNG MALES TO HAVE POSITIVE MALE ROLE MODELS. IT'S A GAP BECAUSE A LOT OF THE HOMES THAT I WAS IN THE KIDS DIDN'T HAVE FATHER FIGURES."

–YOUTH IN CARE

"I'VE BEEN PUT ON MEDICATIONS SINCE I WENT TO THOSE GROUP HOMES. I'VE BEEN ON SO MANY DIFFERENT MEDS, SO MANY DIFFERENT THINGS, THAT IT'S JUST MESSING UP MY BRAIN. SOME I'VE BEEN ON MADE ME WORSE, SOME MADE ME BETTER."

–YOUTH IN CARE

"THEY TRY TO ACT LIKE COPS. THEY'LL HAVE A FOOT ON YOU OR BOTH KNEES OR SOMETHING AND COMPLETELY LAYING ON YOU AND FLATTENING YOU OUT TO THE POINT WHERE YOU CAN'T HARDLY BREATHE. A COUPLE OF WEEKS AGO I HEARD THIS KID BEING RESTRAINED BY A COUPLE OF STAFF. I HEARD IT FROM IN MY ROOM. I WAS DOING A LITTLE WORKOUT AND I HEARD THIS RUCKUS. THE WHOLE EVENT DIDN'T SOUND RIGHT TO ME. I ALMOST WANTED TO JUST OPEN MY DOOR, AND JUST TELL THEM 'LEAVE HIM ALONE, STOP IT', COOL IT OFF A BIT."

–YOUTH IN CARE

"I PARTICIPATED IN MY PLAN OF CARE. WHEN I WAS YOUNGER I WASN'T A GREAT FAN OF IT. BUT AS I GOT OLDER I ACTUALLY PARTICIPATED, TO PLAN OUT, I DON'T KNOW, KIND OF WHAT MY NEXT STEPS WOULD BE. I'M A PLANNER, SO THAT KIND OF BENEFITED ME. SOMETIMES I DIDN'T LIKE THE PLAN OF CARE BECAUSE WHEN I WOULD READ WHAT THEY HAD PREVIOUSLY WROTE, I FELT LIKE A CLIENT. I DIDN'T FEEL LIKE A PERSON, I FELT LIKE A CASE NUMBER, A PAY CHEQUE... I FELT THAT THEY WERE CATEGORIZING ME AS SOMETHING, THEY WERE LABELING ME SOMETHING... IF I ACTED OUT, AUTOMATICALLY SOMETHING WAS WRONG WITH ME."

– YOUTH IN CARE

Young people told us that the police were called in many situations where their involvement was unnecessary. They felt the situations could have been diffused if the staff or foster parents had paused and taken a few moments to try and understand the cause of the situation. In many cases the young person said "no one asked me why", they just punished or moved me. Some believed the use of police to diffuse situations in residential care reflected a lack of staff training in de-escalating situations in which youth act out.

Young people also called for more staff training in the area of supporting young people through the various transitions they faced coming into and leaving care, when moving from placement to placement or when staff, foster parents or co-op students were leaving the setting or ending their placements. They felt that staff and foster parents needed to be more aware of the impact of significant life changes on young people in residential care and the skills necessary to help make transitions less emotionally painful or traumatizing.

In every case young people felt strongly that they and other youth should not accept the status quo regarding the quality of services and care in residential care settings in Ontario. They wanted the system to do better.

"I WOULD GET A GIFT BASKET FROM MY DAD, WHO I DON'T TALK TO FOR YEARS ON END, AND THEN I WOULD GO DOWN, INTO THE BASEMENT, KNOCK ON THE OFFICE DOOR AND BE LIKE 'YEAH, SO CAN I HAVE SOME OF MY CANDY?' AND I WOULD CATCH HIM EATING MY GIFT. AND I WOULD GET UPSET, RIGHTFULLY SO, YEAH, BECAUSE THAT'S MY STUFF, THAT IS THEFT. YOU SEND ME TO JAIL FOR THEFT. WHY ARE YOU SITTING THERE IN YOUR LITTLE CHAIR? AND THEN HE WOULD CALL THE COPS ON ME."

–YOUTH IN CARE

RECOMMENDATIONS

"THERE COULD BE A LOT OF GOOD THINGS THAT COULD BE FOR GROUP HOMES IF THERE WAS A DIFFERENT COMMUNITY ASPECT TO THEM. IF THEY WERE ACTUALLY BENEFITING THE CHILDREN AND GIVING THEM RESOURCES AND HELPING THEM MAKE A DEVELOPMENT PLAN FOR THEIR LIFE."

– YOUTH IN CARE

1. Every service agency and every residence must be required to have policies and procedures (practice guidelines) that make clear the philosophy guiding their approach to providing services. These policies and procedures should cover, but not be limited to: the development of "plans of care"; supporting young people's moves into and out of residence; establishing the rules for the residence; use of restraints; recording and reviewing of files and reports; programming; expectations about the conduct of residents and of staff; and access to the community including friends and "family".
2. Policy and procedures must be developed by each service provider and residence ensuring children and staff are aware of the rights of children and youth under the *Health Care Consent Act*. These policies and procedures should be developed with young people in and from the organizations involved.
3. Exit interviews must be offered to all children and youth leaving a place of residence. These interviews must be conducted by MCYS staff.
4. Each service or residential care provider must develop policies and procedures that ensure children and youth have a record of their life experiences during the time they spent involved with the service or residence. This record should be given to the young person when they leave. The record should include, but not be limited to, acknowledgement of any important celebrations or milestones that occurred in their lives or recognition of any special accomplishments or achievements of the child.
5. Feedback from young people in and from services and residences must be incorporated more fully into the licensing review process of those services and residences.
6. Child and Youth Care, Education, and Social Work departments of all post-secondary education institutions must offer mandatory courses in child and youth participation for diploma and degree programs.
7. All forms of "family" should be considered before or when placing children and youth in residential care.
8. Whenever possible sibling relationships and other biological family relationships should be encouraged and supported by residential care service providers.
9. Visits with family must be seen as an undeniable priority where possible and all measures must be taken to ensure that these visits take place. Where visits with family are scheduled they must never be denied for any reason.
10. The development of positive peer relationships must be supported and encouraged among young people in residential care settings.
11. Every child in residential care must be supported in developing at least one stable permanent relationship in their lives prior to leaving that place of residence.
12. Policies and procedures for residential service settings must incorporate an acknowledgment of the fact that participation and confidence in children is built through positive relationships. Staff working in residential care must make the development of supportive relationships with youth a core aspect of their work.

13. The Ministry of Children and Youth must adopt a principle that children and youth living in residential care must live as close as possible to their home communities. This is especially critical for First Nations, Aboriginal and Métis children from remote and fly-in communities. Funding and resources must be provided to communities, service providers and residential care providers to ensure this fundamental need is met.

14. Every residential care setting must have a designated staff member accountable for ensuring that all youth are informed about and can access their rights and entitlements.

15. Service providers must engage and educate children in residential care within their own "self-identified" culture. Training focused on "cultural respect and knowledge" must be mandatory for everyone engaged in the provision of care in residential care settings.

16. All youth must receive developmentally appropriate information concerning sexual orientation and sexual health. It must be presented in an unbiased manner without stigmatization.

17. Services and residences must be required to work with young people to develop a statement about the importance of creating 'safe space' in the setting where children are able to embrace their cultural or gender identities. Services and residences must also be required to display the LGBTTIQQ2SA safe space triangle symbol in a prominent place.

18. The Ministry of Children and Youth must develop a plan and timetable to work towards the establishment of a "zero use of restraint" philosophy for all residences and services. Staff in all service settings must be trained and supported to encourage the use of positive coping, de-escalation and prevention strategies to help children and youth manage their behaviour.

19. The province must support the development of a regulatory body for child and youth care practitioners.

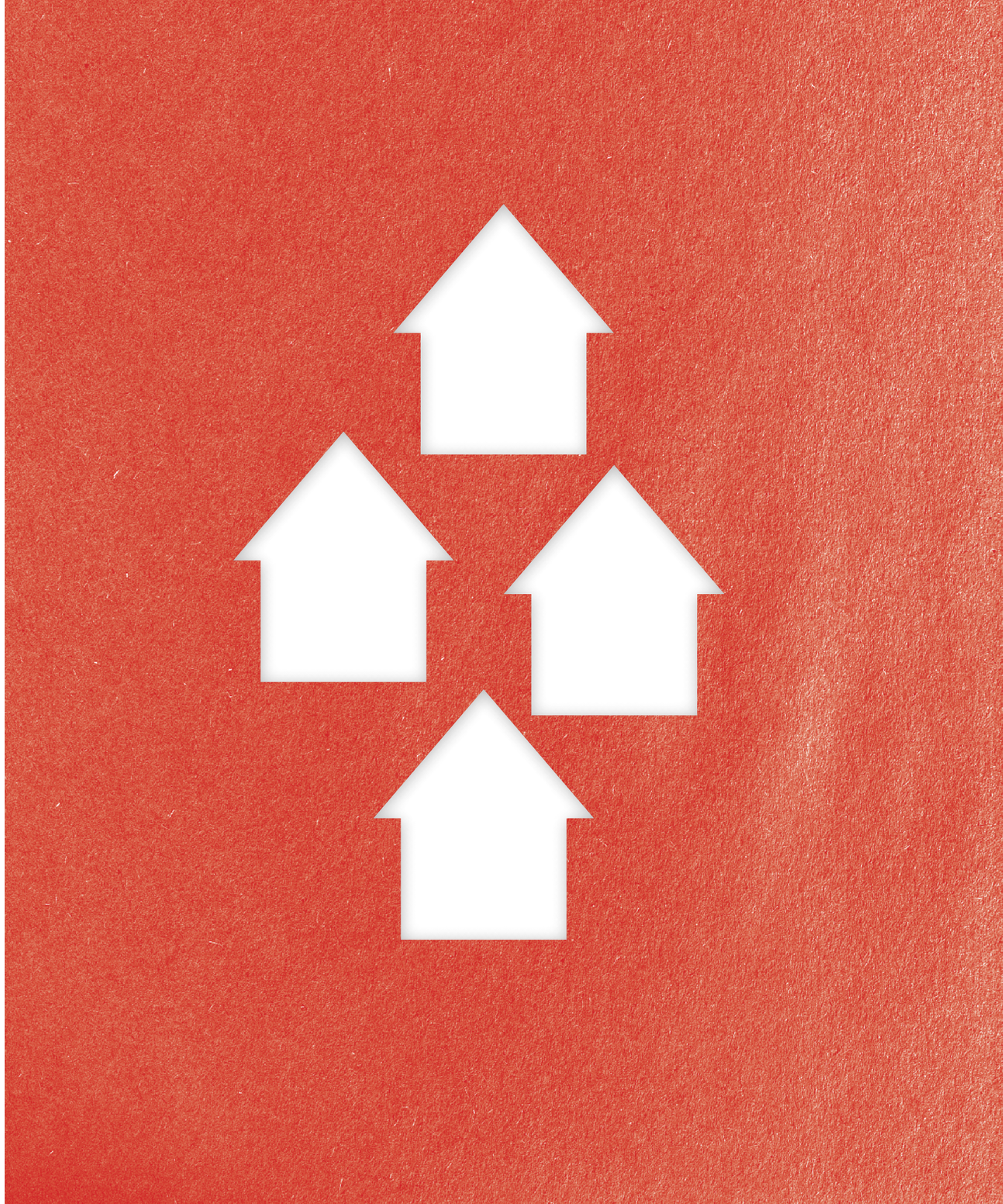
20. In funding residential care consideration must be given to the wages and benefits required to attract and retain well-trained, experienced and capable staff to work in residential care settings.

21. Young people in foster care must be given the opportunity, up to the age of 25, to return to a residential care setting if their exit plan breaks down.

22. Residential care settings must build on the strengths and skills of each child and youth. Decision-making, site operation and programming must revolve around building life skills for children and youth at every stage of their development thereby readying them for the time when they will leave care.

23. Police are over-involved in the lives of young people in residential care and are called in many situations where they are not required. Police departments must not be used as a behavioural management technique and must only be contacted as a last resort or when all other options have been exhausted.

24. Young people in and from services and residences must be involved more fully in the development of criteria for licensing services and residences.



Provincial Advocate for Children & Youth

TORONTO OFFICE
401 BAY STREET, SUITE 2200
TORONTO, ONTARIO M7A 0A6
PHONE 416-325-5669 **TOLL-FREE** 1-800-263-2841

THUNDER BAY OFFICE
435 BALMORAL STREET
THUNDER BAY, ONTARIO P7E 5N4
TOLL-FREE 1-888-342-1380

OOVOO PROVINCIAL-ADVOCATE (ASL/LSQ)

WEB WWW.PROVINCIALADVOCATE.ON.CA
EMAIL ADVOCACY@PROVINCIALADVOCATE.ON.CA

TWITTER @ONTARIOADVOCATE
FACEBOOK OFFICE OF THE PROVINCIAL ADVOCATE
FOR CHILDREN AND YOUTH

TAB 8

Nishnawbe Aski Nation
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NEWS RELEASE

Wednesday February 24, 2016 **FOR IMMEDIATE RELEASE**

FIRST NATION LEADERS DECLARE HEALTH AND PUBLIC HEALTH EMERGENCY

TORONTO, ON: Nishnawbe Aski Nation (NAN) Grand Chief Alvin Fiddler and representatives of the Sioux Lookout Area Chiefs Committee on Health (CCOH) have declared a Health and Public Health Emergency for First Nations in the Sioux Lookout region and across NAN territory.

"The chronic failure of the health care system for First Nations in the Sioux Look region and across NAN territory has left our communities in a state of crisis. Children are dying and lives are at risk. The fact that many First Nations still lack access to even the most basic health services is nothing short of a national tragedy," said NAN Grand Chief Alvin Fiddler. "The many urgent and long-standing health issues that plague our communities are well-documented and the time for action is now. We are calling on all levels of government to commit to a plan of action to begin to address this crisis."

The Health and Public Health Emergency was declared to address urgent and long-standing health issues caused by the inequality of health and health care services. Supported by Chiefs, First Nation and public health officials, the Grand Chief and First Nation leaders from the Sioux Lookout region issued a declaration calling for immediate, intermediate and long-term action strategies and are calling on the governments of Ontario and Canada to take immediate action to address this crisis, including:

1. Meet with Health Ministers to commence an investment and intervention plan, on an urgent basis.
2. Indigenous and Northern Affairs Canada to provide detailed plans and timelines indicating how First Nations communities will be provided with safe, clean and reliable drinking water.
3. Health Canada to provide detailed plans and timelines on how they will follow all the recommendations in the Auditor General's Spring 2015 Report.

"Since returning home recently to represent my people I see a wide discrepancy of health services compared to those available in urban centres. I have my supplementary health card

and I cannot access common services such as chiropractic care, dental services, registered dietician services or an optometrist in my home community. I don't have a physician and can only access those services when I travel to Thunder Bay," said Kitchenuhmaykoosib Inninuwug Chief James Cutfeet, a member of the Sioux Lookout First Nations Health Authority (SLFNHA) Chiefs Committee on Health.

A scathing report by the Auditor General of Canada in 2015 confirmed the continued failure of Health Canada to address the needs of First Nations when it comes to access to and the delivery of health care services in remote First Nations.

"Health care was to remain on the same level or better upon amalgamating the hospitals in Sioux lookout. We now have state-of-the-art facilities at the hospital and hostel but people still have to wait for health services and the level of health care continues to deteriorate," said John Cutfeet, chair of the SLFNHA Board of Directors. "When will we see the commitment for improved health services?"

"Ontario has one of the best health care systems in the world, but that health care system stops at the reserve boundary. We're going to be fighting so that from now on our children who live on the reserve will enjoy the same level of health care enjoyed by all children in Ontario," said James Morris, SLFNHA Executive Director.

"The lack of mental health and developmental services for children and youth has never been acceptable," said Solomon Mamakwa, Health Director with the Shibogama Health Authority and SLFNHA board member. "The health system provided to First Nations is an atrocious mess, which has led to the health crisis we are facing today. We are not even allowed to access all mainstream health services and supports. This has led to the loss of many of our people, including children. This type of system is not tolerated or acceptable in mainstream society. Why are we expected to accept this as Indigenous peoples?"

Two four-year-olds from NAN First Nations passed away in 2014 from Rheumatic Fever, an infection stemming from strep throat, a relatively minor ailment that any child in an urban area could easily be treated with antibiotics. Tragically, neither child received adequate medical attention in time.

The dire straits of the status quo health care in our First Nations is unacceptable. NAN and SLFNHA are calling on our Treaty partners, the governments of Canada and Ontario, to commit to a multilateral government-to-government to address these urgent issues and the long standing inequality of health and health care services.

Nishnawbe Aski Nation

Nishnawbe Aski Nation (NAN) represents 49 First Nation communities in James Bay Treaty No. 9 and Ontario portions of Treaty No. 5 – an area covering two thirds of the province of Ontario in Canada.

Sioux Lookout First Nations Health Authority

Sioux Lookout First Nations Health Authority (SLFNHA) serves 33 First Nation communities in the Sioux Lookout region in Ontario, Canada.

For more information please contact: *Roxann Shapwaykeesic, Communications Officer – Nishnawbe Aski Nation (807) 625-4906 or cell (807) 251-6876 or by email rshapwaykeesic@nan.on.ca*

Nishnawbe Aski Nation
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Sioux Lookout First Nations Health Authority

BACKGROUNDER

HEALTH AND PUBLIC HEALTH EMERGENCY

Nishnawbe Aski Nation (NAN) NAN is a political territorial organization representing 49 First Nation communities located across the whole of northern Ontario with the total estimated population of 45,000 people.

The Sioux Lookout region is comprised of 33 remote and isolated First Nations communities in northwestern Ontario with a population of approximately 30,000 First Nations people. Of these communities, 25 are accessible only by air.

The health system for First Nations in northern Ontario has been in crisis for decades. The consequences of these health effects are well-documented in several reports with recommendations for action, including:

- The United Nations Special Rapporteur on the Rights of Indigenous Peoples confirmed there is a health crisis affecting Indigenous people in Canada and that significant improvements in funding and policy change are desperately needed.
- The Final Report of the Truth and Reconciliation Commission calls for Canadians and governments to play a role in healing and reconciliation in order to close the gaps in the quality of life between Aboriginal People and other Canadians.
- The Auditor General of Canada Spring 2015 Report found that First Nations living in remote communities in northern Ontario and northern Manitoba did not have comparable access to clinical and client care services as other provincial residents living in similar geographic locations. It was also concluded that Health Canada had not assessed whether each nursing station was capable of providing essential health services and also that Health Canada did not take into account community health needs when allocating its support.
- NAN and Manitoba Keewatinowi Okimakanak urged the federal Health Minister to engage with First Nations on a course of action to address the issues identified in the Auditor General's report but no serious commitment has been received.
- In September 2015, the Sioux Lookout First Nations Health Authority (SLFNHA) Chiefs passed a resolution calling for a declaration of a public health emergency. In January 2016, the NAN Chiefs-in-Assembly passed a similar resolution.

The serious health challenges faced by the First Nations in the Sioux Lookout region and across NAN territory include:

- **Trauma and Suicide**: The legacy of Residential Schools and intergenerational trauma has resulted in devastating rates of suicide. Since 1986, there have been over 430 suicides in the First Nations in the Sioux Lookout region, and 500 across NAN. Few communities have access to mental health services.
- **Opioid Addiction**: Prescription drug abuse is rampant and First Nation are unequipped to deal with the epidemic of opioid addiction.[1] Injection drug use is alarmingly high and has led to increasing rates of Hepatitis C. Resources are minimal and communities have to scramble to fund addictions counsellors and opioid substitution programs. Rates of addiction have been as high as 80% of the population in some communities with users as young as 11 years old.
- **Chronic Disease Complications**: Complications related to chronic diseases like diabetes have taken a significant toll on our communities. Our communities have the highest amputation rate in Ontario due to diabetes complications.
- **Child Development Services**: There are significant gaps in child developmental services. Families face many barriers in accessing screening for hearing, vision and multidisciplinary assessments for conditions such as FASD. Once diagnosed, it is difficult to access treatment. Jordan's Principle has been so narrowly defined by the governments that it has become an access barrier for children who need services.
- **Infrastructure and medical supplies**: Many First Nations lack the necessary infrastructure to support the delivery of health services. In addition to buildings, many communities lack basic diagnostic equipment and x-ray machines remain in disrepair for years. Basic medications are sometimes not stocked leading to complications or death, as has been the case with a few children.
- **Human Resources**: Despite the complex needs in the communities, community-based workers and health staff are unsupported and lack basic training and resources. As a result, turnover is high and workers struggle with wage parity issues.
- **Service Delivery Gaps**: Jurisdictional barriers and gaps in service delivery lead to untreated illnesses and injuries and avoidable deaths. Two young children died tragically in 2014 from cases of rheumatic fever that went undetected by community primary care providers. Considered a third world disease, rheumatic fever is still present in many First Nations due to poor living conditions, overcrowding and lack of sanitization.[2]
- **Cultural Safety**: Colonization has resulted in ongoing and entrenched racism in policy and treatment against Indigenous peoples and is manifested in hospitals by staff. Racist ideologies continue to significantly affect the health and wellbeing of Indigenous people.[3]

On February 19 2016, SLFNHA and NAN leadership met with representatives from First Nations & Inuit Health Branch and Ministry of Health & Long Term Care to discuss a provincial and federal public health emergency declaration on behalf of the communities. The response was that neither could declare an emergency for SLFNHA and NAN. Intentions were expressed by the governments to work on the health deficits with SLFNHA and NAN and to begin the health transformation process.

[1] In 2012, some communities estimated greater than 50% of their adult population was addicted to opioids.
[2] In an 18-month period there were 8 cases of rheumatic fever detected in the Sioux Lookout region.
[3] First Peoples, Second Class Treatment: The role of racism in the health and well-being of Indigenous peoples of Canada, Wellsley Institute, 2005.

TAB 9

T.D. 3/97
Decision rendered March 19, 1997

CANADIAN HUMAN RIGHTS ACT
(R.S.C. 1985, C.H-6 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

NATIONAL CAPITAL ALLIANCE ON RACE RELATIONS (NCARR)

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HER MAJESTY THE QUEEN
AS REPRESENTED BY HEALTH AND WELFARE CANADA,
THE PUBLIC SERVICE COMMISSION
AND THE TREASURY BOARD

Respondent

- and -

PROFESSIONAL INSTITUTE OF THE PUBLIC
SERVICE OF CANADA

Interested Party

TRIBUNAL DECISION

Tribunal: J. Grant Sinclair, Q.C. Chairperson
Carol H.Y. Boxill, Member
Alvin Turner, Member

Appearances: Helen Beck and Prakash Diar, Counsel for the Canadian Human Rights Commission
Iyavar Chetty, Counsel for the National Capital Alliance on Race Relations

Cynthia Sams, Counsel for the Professional Institute of the Public Service of Canada
Arnold Fradkin and Hélène Laurendeau, Counsel for Her Majesty the Queen

Dates and Location
of Hearing: December 4 to 8, December 18-21, 1995, January 10 to 12, January 15 to 19, February 5 to 8, February 26 to March 1, April 15 to 19, April 22 to 26, May 6 to 10, May 15 to 17 and May 23-24, 1996
Ottawa, Ontario

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I THE COMPLAINT

This case arises out of a complaint ("Complaint") filed by the National Capital Alliance on Race Relations ("NCARR") with the Canadian Human Rights Commission ("CHRC") dated September 16, 1992. NCARR is a non-profit organization whose mandate is to fight discrimination and racism through political action, education and where appropriate, through legal action. NCARR has an elected board of eight directors and an executive director who is responsible for the day to day operations. NCARR is located in Ottawa.

The Complaint alleges discrimination by Health and Welfare Canada, now Health Canada ("HC"), against persons who are visible minorities employed by HC contrary to section 10 of the Canadian Human Rights Act ("CHRA"). The Complaint reads as follows:

> Health and Welfare Canada discriminates against persons who are visible minorities by establishing employment policies and practices that deprive or tend to deprive persons who are visible minorities of employment opportunities in management and senior professional jobs on the basis of race, colour and ethnic origin contrary to section 10 of the Canadian Human Rights Act. This is indicated by the extremely low number of permanent visible minority employees in senior management positions and in the Administration and Foreign Service Category. It is especially supported by the concentration of visible minority employees at lower level positions within the Science and Professional category and their failure to be promoted equitably. This lack of promotions negatively affects their eligibility for appointments to senior management positions.

The parties in this Complaint are NCARR, CHRC, the Professional Institute of the Public Service of Canada ("PIPSC"), added as an interested party, (collectively the "Complainants") and Her Majesty the Queen as represented by Health and Welfare Canada, the Public Service Commission and the Treasury Board ("Respondent").

In alleging discrimination, the Complaint focused on the Scientific and Professional category ("S&P") and the Administrative and Foreign Service Category ("A&FS"), as opposed to the other occupational categories

in HC. This is because it is from these two occupational categories from which senior management in HC is drawn. The evidence is that approximately 75% of senior management are recruited from the S&P category and 25% from the A&FS category.

II THE JURISDICTIONAL ISSUE

The Respondent's initial response to the Complaint before this Tribunal was to challenge both the Tribunal's jurisdiction to hear the Complaint and the Tribunal's jurisdiction to grant the remedy sought by the Complainants.

The Respondent argued that, to the extent this Complaint involves under-representation of a designated group, it is an issue of employment equity, not one of discrimination. Matters of employment equity are

specifically addressed under section 11 of the Financial Administration Act, ("FAA") and section 5.1 of the Public Service Employment Act ("PSEA"). This legislation provides a complete regime for dealing with employment equity issues within the Federal Government, and this Tribunal can not and should not deal with allegations of under-representation of visible minorities in HC.

In its closing argument, the Respondent shifted its position somewhat by submitting that the Tribunal has jurisdiction to hear the Complaint, but, if, at the end of the day, the only thing left for the Tribunal to support a finding of discrimination is statistical evidence of under-representation, the Tribunal loses jurisdiction to make that finding.

On remedy, the Respondent's position was that if the Tribunal makes a finding of discrimination within its jurisdiction, it is limited to making a cease and desist order. It can not go further and order such things as a remedial program or numerical targets or monitoring procedures because this is "employment equity country" and is forbidden territory for this Tribunal. Rather, the authority to impose this type of employment equity remedy is reserved to the Public Service Commission and the Treasury Board under the FAA and PSEA. In this respect, all this Tribunal can do is to declare that an employment equity program would be the appropriate remedy and leave it to the above agencies to devise and implement such a program.

The Respondent, in its preliminary objection, also objected to certain witnesses proposed by the Complainants giving evidence in this hearing.

The reason for this objection was that to allow such evidence would result in a rehearing of the personal complaint of discrimination of the witness. We decided that this objection should be made at the time the evidence was given. The objection was made numerous times during the course of the hearing, was dealt with at the time, and no further comment is needed here.

We reserved our decision on the jurisdictional question until completion of the evidence and final arguments. It is clear that the Complainants' case is about systemic discrimination in HC staffing practices. Certainly statistical evidence of under-representation is one of the things that the Complainants relied upon to prove their case. But the Complainants have consistently taken the position that they are relying not just on numbers showing under-representation to support an inference of discrimination, but on the whole of the evidence presented and have asked the Tribunal to make its finding on that basis.

As will be seen in our following reasons, we have done just that. Even if the Respondent is correct in characterizing our jurisdiction as it did, we have exercised our jurisdiction within this framework.

In any case, we do not agree with this limitation on our jurisdiction as suggested by the Respondent. There is nothing in the CHRA and, in particular, section 40, which limits the jurisdiction of the CHRC or this Tribunal from hearing a complaint which involves a so-called employment equity issue. Section 50 of the CHRA requires the Tribunal to hold a hearing and inquire into the complaint in respect of which it was appointed.

To refuse jurisdiction to hear this Complaint would mean that the FAA and PSEA have paramountcy over the CHRA. This is not a tenable legal position as we point out later in these reasons when discussing

jurisdiction over remedy. Accordingly, that part of the Motion objecting to our jurisdiction to hear the Complaint is dismissed.

III THE EVIDENCE

(A) Statistical Evidence of Under-Representation of Visible Minorities

1. Evidence of Erika Boukamp Bosch

The starting point of the Complainants' case is that, as of September 30, 1993, there was one visible minority in the senior management complement out of a total of 118 (0.8%) in HC. This was the evidence of Erika Boukamp Bosch, Chief, Statistical Analysis, Employment Equity Directorate, CHRC. Ms. Bosch was qualified as an expert in statistics, with a specialty in employment systems and occupational data.

(a) Definitions

It is useful at this point to define certain terms used by Ms. Bosch and other experts who gave evidence at the hearing. These terms are:

Availability - estimates of the number of persons of a designated employment equity group qualified to work for an employer. The estimates can be based on the internal or external labour pool from which employers can reasonably be expected to recruit, and is often expressed as a percentage of the total qualified labour pool.

Designated Groups - the four groups designated under Employment Equity legislation, women, aboriginals, persons with disabilities and visible minorities.

EX Group - management category in the Federal Public Service ("FPS").

EX Equivalent - senior levels in some occupational groups in the FPS which are considered to be equivalent to senior management but are not included in the EX group.

EX minus one and EX minus two - senior levels in some occupational groups, which are one and two levels below the EX group.

Feeder Group - senior levels in some occupational groups from which the employer may reasonably be expected to promote employees into the EX group. The feeder group consists of some of the EX Equivalent levels and the EX minus one and EX minus two levels.

Occupational Category - The grouping of occupations in the Federal Public Service. The FPS has one management category, the Executive Group (EX) and five non-executive categories, Scientific and Professional (S&P), Administrative and Foreign Service (A&FS), Technical (T), Administrative Support (AS) and Operations (O).

Occupational Group - The grouping of occupations within each occupational category. For example, in the S&P category, there are a number of occupational groups, Veterinary Medicine (VM), Biological Science (BI), Scientific Research (SR), Chemistry (CHEM), etc.

Occupational Level - Each occupational group is divided into a number of levels, for example, Biologist 1 - 5, Chemist 1 - 5, etc.
Representation - the number or percentage of a designated group employed by an employer.

Under-Representation - representation of a designated group in an employer's work force below availability.

Utilization (Representation) Rate - the representation of a designated group in an employer's work force as a proportion of the group's availability, ie. representation divided by availability.

(b) Under-Representation of Visible Minorities in the EX group

Ms. Bosch testified that, as of September 30, 1993, the representation of visible minorities in the EX group of HC was 1/118 or 0.8%. Availability estimates for visible minorities for EX positions varied from 8.7% to 9.2%, depending upon whether it was the availability from within HC or from the FPS as a whole. These availability estimates suggest that, as of that date, HC should employ 10 or 11 (8.7% or 9.2% x 118) visible minorities in the EX group. Because the representation was only one, Ms. Bosch concluded that visible minorities were severely under-represented in the EX group, at less than 10% of their availability.

It should be noted that Ms. Bosch did not include in her totals anyone in the EX Equivalent group as part of management. She considered the EX Equivalent, EX minus one and EX minus two in both the S&P and A&FS categories to be the feeder groups for EX. The relevance of this will become apparent when we deal with the evidence of Adele Furrie, the statistical expert called by the Respondent.

(c) HC recruitment into EX positions

Ms. Bosch attempted to explain why, in her opinion, visible minorities were under-represented in HC management. She analyzed data from HC on the occupational group and level in the S&P category from which its EX members were recruited into the EX group. The data was as at April 12th, 1994 and at that date, there were 115 in the EX group, 63 recruited from within HC, 45 from the FPS and 7 from outside the FPS. Of the 63 from within HC, 33 were from the S&P category, and it is on this group that Ms. Bosch concentrated.

Ms. Bosch compared each occupational group and level from which these managers were drawn to the availability of visible minorities in the same group. The availability estimates that she used were as at September 30, 1993.

Three different patterns emerged from Ms. Bosch's analysis. First, a majority of members of the EX group (17/33 or 52%) were recruited from three occupational groups with a fairly high representation of visible minorities in the feeder group, yet it appears that no visible minorities were recruited from this group.

Secondly, there was a very low recruitment of numbers into the EX group from occupational groups which had a very high representation of visible minorities. For example, only 3% of managers were recruited from

the BI group which has a 19% visible minority representation; and no managers from the VM group which has a 30% visible minority representation.

Thirdly, there was a very high recruitment from occupational groups with no representation of visible minorities.

(d) Under-Representation of Visible Minorities in the A&FS Category

Ms. Bosch also did an analysis of the data relating to the representation of visible minorities in the A&FS category. This information is relevant because the A&FS group is the source of 25% of the managers in this EX group. Because it is an important feeder group, if the visible minority representation is low, there will not be the critical mass to progress to the higher level positions and then to management.

Ms. Bosch concluded that visible minorities are severely under-represented in the A&FS category. In reaching her conclusion, she analyzed the representation, availability and utilization of visible minorities in all of the non-executive categories in HC in 1992. Although her focus was the A&FS non-EX category, Ms. Bosch reviewed them all to place the A&FS category in context.

The data indicates a utilization rate of 48% for the combined non-EX categories including the A&FS, and a utilization rate of 33% for the A&FS category that is, the representation of visible minorities in this category was only 33% of availability.

2. Evidence of Adele Furrie

Ms. Furrie gave expert evidence for the Respondent in response to Ms. Bosch. Ms. Furrie is now a private consultant who spent most of her professional career in the FPS mainly with Statistics Canada. Ms. Furrie was qualified as an expert to give evidence on data analysis relating to visible minorities in the workplace in HC.

Ms. Furrie's approach differed from that of Ms. Bosch. Because the Complaint alleged discrimination from on or before September 8, 1992 and was continuing, Ms. Furrie analyzed data for the five years from March 31, 1991 to March 31, 1995. Further, because the Complaint alleged certain indicators for the discrimination, Ms. Furrie tested the validity of these indicators.

(a) Indicator One

The first indicator is in the Complaint that "discrimination is indicated by the extremely low number of visible minorities in senior management". Ms. Furrie had to calculate the number of persons in the EX group for the years that she considered. In calculating these numbers, she used a different base than Ms. Bosch. Ms. Furrie considered that management in HC should include those in the EX Group, those persons in selected EX Equivalent groups and levels in the S&P category. Her criteria for selection from the EX Equivalent was based on information obtained from HC and included comparable salary ranges to EX, significant management responsibilities, and exclusion from collective bargaining because of management responsibilities. By broadening the spectrum of positions considered, Ms. Furrie showed a higher number of persons in

senior management in HC than Ms. Bosch. To estimate the availability of visible minorities, Ms. Furrie used a similar approach to that of Ms. Bosch, except she looked at five years, not just one year.

Ms. Furrie's analysis of the data indicated that for 1991, EX/Ex Eq./SR.M. 197, VMS = 6.3%, Availability = 17 or 8.4%; 1992, EX/EX Eq./SR.M. 209, VMS = 9 or 4.3%, Availability = 18 or 9.2%; 1993, EX/EX Eq./SR.M. 216, VMS = 13 or 6%, Availability = 9.5%; 1994, EX/EX Eq./SR.M. 212, VMS = 12 or 5.7%, Availability = 19 or 9%; 1995, EX/EX Eq. 209, VMS = 10 or 4.8%, Availability = 19 or 9.1 %.

On the basis of this information, Ms. Furrie calculated the utilization rate for visible minorities in the EX group for the S&P category to be as follows: 1991 UR = 35.3% (6/17); 1992 UR = 50% (9/18); 1993 UR = 68.4% (13/19); 1994 UR = 63.2% (12/19); 1995

UR = 52.6% (10/19). This is compared to the utilization rate of 10% as found by Ms. Bosch.

Having calculated the utilization rates for the years 1991 - 1995, Ms. Furrie concluded that the data does not support the allegation in the Complaint that there is an extremely low number of visible minorities in senior management. Ms. Furrie defined "low" by reference to a text book, The Canadian Class Structure, by Dennis Forcese, (pp. 53 - 54), which she found in her library at home, and which was used in one of her undergraduate sociology courses. According to this text, "low income" is defined as a level of income where 70% or more is spent on non-discretionary items. The corollary is that 30% or less is available for discretionary spending. Ms. Furrie adapted and adopted this definition and used it for her cut off point to measure extremely low. Since all of the utilization rates for the years 1991 - 1995 exceeded 30%, she concluded that the allegation of extremely low was not supported by the data.

In our view, both the conclusions of Ms. Bosch and Ms. Furrie on the question of under-representation are flawed. Dealing first with Ms. Bosch, she focused primarily on 1993 to reach her conclusion that visible minorities were severely under-represented. Her choice of 1993 is unfortunate since that particular year involved a major restructuring and reorganization which involved the transfer of the Welfare portion of the Department to another Department leaving only HC.

More significantly, Ms. Bosch included only one occupational group, the EX group, in her analysis of senior management. The result is that her calculations of the representation, availability and utilization of visible minorities are understated.

Ms. Furrie, on the other hand, included nine occupational groups (including the EX Group) in her calculations for senior management, four of which, in our opinion should not have been included. To this extent, Ms. Furrie overstated the numbers and her resulting calculation of the utilization rate of visible minorities is overstated.

Danielle Auclair, a representative of PIPSC, presented comprehensive data on the eight additional groups that Ms. Furrie extracted from the EX/Equivalent group. Her evidence

demonstrated that four of these occupational levels are not excluded from collective bargaining and thus should not be included in the totals for

management. She agreed, however, with Ms. Furrie that the other four occupational levels should be included.

Having agreed to include these groups, the Complainants through Micheline Nehme, put into evidence, revised calculations showing the total population, visible minority representation, the estimated availability of visible minorities, the utilization rate and the future estimated vacancies which were calculated by tracking HC's recruitment trends over a period of five years.

The Tribunal accepts the evidence of both Danielle Auclair and Micheline Nehme. The resulting data for the utilization rate for visible minorities for the years noted are as follows: 1991 UR = 33% (5/15); 1992 UR = 27% (4/15); March 31 1993 UR = 42% (7/17); September 30 1993 UR = 20% (3/15); 1994 UR = 36% (6/16); 1995 UR = 25% (4/16). The average utilization rate for these 5 years is 33%, (excluding September 30, 1993).

Ms. Furrie's conclusion is that, given her cutoff point of 30%, the data does not support the allegation of the extremely low number of visible minority employees in senior management. Ms. Bosch concluded that visible minorities are severely under-represented in the EX group. Of course, the validity of either of these two conclusions depends upon how under-representation is defined. In any case, we do not understand Ms. Furrie's position to be that visible minorities are not under-represented in management, but only that their numbers are not extremely low.

There was some evidence presented to the Tribunal from Ms. Bosch and Dr. Nan Weiner, that 100% representation is the "ideal", but the "four-fifths rule" or 80% representation is generally accepted.

Applying this test, it is clear that, according to the data of Ms. Bosch or Ms. Furrie, there is a significant under-representation of visible minorities in HC senior management.

(b) Indicator Two

Dealing now with the second indicator in the Complaint that "discrimination is indicated by the extremely low number of visible minorities in the A&FS category". Ms. Furrie limited her analysis to non-management occupational groups and levels, namely, the EX Equivalent non-management and EX minus one and Ex minus two. The data indicates a utilization (representation) rate for visible minorities in these groups to be: March 31, 1991, UR = 53% (9/17); March 31, 1992, UR = 53% (9/17); March 31, 1993, UR = 42% (8/19); March 31, 1994, UR = 40% (8/20); March 31, 1995, UR = 40% (8/20). By comparison, Ms. Bosch

determined a utilization rate in the A&FS group of 33% in 1992. Ms. Furrie did not consider the visible minority representation to be extremely low, again using a cut off point of 30%.

If the four-fifths rule is applied, there is a significant under-representation of visible minorities in the A&FS category.

(c) Indicator Three

In the third indicator that, "discrimination is especially supported by the concentration of visible minorities at lower levels in the S&P category", Ms. Furrie defined lower level positions as those below the feeder group, i.e. below EX Equivalent/non senior management and EX minus one and EX minus two.

According to the data that she analyzed over the five year period, visible minorities consistently maintained a smaller share of the lower levels in the S&P category and again she concluded that the allegation was not supported by the data.

But it is the corollary of her finding that is much more telling. The data that Ms. Furrie presented shows that for each year, for the years 1991 to 1995, the percentage of visible minorities in the EX Equivalent/non-senior management, EX minus one and EX minus two, the feeder group, consistently exceeded the percentage of the total population of this group. For example, as at March 31, 1991, visible minorities constituted 36% of the EX Equivalent/non senior management, EX minus one and Ex minus two, (or 36% of the feeder group) compared to 27% for non visible minorities. As of March 31, 1995, visible minorities were 35% of the S&P feeder group compared to 27% for non-visible minorities. This pattern is consistent for the other 3 years and is consistent with Ms. Bosch's conclusion that there is a high concentration of visible minorities in the feeder group, but low numbers in the management group, the next progression. In other words, visible minorities in the S&P category are bottlenecked at the feeder group level.

(d) Indicator Four

With respect to the fourth indicator that "visible minorities in the S&P category are not promoted equitably which negatively affects their opportunity for appointment to senior management", Ms. Furrie analyzed three types of HC staffing actions, acting appointments, competitions and reclassifications. She did so because promotions to a higher level are usually achieved through competitions or reclassifications and acting

appointments provide experience that is very useful when applying for a promotion. The data she analyzed related to acting appointments, competitions and reclassifications in the S&P category for the fiscal years, 1991 - 92 to 1994 - 95.

Acting appointments constituted the majority of the total of these staffing actions during this period, being about 65% of the total. There is no consistent pattern in the data with respect to the success of visible minorities obtaining acting appointments whether it be for less than or more than 4 months. For example, visible minorities were given a greater proportion of acting appointments of less than 4 months than non visible minorities in 2 of these years, but a lesser proportion in the other 2 years. For acting appointments of more than 4 months, visible minorities succeeded in a greater proportion than non visible minorities in one of the years, and in the remaining three years, the majority of acting appointments were given to non visible minorities.

With respect to competitions and reclassification, visible minority employees were slightly more successful in competitions and significantly more successful in reclassification.

The question the Tribunal must now address is, what is the reason for this under-representation. Is it because of certain staffing practices at HC, which, as alleged, bear adversely on the promotion opportunities of visible minority employees? That is, can the under-representation be linked to discrimination in staffing practises of HC? The remainder of the Complainants' evidence was directed to answering these questions.

3. Evidence of Jeffrey Reitz - The Mail Back Survey

Dr. Reitz has a Ph.D. in sociology from Columbia University and is a professor of sociology at the University of Toronto. He teaches graduate courses in ethnicity and social inequality and in survey research methods and data analysis. Dr. Reitz has been involved in a number of studies with respect to race relations, the immigrant labour market and he has also published various books and journal articles relating to ethnic and racial issues.

Dr. Reitz was retained by PIPSC to conduct a survey, the purpose of which was to determine whether, at HC, racial minorities in the S&P category have equal access with whites to career development opportunities. The survey was a "mail back questionnaire" sent out in late October and early November, 1995. Questionnaires were mailed to 1563 persons out of a

total population of 2033 employees in the S&P category. Those who were not mailed the survey were "Rand Formula" members of PIPSC. That is, these employees are required to pay PIPSC union dues, but are not members of PIPSC and have not signed PIPSC membership cards. Because they are not PIPSC members, PIPSC does not have permanent address records for them and could not send them the questionnaire. There were 533 responses to the survey for a response rate of about 34%. Dr. Reitz considered this to be adequate although it is slightly below the norm for a mail back survey.

Dr. Reitz identified five areas of career development opportunities and the survey questions were designed for responses in these five areas, career development training, special assignments, access to acting positions, supervisory responsibility and service on selection boards.

Dr. Reitz' analysis of the responses indicated that the survey sample was representative of PIPSC members in terms of occupational groups in the S&P category. For example, Biology was 15% compared to 16% PIPSC membership; 13% in Chemistry/12% membership; 18% Scientific Regulation/17% membership; 7% Scientific Research/6% membership; 32% Nursing/36% membership and so on. The survey closely reflected the membership in terms of gender, 44.6% males/45.5% membership.

On the question of race, Dr. Reitz testified that the survey questions were designed to compare the position of whites with that of racial minority groups, i.e., to evaluate the actual experiences of different racial groups. The objective was not to find out what the membership of PIPSC thought about the impact of race in HC. Racial status was measured using questions adapted from the 1996 Canadian Census and respondents were

asked to self identify. Whites in the sample numbered 82% of the responses. Racial minorities were 13.4% of the responses and aboriginal persons were 4.6% as compared to HC data as of October, 1994, which showed that 8.3% of the employees in the S&P category were visible minorities and 4.7% were aboriginals. About 60% of those responding worked in the Health Protection Branch and 36% in the Medical Services Branch.

The questionnaire asked respondents whether they ever had career development training and listed a number of training courses. The survey data indicated that racial minorities are less often to have had career development training experiences than whites (39% v. 46%). This racial difference for management-related training was larger for males and larger for those more senior in terms of age, length of service, educational level and supervisory responsibility.

The sample data also identified a racial difference as to how respondents became aware of a training opportunity. Whites were more often informed of these training opportunities by managers, whereas minorities were much more proactive and found out about these opportunities by using their own initiative.

The survey contained a number of questions relating to acting positions. This was considered an important area because an employee in a higher acting position gains valuable management experience and may obtain an advantage in a later competition if the position is filled on a permanent basis.

The sample results indicated that whites more often hold acting positions than racial minorities (45% v. 34%). The minority disadvantage is even more pronounced among males and among those more senior in age, experience, supervisory responsibilities and graduate education. For white males, 47% obtained acting positions compared to 27% for non-white males.

There were also racial differences regarding how employees found out about acting positions. Whites were more often asked by their managers to apply, whereas racial minorities were more self reliant in finding out about opportunities for acting positions.

The survey also measured supervisory responsibility, as this can be a qualification for career development. The survey data indicated that among whites, 42% supervise other employees compared to 32% for racial minorities. This difference was not explained by difference in age, experience or education. Further, management training and holding an acting position increased the likelihood of supervising for both whites and racial minorities. However, the advantage was much greater for whites. For whites with management training or who held acting positions, the likelihood of being supervisors increased significantly compared to racial minorities.

Respondents were also asked if they had served on a selection board. This is relevant not for assessing a career development opportunity, but rather to assess the participation of minority groups in hiring and promotion decisions. The survey data again showed a minority disadvantage. In fact, whites were almost twice as likely to serve on selection boards as non-whites. Interestingly, this racial difference is not explained by other factors such as age or experience or eduction. In fact, the racial

gap is much greater for those who are more senior and with more qualifications. Dr. Reitz considered this was particulary significant because service on selection boards is primarily a management decision. In his view, this suggests that this management decision favours whites over non-whites for reasons that have little to do with the level of education, experience or responsibility.

Dr. Reitz agreed that the total population in the S&P category was not surveyed, but did not agree that this would affect the validity of the survey in terms of its representation. In his view, there is nothing to indicate that those persons not surveyed were different in some way or less representative of the population that was surveyed.

Dr. Reitz was also challenged with respect to the fact that there was an over-representation of visible minorities responding to the questionnaire, (13.4% v. 8.3%). It was also pointed out to him that 60% of the respondents to the survey came from the Health Protection Branch, and that 83% of non-whites who responded came from this Branch. This, plus the fact that, respondents can, with a mail back survey, consider all of the questions before answering any, raised questions about a possible bias in the responses.

While agreeing to these facts, Dr. Reitz pointed out that because the number of visible minority responses were only 13% of the total, these facts were not particularly significant. Further, the purpose of the survey was to compare whites and non-whites, and a higher response rate from one group compared to another, is not in itself a source of bias.

4. Evidence of Visible Minority Employees in HC

The Tribunal heard from a number of other witnesses, many of whom testified as to their experiences and perceptions as visible minorities seeking advancement opportunities in HC.

(a) Dr. Dennis Awang

Dr. Awang was employed at Health Canada from 1969 to 1993. Dr. Awang, a visible minority, was born in Trinidad and received his undergraduate and doctoral degrees in organic chemistry from Queen's University, Kingston, Ontario. He spent two post-doctoral years as a lecturer and research associate in the Department of Chemistry at both the University of Illinois and at the University of Michigan. He is fluent in English and in French.

Dr. Awang has published more than 70 papers in national and international scientific journals and has given numerous presentations at universities and at learned conferences. In 1990, he was the sole Canadian

representative in a group from eight countries who participated in the World Health Organization (WHO) meeting on traditional medicine and AIDS.

He was chosen for this meeting because of his expertise in medicinal chemistry and herbal botanical science. Because of his expertise, experience and frequency of invitations to national and international conferences, Dr. Awang, with all modesty, considered that he could make a reasonable claim to be the leading authority in his field in Canada.

Dr. Awang began his employment with HC in 1969 as an entry level Research Scientist (RS1) in the Pharmaceutical Chemistry Section of HC. When he was hired, Dr. Awang was told that he was the best candidate interviewed by HC. Yet a (white) colleague, Dr. Keith Bailey, a non visible minority from Great Britain, with similar qualifications, was hired at the same time, at a higher classification and salary. Dr. Awang discussed this differential with his superior, Dr. Cook. As a result, he received a modest increase in salary, but his classification level, which was much more important for him, was not changed.

Dr. Awang was appointed, Head, National Products Chemistry Section in 1979. At that time, he was a Research Scientist 2 having been promoted in 1974. He was the Head of this section until it was merged with another section in 1991. This was the highest level and classification that he achieved except for a brief stint in 1984, as acting Chief, Chemical Standards Division in 1984. Dr. Awang retired from HC in 1993.

During his tenure at HC, Dr. Awang had a number of unpleasant experiences with his colleague, Dr. Lodge, who was the Head of the Steroids Section. In the spring of 1984, they attended a university lecture given by a professor from the United States, who during his lecture, noted that most of the background research for his work had been done by a graduate student, a doctoral candidate of Middle Eastern origin.

On hearing that comment, Dr. Lodge said to Dr. Awang, "That guy worked like a nigger." Dr. Awang was surprised and bothered by this comment and reported it to Dr. Hughes, the then Acting Director of the Bureau of Drug Research. Dr. Hughes' response was that he did not find the term particularly bothersome and in fact, his family once had a dog named "Nigger".

Dr. Awang testified that Dr. Lodge often greeted him by "Hello darkness my old friend", and on occasion, referred to him as "Blackie".

For a period of about one year, Dr. Lodge would place stickers from South African fruits on Dr. Awang's telephone, his desk, his desk lamp and on the door of his office. This was prior to the abolition of apartheid and Dr. Awang believed that the only reasonable explanation for this behaviour was an indication of support for apartheid or white superiority.

Dr. Awang took up this matter with Dr. Hughes and Dr. Lodge. At the meeting, Dr. Lodge admitted responsibility for his conduct, but offered no explanation or apology. The meeting was effective and Dr. Lodge stopped this type of insulting conduct.

Dr. Awang testified that he had recorded the incidents in a report and forwarded it to PIPSC, but decided not to follow up and that his best course of action was to continue to perform his duties and press on.

Dr. Awang did not leave the FPS willingly, but rather because, the Natural Products Section was merged with another section and all the employees of that section, including Dr. Awang, were declared surplus effective June 1st, 1991. This happened in spite of an external evaluation which considered the Natural Products Section as dealing with a very important field and the work being conducted by Dr. Awang was highly valued.

When Dr. Awang learned that he was designated surplus, he wrote to the Deputy Minister requesting a meeting to discuss this matter. In his letter, he indicated that, as one of the announced goals of the Public Service Commission was to increase the number of visible minorities in the FPS, he did not understand the rationale of the lay-off of an internationally recognized black scientist. He met with the Deputy Minister and subsequently with the Director General of the Personnel Administration Branch of HC, but he was unsuccessful in having the decision changed.

Between 1991 and 1993, Dr. Awang made persistent efforts to obtain another position within HC, but his efforts were unsuccessful. During that period a permanent position for a Research Scientist became available. But according to Dr. Awang, someone else was appointed to the position without a competition and even though the person appointed did not meet the educational qualifications required by the job description. Dr. Awang brought this matter to the attention of PIPSC, who intervened on his behalf, but was not able to achieve any positive result. On another occasion, another position became available for which Dr. Awang believed he was qualified. He did not get the position and subsequently found out that

the position had been downgraded and given to someone who was working as a technologist with an undergraduate degree in another section in HC.

After he received his surplus notice, Dr. Awang made repeated requests for extensions to his termination date to give him time to seek another position within his area of experience in HC. At no time did he want to retire. Dr. Awang testified that he was prepared to do laboratory work if necessary and he suggested that he would return to University to be trained in another area. However, when he made that suggestion, he was told it would take more than two years to train and was not feasible.

After exhausting all the possibilities for another permanent position, and receiving no more extensions, he left HC in August, 1993.

(b) Ivy Williams

Ivy Williams holds a double masters degree in education and psychology from Columbia University. Her main work experience has been in education, child development and child mental health. She was senior lecturer at Mico Teachers College in Jamaica and, subsequently, a lecturer in the Faculty of Education at the University of the West Indies ("UWI"). She had also served as the director of a regional pre-school child development centre at UWI, with supervisory responsibility throughout the islands of Barbados, Jamaica and St. Vincent. Currently, Ms. Williams is the acting chief of the Mental Health Promotion Plans Unit in HC. She has held that position since April, 1995. Her classification is a PM-04, which classification she has held since 1987 when she first became a permanent employee in HC.

The relevant portions of Ms. Williams' evidence centered around two matters, first her failure to obtain the position of Chief of the Children's Mental Health Unit, the Mental Health Division of HC; and second, her position as the first chair of the Visible Minorities Advisory Committee (VMAC) in HC.

Ms. Williams testified that the Children's Mental Health Unit was established in approximately 1992, as a result of her initiative and the proposal which she drafted to set up this unit. Her proposal was accepted and the unit was established with initial funding of about $6.5 M. She also drafted the job description for Chief of the unit, which job description described very closely the work that she had done in the preceding five years and she expected that she would be appointed into this position on a permanent basis. She was not appointed and it was her understanding that a person with less educational qualifications and

experience for the position was appointed Acting Chief, without competition. She later found out that the person appointed had worked at the PM-04 level as a Chief of Operations overseeing a budget of about $18 M.

Ms. Williams testified that she did not feel personally discriminated against as a visible minority when she was not appointed as Chief, nor did she file a grievance. She felt that it was "terribly unfair treatment", but she was not disposed to pursue any appeal because it was too painful for her to do so. She did make a point of discussing this matter with her immediate supervisor, and pointedly recalled that her supervisor told her "that she did not see her as a manager". Ms. Williams requested that she be sent on language training immediately which was done, and following language training she was seconded to the Public Service Commission for approximately two years and returned to the Mental Health Unit in December, 1994.

It was pointed out to Ms. Williams during her cross-examination that there was a competition for the permanent position of Chief of the Children's Mental Health Unit dated July 25, 1994. Ms. Williams responded that this was the first she had heard about a competition because she had been away on a secondment. No one had informed her about this competition, even though she had regular contact with her supervisor in the Mental Health Division. Had she known, Ms. Williams said she certainly would have applied. She also noted that the acting Chief would have had a two year advantage in experience and knowledge of the position.

It was also pointed out to Ms. Williams in cross-examination that in her 1992 Performance Appraisal indicated that financial accountability and administrative tasks were not a priority for her and the Chief of the Children's Mental Health Unit was responsible for a substantial budget. Ms. Williams' response was that she regarded these comments as a justification for not appointing her or considering her for the acting position. In her view, the requirement for financial accountability and administrative tasks were considerably less important than the program planning and development responsibilities in the job.

Ms. Williams also spoke about the Visible Minority Advisory Committee (VMAC) which was established by HC in 1991. VMAC consisted of twelve persons and Ms. Williams was elected the first chair of the Committee. VMAC's mandate was to recommend implementation of methods that advocate and promote the recruitment, retention and promotion of visible minorities in HC, and to advise HC on work related programs and policies that are responsive to a certainly diverse population. VMAC issued its report in September 1992 entitled "Health and Welfare: Excellence through Diversity". The VMAC noted a perception among visible minorities that discriminatory behaviour exists within HC. While there was no quantitative

data for the perception of the discrimination, the Committee concluded that whatever their origins and accuracy, these perceptions are detrimental to the individuals involved and to those they work with. VMAC made a number of recommendations including, establishing a mechanism to actively recruit visible minorities; that steps be taken to increase the representation of visible minorities on selection boards; that mechanisms be established to ensure that visible minorities are represented fairly at all levels and in all categories within HC, and that HC recognize, use and develop the skills of visible minorities and actively promote their career development.

According to Ms. Williams, VMAC's Report was given to the Deputy Minister, but there has never been any official acknowledgment of receipt of the Report and no discussion with VMAC as to its findings or recommendations.

(c) Tina Walter

Tina Walter holds an M.A. from the University of Western Ontario and is a management trainee in the Management Training Program offered by the Public Service Commission. Ms. Walter is a visible minority and was the Chair of the VMAC in 1993. Perhaps her experience as the Chair of VMAC can best be summed up by reference to her January 12th, 1994 memorandum to Kent Foster, the Assistant Deputy Minister of the Health Protection Branch and who was the liaison between VMAC and HC. Ms. Walter wrote this memorandum at that time she was leaving the Department to join the Treasury Board.

In her memorandum, she pointed out that being a member of the VMAC had been a test in perseverance. She pointed out that with exception, senior management had not shown any commitment to the issues of employment equity for visible minorities and visible minorities themselves recognized this lack of commitment. Over the past three years of the life of VMAC there has been no real movement towards change within HC at any level. She also pointed out that VMAC was asked by the Deputy Minister to prepare a Report, the Report was produced and distributed in 1992. By 1994 nothing had been done about the Report and the manner in which the Report was managed and addressed by HC was less than adequate. She concluded that the Department can not afford to allow employment equity for visible minorities to continue to be a low priority.

(d) Dr. Daljit Dhillon

Dr. Daljit Dhillon is a Scientific Evaluator in the Bureau of Medical Services, Environmental Health Directorate of HC. Dr. Dhillon holds a M.Sc. in Chemistry from Harcourt Technological Collegiate Institute, India and a Ph.D. (1970) in Microbiology from the University of Manitoba.

Dr. Dhillon's testimony was focused primarily on his failure to be promoted or obtain an acting position at HC.

It is his belief that it is because of racial discrimination that he was not selected for acting positions that would help advance his career. He testified that on a number of occasions, he had appealed the selection

of the person chosen for the acting position for which he had applied, but he conceded that he had never alleged discrimination on any of his appeals nor had he ever made any complaints to the CHRC. His explanation for this was that he thought that such course of action would cause bad feeling and cause unnecessary antagonism in the work place. It was his position that he had to work within HC and therefore, had to live with the situation.

It is not our purpose here to determine whether or not Dr. Dhillon personally suffered racial discrimination. Rather our focus is on the process of appointment to acting positions that Dr. Dhillon described in his evidence.

Dr. Dhillon's concern related to the appointment of Dr. Mary Jane Bell as acting Head of the Pre-Market Review Section. Dr. Dhillon worked as an Evaluator in this section. According to Dr. Dhillon, Dr. Bell was appointed to this position in January, 1993, but no notice of the appointment or notice of a right of appeal was posted. As a result of Dr. Dhillon's and PIPSC's intervention, a notice of appeal was posted in November, 1993 and Dr. Dhillon and five other persons, four of whom were not visible minorities, filed an appeal on the basis that there had been no competition for this acting appointment. This appeal was allowed and the appeal board ordered that a competition be held for this acting position.

This was subsequently changed to a comparative paper assessment of the candidates who applied, rather than a competition. Dr. Dhillon testified that there was no written exam, that he was not interviewed and he had no idea of how he was assessed, other than the fact that he was assessed. He was advised in March, 1994 that his qualifications had been assessed and he was found not to be qualified for the position. The assessment was done by Dr. Freeland, the chief of the Device Evaluation Division to whom the head of the Pre-Market Review Section reported. Dr. Dhillon testified that

Dr. Freeland did not supervise him and he had virtually no direct contact with him.

Dr. Dhillon subsequently learned that Dr. Freeland assessed him on the basis of his performance appraisals and on the basis of consultations with his immediate supervisor, who, in this case was Dr. Bell, the acting head of the section and the person whose acting appointment had been appealed by Dr. Dhillon. Dr. Freeland had initially appointed Dr. Bell and Dr. Bell was confirmed in the acting position, having been assessed as the best candidate by Dr. Freeland.

A competition was held for the permanent appointment of Head of Pre-Market in September, 1994. The qualifications for the position included experience in the supervision of professional or support staff and now required a degree in natural, physical or applied sciences. Previously the statement of qualifications had required a post-graduate degree in biology. Dr. Bell does not have a degree in biology, but does have a post-graduate degree in chemistry. Dr. Dhillon applied for the position and was screened out because he did not have the management experience for the position.

Dr. Dhillon appealed the permanent appointment, but he withdrew the appeal because, in his view as a union steward with PIPSC, he did not have any faith in the appeal process. His experience has been that, even when

an appeal is successful and corrective action is required, the same person who was in the acting position seems to get appointed to the permanent position. Dr. Bell was the successful candidate.

It should be pointed out that prior to Dr. Bell obtaining the acting position, Dr. N. Chopra, a visible minority, was the Head of the Pre-Market Review Section from 1988 to 1991. She was succeeded by Dr. Boulay who was the acting head between 1991 and 1992. Dr. Chander replaced him and was then the acting head from about September, 1992 to January, 1993. Dr. Chander and Dr. Wadera are visible minorities. Dr. Dhillon did not appeal their acting appointments.

(e) Dr. Ajit Das Gupta

Dr. Das Gupta had an interesting tale to tell. He was born in India and came to Canada in 1952 as a student. He holds a Ph.D. in Physics and did post-graduate research at Oxford University. In 1959, he became a lecturer in nuclear and radiation technology at McMaster University, and in

1960 he joined HC as a Physical Scientist in the Radiation Protection Bureau. Dr. Das Gupta was promoted rather rapidly, first to Section Head, then to Assistant Chief, then to Chief, then finally Director, of the Bureau of Medical Devices. He was appointed to this position in about 1974.

When he first joined HC, Dr. Das Gupta worked in the newly formed Radiation Protection Program which was established to deal with Canada's concerns about the potential of radioactive emissions and nuclear fallout. He was very involved in the development of the legislation dealing with this subject matter, the Radioactive and Emitting Devices Act. Because of his expertise and work in the field, he was known across Canada in his words, as "Mr. Radiation", and travelled across the country to help provinces develop radiation protection programs.

By 1982, the Bureau of Medical Devices had grown to 35 employees of various scientific backgrounds and expertise. Dr. Das Gupta believed the Bureau should become more proactive and should adopt a preventative approach by carrying out a pre-market review of products, particulary those being used for human implant. In order to accomplish this, Dr. Das Gupta requested additional resources which was approved by the Deputy Minister and the Treasury Board. However, he had to obtain approval from the Director General of the Environmental Health Directorate to actually staff these positions. This Directorate was headed by Dr. Somers who did not agree that these resources should be allocated to the Bureau of Medical Devices. As a result, Dr. Das Gupta did not get these additional staff positions and a large backlog developed in the Bureau of Medical Devices in the processing of the many applications for approval received by the Bureau.

Dr. Das Gupta testified that from about 1982 until his eventual retirement in 1993, he was engaged in a constant battle with Dr. Somers to get the necessary resources to staff positions in the Bureau. In many instances he was given staff positions that were classified much lower than was required to perform the tasks. Dr. Das Gupta offered voluntary overtime and to divert resources from other areas within the Bureau to deal

with the backlog, but Dr. Somers would not approve any of these actions. Eventually Dr. Das Gupta became convinced that Dr. Somers was creating these obstacles because he wanted him out of the Bureau and was attempting to show that he was an ineffectual director.

In 1985, Dr. Das Gupta attended a conference in Madrid and was invited by the Spanish Government subsequently to spend time in Spain to advise on the development of their medical device program, his program in Canada having developed an international reputation. He advised Dr. Somers of this, but Dr. Somers did not approve this and told him that he was on a program of saving resources and intended to merge the Bureau of Radiation Protection and the Medical Devices Bureau into one. Two Directors would no longer be required and Dr. Das Gupta was to lose his position as Director. Instead, he would be appointed as a Special Advisor.

Dr. Das Gupta felt that since he had been responsible for the development of the Radiation Protection Unit that he should be the Director of the combined Bureaux. Dr. Somers, however, informed him that he lacked a suitable personality for the political and other aspects that were required for this new position. In particular, he did not have the personality and was not suitable to interact with the medical profession, scientists and politicians. Dr. Das Gupta testified that this was not the first time that Dr. Somers had spoken to him about his personal unsuitability. He and Dr. Somers had had many conversations over the years and when they talked about interacting with other people, Dr. Somers told Dr. Das Gupta that individuals of his background were not quite suitable because they were "colonials". Dr. Somers told him that "good brainy guys had to come from the U.K.". Dr. Somers also told Dr. Das Gupta that there were too many Indians in the Bureau and expressed the view that Indians were technically competent, but wondered if they were good for regulatory programs.

As Director of the Bureau of Medical Devices, Dr. Das Gupta sat on selection boards, particularly for competitions where the position to be filled would be reporting directly to him. Dr. Das Gupta testified that on some of these occasions, Dr. Somers would approach him and tell him whom he, Dr. Somers, would like to see selected as well as those who should not be selected. Dr. Das Gupta recalled on one occasion, there had been a competition for a Research Scientist and one of the candidates was a scientist from India. Prior to the formation of the selection board, Dr. Somers told him that he did not want him to sit on the board, as he may very well select this candidate because he was Indian.

On another occasion, Dr. Somers upon returning from a conference from India, told Dr. Das Gupta that visiting India had been a very unpleasant experience because the people of India were so corrupt. He also stated that "I hope you don't get some of that corruption here".

The two Bureaux were amalgamated as the Radiation Protection and Medical Devices Bureau and Dr. Das Gupta was not appointed as the Director. After these events had taken place, he reviewed the options available to

him which were to accept the position of a Special Advisor, take medical leave, retire, or fight. He elected to retire from HC and did so in 1993.

(f) Dr. Shiv Chopra

Dr. Chopra is currently chair of the Employment Equity Committee of NCARR, immediate past president of NCARR. He played a key role in bringing NCARR's complaint to the CHRC. Dr. Chopra had previously filed a complaint against HC under section 7 of the CHRA, which was heard by another Tribunal. The major portion of his evidence before this Tribunal related to his personal experiences and, in particular, his obvious frustration with his inability to rise within the management structure in HC. Dr. Chopra's individual complaint is not before this Tribunal and we have considered his evidence to the extent only for its relevance to the staffing practices at HC that have been alleged by NCARR to create barriers to the progression of visible minority employees into management.

Dr. Chopra has a B.VSc. (1957) from Punjab Veterinary College, India and a Ph.D. (1964) in Microbiology from McGill University. Prior to coming to Canada and after obtaining his B.VSc., he worked as a veterinary surgeon in charge of the State Veterinary Hospital in India, supervising a staff of six assistants. His duties in this position involved management of technical, fiscal matters and personnel. From 1958 to 1960, he was a research officer with the Biologics Production and Quality Control at the Punjab Veterinary College, and managed a staff of 30 scientific and technical personnel.

In 1965, Dr. Chopra moved to England to work for Miles Laboratories. He headed a section of a multi-disciplinary team of 13 researchers and the functions of this position involved the supervision and management of the pharmacology and toxicology program for the regulatory approvals of new drug submissions.

Dr. Chopra returned to Canada in 1969 and joined HC as a Scientific Advisor (SA-1), in the Bureau of Human Prescription Drugs (BHPD) of the Health Protection Branch and was reclassified in 1971 to a Biologist 4 (BI-04).

Dr. Chopra worked in the BHPD from 1969 to 1987. In 1987, Dr. Chopra applied for and was selected for a position in the Human Safety Division of the Bureau of Veterinary Drug, with the classification of Veterinary Medicine 4 (VM4). He has remained in this Division and at this classification since 1987 (with the exception of some special assignments).

During his tenure with HC, Dr. Chopra has received fairly extensive management training, either through formal training courses or through his involvement on management related committees and on task forces. He has frequently acted as Chief of his Division for short periods of time and performed the regular duties of the Chief on a day to day basis.

Dr. Chopra was keenly interested in moving into management at HC and it is clear from his evidence that over the years, he experienced an increasing level of frustration due to what he characterized as senior management's insensitivity and inaction with respect to his requests, given his experience, qualifications and positive performance appraisals.

Dr. Chopra gave evidence relating to a particular staffing action at HC which he put forward as raising issues of fair treatment in the staffing

process. These are the events of 1990 to 1992 which involved the acting appointment of Dr. Claire Franklin to the position of Director, Human Prescription Drugs and the saga of all that happened following that appointment.

In 1990, the position of the Director of the BPD, where Dr. Chopra worked for eighteen years, became vacant. Dr. Chopra wrote in September, 1990, to Dr. Somers, the Director General, proposing himself as a candidate for the position and he also wrote to Dr. Liston, the Assistant Deputy Minister. Dr. Liston replied that Dr. Somers thought that this position should be filled by someone with a medical background. The position was described as bilingual and required the director to be a medical doctor. The previous incumbent did not have a medical degree and the duties were split between the director and assistant director who was a medical doctor.

No competition was held to fill the vacancy, and Dr. Franklin was given the acting appointment in October, 1990.

Dr. Franklin had been chief of a division in the Environmental Health Directorate for about nine years and had substantial experience as a manager. She was not a medical doctor, nor was she bilingual at the time of the appointment.

The statement of qualifications for the position was not prepared until March 25th, 1991, but was made retroactive to October, 1990. It did not require that the director be a medical doctor. Dr. Chopra objected to and appealed the acting appointment in December, 1990 to the PSC. Early in 1991, HC created an EX-02 Director position with some job qualifications

as Director, except for the requirement to be a medical doctor. The medical duties were assigned to another position. Dr. Franklin was appointed to this position on an acting basis for four months when her previous acting appointment expired and was reappointed two more times to the end of November, 1991.

The appeal heard on July 19th, 1991, was allowed, the appeal board finding that Dr. Franklin was not fully qualified for the position of Director. Notwithstanding this decision, Dr. Franklin continued to act in the position for two more months until, through intervention of Dr. Chopra and PIPSC, the PSC ordered that Dr. Franklin's acting appointment be terminated on September 20th, 1991, and that there be two competitions, one for a four month acting appointment and the other for the permanent position as director. Dr. Franklin continued in the position and continued to exercise the responsibilities of Director, but she was classified and paid at her previous classification and salary level not at an EX-02 level.

In October, 1991, a competition for the position of Director was posted, but Dr. Chopra could not apply because his classification was one level below the eligibility level set for the position. Dr. Chopra responded by an application to the Federal Court requesting that Dr. Franklin's appointment be revoked. This litigation was resolved on the basis that Dr. Franklin would be assigned to other duties, that there would be a new competition to staff the permanent position of the Director and Dr. Somers was excluded from any involvement in the selection process. On March 20th, 1992, a competition was posted for the position of Director and Dr. Chopra was eligible to apply, which he did. Dr. Chopra was screened

out by the screening committee for the reason that he did not possess the necessary management experience. Dr. Franklin was found to be qualified and her appointment as a permanent Director was confirmed on April 21st. At the same time, the position of Assistant Director was abolished. Both Dr. Chopra and Dr. Michele Edwards, the former assistant director, appealed the appointment of Dr. Franklin, but their appeal was dismissed on July 27th, 1992. The appeal board found that HC had not acted improperly by reclassifying the position of director to an EX-02 and dropping the requirement of a medical doctor. The board also upheld the selection of Dr. Franklin and concluded that Dr. Chopra did not possess the necessary management experience for the position.

On October 12th, 1992, a final level grievance meeting was held with the Deputy Minister of HC. Dr. Chopra presented a written statement

outlining the grounds for his grievance, but nothing was resolved in favour of Dr. Chopra except that the Deputy Minister directed Shirley Cuddihy of Staff Relations to speak to Dr. Liston and Dr. Somers with respect to the reasons why Dr. Chopra was not being promoted into management.

(B) Systemic Barriers in Staffing and Staffing Development Systems in HC

1. Dr. Nan Weiner

Dr. Nan Weiner, a consultant in human resources, including staffing and organizational behaviour, gave expert evidence for the Complainants. Dr. Weiner has a Ph.D. (1977) in human resources from the University of Minnesota and over 20 years of human resources experience gained through practical experience, consulting and teaching. Dr. Weiner was qualified as an expert in staffing development and systemic discrimination.

Essentially, Dr. Weiner's evidence consisted of identifying in general terms, systemic barriers in staffing and staffing development which adversely affect the hiring and promotion of visible minorities. She then examined two specific staffing practices at HC to determine whether barriers, which are found in other employment systems, were operating in HC. Having concluded that certain barriers were present, Dr. Weiner then suggested remedies to overcome the barriers found at HC.

Dr. Weiner defined staffing as initial hires and promotion and staffing development as dealing with employees' needs to develop the skills necessary to do their current jobs and obtain the additional skills necessary for promotion.

Barriers are staffing practices which directly or indirectly disadvantage members of a particular group, and for which there is no job related rationale.

To identify the relevant barriers, Dr. Weiner relied primarily on three sources. The 1995 Glass Ceiling Report of the U.S. Federal Glass Ceiling Commission (which was concerned with the opportunities for women and minorities to advance to management and decision making positions in private sector organizations in the United States) and two reports prepared by the FPS, Breaking Through the Visibility Ceiling: Interim Report of the Visible Minority Consultation Group on Employment Equity (March 27, 1992);

and Distortions in the Mirror: Reflections of Visible Minorities in the Public Service of Canada (January 22, 1993), (both reports prepared for the Secretary of the Treasury Board and Council of Deputy Ministers).

The two specific staffing and staffing development practices at HC that Dr. Weiner examined were:

(1) promotion of visible minorities into senior management; and

(2) initial hire and promotion of visible minorities in the A&FS category.

With respect to (1) above, Dr. Weiner extracted the following barriers that she considered relevant to HC and then sought to determine whether these barriers are operating in HC:

(a) ghettoization of or the clustering of visible minorities into technical and professional jobs that do not lead to management positions;

(b) staffing decisions which are ultimately based on an informal process;

(c) less encouragement for visible minorities; and

(d) perceiving visible minorities as different and "unfit for managerial positions".

(a) Ghettoization

Ghettoization, is the clustering or concentration of visible minorities in staff jobs or in highly technical or professional jobs from which they do not proceed into management positions, in other words, a "visibility trap".

Dr. Weiner considered that the possible explanations for the under-utilization of visible minorities in senior management could be lack of interest of visible minorities in management, or lack of skills of visible minorities for management. She concluded that there is no evidence that visible minorities as a group, are any less interested than non visible minorities in advancing into management. Certainly at least, the evidence of Ms. Williams, Dr. Dhillon, Dr. Chopra and Dr. Das Gupta is to the contrary. With respect to skills, Dr. Weiner stated that there is nothing to suggest visible minorities in the S&P category are any less skilled professionally or technically than other employees.

Dr. Weiner noted, however, that lack of management experience seemed to be holding back visible minorities from management positions. This was the reason given for the failure of Dr. Chopra, Dr. Dhillon and Ms. Williams to be promoted to management.

For Dr. Weiner, the requirement for managerial experience is a legitimate one and not necessarily discriminatory. However, for this requirement to operate in a non-discriminatory way, there must be an opportunity for all employees to obtain the necessary training and experience, and the assessment of this qualification must be consistently assessed for all employees.

Dr. Weiner referred to Dr. Reitz' survey data, which indicated a minority disadvantage in access in management training, and a minority disadvantage in obtaining supervisory responsibility and acting positions, all three of which are important methods of obtaining the requisite experience. The evidence of Ms. Furrie also confirmed the minority disadvantage of visible minorities in obtaining acting appointments. This data also showed a minority disadvantage with respect to how employees were apprised of acting appointments.

Dr. Weiner also considered the promotional patterns of visible minorities in the S&P category into the EX positions. These patterns (described in Ms. Bosch's evidence) showed that the majority of EX positions are filled from occupations in the feeder group in which there are few or no visible minorities.

Dr. Weiner also noted by reference to Dr. Chopra and Ms. Williams that managerial qualifications are not consistently assessed; their management and supervisory experience, although admittedly obtained prior to joining HC, seemed to be discounted.

Dr. Weiner concluded that the under-representation of visible minorities could not be explained by lack of interest or lack of skills on the part of visible minorities. This under-utilization and the promotional patterns are consistent with a finding that the barrier of ghettoization is operating in HC.

(b) Less Encouragement of Visible Minorities

Dr. Weiner referred to the survey response which indicated that, in the employment context, visible minorities receive less encouragement than whites. Dr. Weiner explained this is important because people tend to

apply for promotions because they feel they are competent and are eager to move up the ladder. But there is always some uncertainty about one's ability to succeed at the next level and in her view, people watch for signals from their manager or from their organization that if they bid for a higher level job, that they will be given fair consideration. These signals can be encouragement to take management training programs, serving on committees or task forces or other activities that provide experience and exposure to others in the organization.

The survey data was that whites are more likely to be told about training opportunities than visible minority employees; whites are more often asked to apply for acting positions, whereas visible minorities had to be more proactive and self-sufficient in seeking management training opportunities and acting positions; and whites are very much more likely to be asked to serve on selection boards. This is important because whites are asked to take part in who gets chosen for promotion and racial minorities are not included in that decision making process.

The result is that whites are getting more of the experience and training necessary for promotion into the EX jobs.

(c) Informal Staffing Decisions

Staffing decisions based on an informal process can present a barrier for promotion, because, according to Dr. Weiner, the less formal the process, the less likely job qualifications will be set out in advance, will be assessed in a standard manner for all candidates and will allow for their recognition in candidates who are different from those who typically perform the job.

In reviewing this as a potential barrier, Dr. Weiner focused on acting appointments. The evidence indicated that acting appointments had become a significant part of the staffing actions of HC in recent years and many of the acting positions were filled without competition. In her opinion, the more acting positions, the more the likelihood that the selection will be more informal. The more informal, the more the unintended bias can affect the selection process.

The acting appointments of Dr. Bell and Dr. Franklin provide examples of how bias or perceived unfair treatment can enter the selection process. Dr. Bell was appointed without a competition and when on appeal it was found that Dr. Bell's appointment was made on a too informal basis, it was then made a second time by the same manager who originally appointed her,

on the basis of a paper assessment of all the candidates. In this situation, it is very likely that the second decision has been influenced by the fact that the same person made the first decision.

Dr. Bell's appointment and Dr. Franklin's appointment (which was also made without a competition), were also coloured by the fact that the job qualifications were tailored to fit the pre-selected candidate or were changed after the staffing action had begun.

In Dr. Franklin's case, she remained in the position, even after she was found not to be qualified.

This informality can create barriers in that not all potentially qualified staff can seek the acting position. Further, the acting assignment provides valuable managerial experience and gives the person who is acting the appearance of being "right" for the jobs.

Dr. Reitz' survey results showed that visible minorities proportionately get less acting appointments than whites and the effect may well be that they are less likely to apply because they do not believe they have a chance to be appointed.

(d) Perceiving Visible Minorities as Unfit for Management

For Dr. Weiner, the evidence of this barrier in Health Canada is found in the September 1, 1992, memorandum from Shirley Cuddihy, then, Chief, Staff Relations, Operations to Rod Ballantyne, Director-General, Personnel Administration Branch.

This memorandum came out of the direction of the Deputy Minister following Dr. Chopra's grievance hearing. The Deputy Minister wanted information concerning the impediments to the promotion of Dr. Chopra into a management position. Ms. Cuddihy was asked to meet with senior management who knew Dr. Chopra and she met with both Dr. Liston, the

Assistant Deputy Minister for the HPB and Dr. Somers, the Director General of the Drugs Directorate.

Ms. Cuddihy prepared the memorandum based on her hand written notes taken during her interviews with these two persons. Her notes were in point form and she prepared the memorandum from these notes immediately after the meeting.

Ms. Cuddihy was very definite in her evidence that the memorandum accurately represented the ideas and thoughts which Dr. Liston and Dr. Somers expressed to her during the meeting. The Tribunal accepts her evidence that the memorandum is an accurate representation of their position.

Almost all of the memorandum deals with Dr. Liston's comments. It is his general comments that are of importance here. His comments are as follows:

General:

> Employees who are being considered solely for "technical" positions seem to fare better than when being considered for "management" positions. The cultural differences are minimized when we are only looking for the scientific approach. However, when we start looking for the "soft skills" such as communicating, influencing, negotiating... quite often their cultural heritage has not emphasized these areas and they are at a disadvantage. (Exhibit HR-4)

For Dr. Weiner, the reference to "technical" positions rather than "management" and "cultural differences being minimized for the scientific approach", suggests an attitude that individuals of the same racial group as Dr. Chopra, are good at jobs involving technical matters, but are not good in management jobs. Racial differences are irrelevant to staffing for scientific jobs, but not for management positions.

The memorandum goes on:

> Abilities to interact with a number of stakeholders, such as industry as well as internally with peers, subordinates and superiors are important. As well we do business in the North American way - "consensus reaching model" which to some cultures is very foreign. (Exhibit HR-4)

Dr. Weiner's comment is that this sets up a stereotype, namely, that there is only one style of management that can be successful and only one set of people can manage that way and that does not include those such as Dr. Chopra. This attitude respecting cultural differences and abilities was also reflected in the comments of Dr. Somers, who expressed the view to Dr. Das Gupta that "good brainy guys had to come from the U.K".

Dr. Weiner also highlighted Dr. Liston's comment that:

> There is however a bit of a paradox in highlighting what we consider needs to be changed because we run the risk of having to defend ourselves against charges of assimilation. He suggests that we need to provide minority groups with training - we need to point them in a direction in a mirror and say: because of your cultural background, you need to communicate better to adopt a less authoritarian style. (Exhibit HR-4)

Dr. Weiner's translation of this is that there is an assumption that there is only one way to perform a job successfully. What this does is to set up a "us/them" kind of dichotomy, seeing visible minorities as different and thus the need to change their ways, so that they can acquire the ability to manage.

Dr. Weiner agreed that the ideas and attitudes expressed may not be representative of management in HC. But she pointed out that Dr. Liston was the Assistant Deputy Minister and the more senior the managers, the more they contribute and set the tone for the whole department.

Other comments such as those expressed to Dr. Das Gupta by Dr. Somers that Indians are corrupt and the suggestion that he, Dr. Das Gupta, should not sit on a selection board because as a visible minority, he would be biased in favour of a visible minority candidate; and the comments of Dr. Lodge to Dr. Awang, calling him "Blackie" and "Hello darkness my old friend", are consistent, in Dr. Weiner's view, with an organizational attitude of "we/they", (even bordering on individual discrimination).

(e) Under-Representation in the A&FS Category

Finally, Dr. Weiner dealt with under-representation of visible minorities in the A&FS category. Both Ms. Bosch's and Ms. Furrie's evidence showed this to be the case. This in itself, of course, does not establish that there is discrimination in the recruitment practises for the A&FS category. During the hearing, Respondent counsel objected to the Tribunal making any finding of discrimination in HC's recruitment practices for the A&FS category arguing that this had not been identified as an issue. Counsel did agree, however, that if the Tribunal finds that one of the reasons for the under-representation of visible minorities in management is because of the under-representation of visible minorities in the A&FS category, then the Tribunal can make an order to correct this under-representation, without deciding whether HC has or has not

discriminated in its recruiting practices.

IV THE FINDINGS

The Tribunal makes the following findings on the evidence:

(1) There is a significant under-representation of visible minorities in senior management in HC.

(2) There is a significant under-representation of visible minorities in the A&FS category in HC. This

is a contributing factor to the very low numbers of visible minorities in senior management.

(3) There is a high concentration of visible minorities in the feeder group in the S&P category and visible minorities are bottlenecked in the feeder group and are not progressing into senior management.

(4) The majority of members in the EX group from the S&P category were recruited from occupational groups with a fairly high representation of visible minorities, but no visible minorities were recruited from this group; or were recruited from occupational groups with no visible minorities; and there was a very low recruitment of members into the EX group from feeder occupational groups with a very high representation of visible minorities.

(5) The failure of visible minorities to progress into management cannot be explained by a lack of interest or lack of technical or professional skills on the part of these visible minorities.

(6) A common theme in the evidence is that visible minorities in HC lack the necessary managerial experience to move into senior management positions.

(7) The necessary managerial experience can be obtained through acting positions, and through exercising supervisory responsibilities and through management training programs.

(8) Acting positions constituted a very large part of the total staffing actions in HC during the period 1991 to 1995.

(9) Acting appointments were often made without a competition and on an informal basis. As a result, potentially qualified persons are not considered for appointment or when an acting appointment is challenged, the subsequent selection process is affected by an unintended bias so that the person initially appointed is usually confirmed in the position.

(10) Visible minorities proportionately were given less acting positions than non-visible minorities.

(11) Visible minorities were at a disadvantage with respect to how they found out about acting positions. Non-visible minorities were more often asked by their managers to apply whereas visible

minorities were required to be more proactive in finding out about opportunities for acting positions.

(12) Visible minorities received less management related training than non-visible minorities.

(13) Non-visible minorities were more often informed of management training opportunities by their managers whereas visible minorities had to be much more self-reliant in finding out about these opportunities.

(14) There is a minority disadvantage in terms of supervising other employees. Management training and having held an acting appointment increased the likelihood of supervisory responsibility for both non-visible minorities and visible minorities. But in the case of non-visible minorities with management training or non-visible minorities who held acting positions, there was a significant increase in the likelihood of being supervisors as compared to visible minorities.

(15) Visible minorities are viewed by senior management as culturally different within HC and are not considered suitable for managerial positions.

(16) There is a significant difference in the participation of visible minorities in hiring and promotion decisions. Non-visible

minorities are almost twice as likely to serve on selection boards as non-visible minorities. The difference is even greater for those visible minorities who are more senior and have more qualifications. This suggests that management, whose responsibility it is to appoint members of the selection board, chooses members for reasons that have little to do with the level of education, experience or responsibility.

V CONCLUSION

The Complainants have taken the position from the beginning that this complaint is one of "systemic discrimination". In the case of Action Travail des Femmes v. Canadian National Railway, et al. [1987] 1 S.C.R. 1114, the Supreme Court of Canada in considering the meaning of systemic discrimination, referred to in the Abella Report on Equality in Employment which did not define systemic discrimination but set out the essentials as follows:

> Discrimination...means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics...
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or

> systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
>
> This is why it is important to look at the results of a system... (pp. 1138-1139)

The Court went on to say that:

> ...In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of

recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of natural forces...(p. 1139)

The essential element then of systemic discrimination is that it results from the unintended consequences of established employment systems and practices. Its effect is to block employment opportunities and benefits for members of certain groups. Since the discrimination is not motivated by a conscious act, it is more subtle to detect and it is necessary to look at the consequences or the results of the particular employment system.

It is clear from the evidence in this case that visible minority groups in HC are being affected in a disproportionately negative way. There is a significant under-representation of visible minorities in senior management in HC and in the A&FS category in HC. Visible minorities are bottlenecked or concentrated in the feeder group in the S&P category and are not progressing into senior management.

To paraphrase Judge Abella, this is a signal that certain employment practices that lead to this adverse impact may be discriminatory.

In the case of Basi v. Canadian National Railway Company, 9 C.H.R.R. D/5029 (a decision of the HRT), the Tribunal pointed out and we accept as well-established law, that the Complainants must first establish a prima facie case of discrimination and once that is done, the burden shifts to the Respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. Further, there is virtual unanimity in the cases that the usual standard of proof in this type of case is the civil standard of a preponderance of the evidence.

The Respondent, using a rather bold strategy, chose not to call any evidence to explain the reasons for the significant under-representation of visible minorities in senior management or the reasons for the high concentration of visible minorities in the feeder group. Rather the

Respondent tended to rely mainly on the cross-examination of the Complainants' witnesses and make the Complainants satisfy their onus.

The Tribunal has concluded that the Complainants have made out a prima facie case of discrimination which the Respondent has not rebutted. There are a number of staffing practices of HC that have a disproportionately negative effect on visible minorities in HC which the Tribunal finds to be discriminatory.

These practises have been identified in the Tribunal's Findings, specifically Finding numbers 4, 9, 10, 11, 12, 13, 14, 15 and 16. Thus, it is the Tribunal's decision that HC has established or pursued staffing practises that are discriminatory in contravention of section 10 of the CHRA.

VI JURISDICTION ON REMEDY

The Respondent challenged this Tribunal's jurisdiction to make an order in the nature of an "employment equity remedy", which we intend to do. The Respondent argued that the Tribunal's jurisdiction is limited to making an order that HC cease the discriminatory practice. This is because the authority to impose an employment equity program is vested in the PSC and the Treasury Board under the provisions of the FAA and PSEA. As we indicated earlier in our reasons, we do not agree with this argument. Section 53(2)(a) of the CHRA gives this Tribunal the jurisdiction to make a cease and desist order. In addition if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the CHRA.

The scope of this jurisdiction was considered by the Supreme Court of Canada in the Action Travail des Femmes case. In adopting the dissenting opinion of MacGuigan, J. in the Federal Court of Appeal, the Court stated that:

> ...s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future..... (at page 1141)

The Supreme Court also said in reference to the Order made by the Tribunal in that case:

> ...When confronted with such a case of "systemic discrimination", [as was the case with Canadian

National Railway], it may be that the type of order issued by the Tribunal is the only means by which the purpose of the Canadian Human Rights Act can be met.

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In any program of employment equity, there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed, there is no prevention without some form of remedy... (at pages 1141 to 1142)

The Court pointed out that:

Unlike the remedies in s. 41(2)(b)-(d), [now Section 53], the remedy under s. 41(2)(a), is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future, so that a successful employment equity program will render itself otiose. (at page 1142)

And at pages 1143 to 1144:

An employment equity program thus is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless....

Secondly, by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping.....

Thirdly, an employment equity program helps to create what has been termed a "critical mass" of the previously excluded group in the work place. This "critical mass" has important effects. The presence of a significant number of individuals from a targeted group eliminates the problems of "tokenism".

In the Tribunal's opinion, an employment equity remedy is required in this case to prevent future systemic discrimination and to eliminate past barriers arising out of the discriminatory practices identified.

The Respondent has argued that there is no conflict between the CHRA and the FAA and the PSEA. Rather the two regimes complement each other and therefore the paramountcy principle does not apply. In this respect, the Respondent's argument is similar to the argument made by the Respondent in the case of The Attorney General of Canada v. Uzoaba [1995] 2 F.C. 569.

In the Uzoaba case, as part of its order, the Tribunal required Correctional Service Canada to reinstate Dr. Uzoaba in a position which amounted to a promotion from his previous position. Counsel for the Attorney General argued that this would be contrary to the merit provisions of the PSEA and the scheme in the PSEA for promotions and that this cannot be overridden by a Human Rights Tribunal. Counsel also argued that in the

case of a direct conflict, the CHRA would apply, however, the conflict here was not direct. In response to this argument, the Court said:

> On its face, the Tribunal's order appears to fall squarely within the jurisdiction of a Tribunal under paragraph 53(2)(b) of the Act.
>
> The law is clear... It is not clear to me how this argument assists counsel. Indeed, counsel for Dr. Uzoaba submits there is no real conflict between the Act and the Public Service Employment Act. He says that the promotion on merit provisions of the Public Service Employment Act apply in the normal, day-to-day administration of the Public Service and the Act does not purport to displace the Public Service Employment Act in that respect. In practical terms I agree with this submission.
>
> However, even if the power of a Human Rights Tribunal to order promotion in the Public Service conflicts with the Public Service Employment Act, I am satisfied that the provisions of the Act must prevail. (at pp. 576-577)

The unanimity that the CHRA is paramount was first enunciated in the Insurance Corporation of British Columbia v. Heerspink [1982] 2 S.C.R. 145, 158, and further articulated by the Supreme Court of Canada in Winnipeg School Division No. 1 v. Craton [1985] 2 S.C.R. 150, at p. 156 where the court stated:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended or appealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. (at p. 577)

Following on this principle, the Court in the Uzoaba case held that:

I think this principle of paramountcy must apply in this case to enable a Human Rights Tribunal to order a promotion which it has found has been denied for reasons of discrimination, contrary to the Act. In other words, the jurisdiction of the Public Service Commission and the process respecting promotions within the Public Service must give way in those rare exceptions where promotions have been denied based on discriminatory reasons and where a Tribunal, acting within its jurisdiction under the Act, orders a promotion in order to remedy the results of discriminatory action taken by the employer. (at p. 577)

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Although there may not be a direct or real conflict between the CHRA and the FAA and the PSEA, the effect of the Respondent's argument would be to prevent this Tribunal from exercising the whole of the jurisdiction conferred upon it under the CHRA where the Tribunal has concluded that HC has engaged in discriminatory employment practices.

To accede to the Respondent's argument therefore would be to deny the paramountcy of the CHRA over the FAA and PSEA. The law is unequivocal that the jurisdiction conferred upon this Tribunal under section 52 can only be altered or an exception created by a clear legislative pronouncement. There is no such legislative pronouncement in the FAA or the PSEA that in any way affects the jurisdiction of this Tribunal under section 52 of the CHRA. Accordingly, we dismiss the Respondent's motion objecting to this Tribunal's jurisdiction to make an order in the nature of an employment equity remedy.

VII ORDER

The Respondents entered as an exhibit, a document entitled "Detailed Measures - Employment Equity for Visible Minorities at Health Canada". In the introduction to the Detailed Measures, it is stated that HC is committed to ensuring that no person will be denied employment opportunities or benefits for reasons unrelated to ability and that HC is committed to equitable representation and participation of visible minorities at all levels of the organization, corresponding to their availability. HC is also committed to implementing a series of measures for visible minorities intended to achieve improved representation, access to training, development, promotion and overall career advancement. This document sets out detailed measures relating to numerical targets, appointments, recruitment strategies, acting appointments, supervisory/management training and development, career counselling services, and a procedure for monitoring an enforcement.

By letter dated November 15th, 1995, to the Chief Commissioner of the CHRC, the Acting Secretary of the Treasury Board, the President of the Public Service Commission and the Deputy Minister of HC committed these agencies to the implementation of these measures.

The CHRC also presented to the Tribunal, an Outline of the Remedy that the CHRC and the Complainants were seeking. This Remedy was expanded upon in the evidence of Dr. Weiner.

There are many areas of agreement between the Detailed Measures and the Outline of Remedy. But there are two major areas of disagreement namely, the numerical targets and the number of years it will take for visible minorities to reach proportional representation in the EX group; and the enforcement and monitoring of the remedy.

Even though there is considerable overlap between the Detailed Measures and the Outline of Remedy, the parties could not finally agree on the measures to be taken to achieve equitable representation of visible minorities at HC.

The Tribunal, having concluded that HC engaged in certain staffing practices, contrary to section 10 of the CHRA, orders HC to adopt and implement the following special corrective measures program.

SPECIAL CORRECTIVE MEASURES PROGRAM

The objectives of the special corrective program are to:

(i) eliminate discriminatory employment barriers for visible minorities in HC;

(ii) remove discriminatory barriers to the full participation of visible minorities in the EX/Senior Management and in the A&FS categories;

(iii) ensure the maximum utilization of the knowledge, skills, and expertise of visible minorities;

(iv) redress the effects of past discrimination and ensure that HC's organizational structure more accurately reflects its diverse workforce and demographics.

PERMANENT CORRECTIVE MEASURES

(1) HC shall immediately set standards to ensure that visible minority employees are evaluated not only on experience, but also on desirable skills in determining personal suitability for positions.

(2) HC shall train all individuals selected, or who may be selected to sit on selection boards on the proper interviewing techniques needed to facilitate bias-free selection. In addition, HC will develop a list of trained employees from the visible minority group who would be made available to participate on selection boards. Where possible HC should use selection boards that are diverse in its composition.

(3) HC shall provide training to all managers and human resource specialists on strategies to recruit, promote and retain visible minorities by providing guidelines and training on bias-free selection and recruitment practices. This will also include sensitizing them to diversity and employment equity issues, including systemic barriers.

(4) HC shall conduct workshops throughout the department on the benefits of a diverse workforce and human rights legislation, with attendance of management being mandatory.

(5) HC shall set clearly defined qualifications for all EX/Senior managerial positions as well as for all A&FS positions and ensure that these criteria are known to everyone interested in moving into senior management and into the A&FS categories and to all those involved in the staffing process.

(6) HC shall develop in advance parts of the selection process to assess skill needed for EX/Senior Management and A&FS positions which will be used when filling acting appointments.

(7) HC shall develop a computerized inventory (Human Resource Information System) of visible minority and white employees in feeder positions who are interested in advancement into EX/Senior Management categories so that this information is available to staffing managers when acting and/or indeterminate jobs become available.

TEMPORARY CORRECTIVE MEASURES

(1) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities into the permanent EX/Senior Management category at the rate of 18% per year (twice the rate of availability) for five years in order to reach 80% proportional representation of this designated group into this category within this time frame.

(2) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities into the permanent feeder level positions of the A&FS category at the rate of 16% per year (twice the rate of availability) for five years in order to reach 80% proportional representation of this designated group into that category.

(3) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities from the S&P category to acting positions for four months or longer, in the EX/Senior Management category at a rate of 18% per year (twice the rate of availability) for four years to enable visible minorities to develop the requisite job qualifications needed to be screened into permanent competitions when they become available.

(4) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities from the A&FS category to acting positions, for four months or longer, in the EX/Senior Management category at a rate of 16% per year (twice the rate of availability) for four years, to enable visible minorities to acquire the requisite job qualifications

needed to be screened into permanent competitions when they become available.

(5) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities in the S&P category at the rate of 18% per year (twice the rate of availability) for four years, to acting positions, for four months or longer, in the EX minus three and EX minus four positions with supervisory /managerial responsibilities in the S&P category.

(6) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities from the A&FS category, at the rate of 16% per year (twice the rate of

availability) for five years, to acting positions of four months or longer, in the Ex minus three and EX minus four positions with supervisory/managerial responsibilities.

(7) To ensure the successful attainment of the goal of the special corrective measures within the specified time-frame, hiring managers of EX/Senior Management staff at HC shall undertake a special reporting measure. Before a final decision is made in any competition where visible minority candidates have been considered but a visible minority candidate has not been selected, the hiring manager(s) or selection board will explain to either the Deputy Minister or the Assistant Deputy Minister why the visible minority candidates were not found to be qualified.

(8) In order to ensure that the numerical goals are attained and within the specified time-frame, HC shall state specifically in all Staffing Notices (Internal and External Recruiting Advertisements, Job Postings, Electronic Job Postings, MRIS job search, and all other Staffing communication media), for EX/Senior Management and Administrative and Foreign Service positions that HC is an "Equal Opportunity Employer" and that this particular advertisement is aimed at visible minorities.

(9) HC shall identify visible minorities (and whites) in feeder group positions who are interested in advancement into EX/Senior Management and Administrative and Foreign Service jobs so individual career plans can be developed for these groups which

highlight what employees are required to do to be viable candidates for such jobs.

(10) HC shall develop outreach recruitment sources for visible minorities and use them when hiring into Administrative and Foreign Service jobs. Doing so, requires HC to use different media to target visible minorities who have not traditionally learned about job openings e.g., advertising in visible minority - based newspapers, and using informal networks of visible minorities in HC and other federal departments.

(11) HC shall establish mentoring programs and shall train current Senior Management on methods of mentoring its cross-culturally diverse workforce and shall reward good mentoring.

(12) HC shall invite visible minorities to attend the departmental "Learning for Leadership" programs and set aside 25% of the seats for visible minorities, to be assigned on a first come basis.

(13) HC shall invite visible minorities to participate in departmental and other training courses including the Health Protection Management Development Program with 25% of program seats set aside and allocated to visible minorities on a first come basis.

(14) HC shall invite visible minorities in the feeder group levels to participate in Canadian Centre for Management Development (CCMD)

Executive Development Programs and PSC Management Training Programs (MTP).

(15) HC shall appoint a person who shall be responsible with full powers to ensure the implementation of the special temporary corrective measures and to carry out any other duties so assigned by HC to implement this order.

(16) There shall be an annual performance assessment of HC's executive/senior managers including Assistant Deputy Ministers, Director Generals, Directors and Division Chiefs regarding full compliance with this order.

(17) HC shall establish an Internal Review Committee, co-chaired by the Director General, Human Resources and Chair of the Visible Minorities Advisory Committee. Membership of the Committee shall

include an equal number of departmental managerial representatives and delegates from the Advisory Committee on Visible Minorities with additional expertise to be made available on an as required basis. The Internal Review Committee shall monitor the implementation of this plan. The Committee shall meet on a quarterly basis and the Co-chairs shall meet with the Deputy Minister following these meetings to report the results directly. A report shall be made to the Departmental Executive Committee semi-annually.

(18) HC shall submit to the Canadian Human Rights Commission:

(a) Within 60 days of the introduction of the special corrective measures program the current numbers of employees in the EX, EX Equivalent, EX minus 1, EX minus 2, EX minus 3 and EX minus 4 groups; percentage representation of employees in the EX, EX Equivalent, EX minus 1, EX minus 2, EX minus 3 and EX minus 4 groups;

(b) Within 60 days of the end of each quarterly period after the implementation of the aforementioned special temporary corrective measures, and for the entire duration of the said measures, after forwarding a copy to NCARR and PIPSC for their information, a report outlining:

i) The number and percentages of visible minorities appointments to the EX/Senior Management and the Administrative and Foreign Service categories;

ii) The number and percentage of visible minorities appointments to acting positions to the EX/Senior Management and the Administrative and Foreign Service categories;

iii) The number and percentage of visible minorities chosen to sit on selection boards; training sessions

offered/delivered; feedback of participants; and, validation of training program content; and efforts made to recruit visible minorities for the EX/Senior Management and Administrative and Foreign Service

categories for indeterminate and term positions during the previous quarter;

iv) A comparison of the participation rate of visible minorities in training and development activities to that of the Department's general employee population; and the specific steps being taken to ensure that the Department's policies and practices are free of employment barriers.

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Dated at Toronto, Ontario, this 31st day of January, 1997.

J. GRANT SINCLAIR, Q.C., Chairperson

CAROL H.Y. BOXILL, Member

ALVIN TURNER, Member

TAB 10

Action Travail des Femmes *Appellant*

v.

Canadian National Railway Company *Respondent*

and

Canadian Human Rights Commission *Mis en cause*

and

Attorney General of Canada *Intervener*

and between

Canadian Human Rights Commission *Appellant*

v.

Canadian National Railway Company *Respondent*

and

Action Travail des Femmes, Denis Lemieux, Nicole Duval-Hesler, Joan Wallace and the Attorney General of Canada *Mis en cause*

INDEXED AS: CANADIAN NATIONAL RAILWAY CO. *v.* CANADA (CANADIAN HUMAN RIGHTS COMMISSION)

File Nos: 19499, 19500.

1986: November 5, 6; 1987: June 25.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard*, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Civil rights — Discrimination — Employment — Systemic discrimination against an identifiable group — Human Rights Tribunal imposing employment equity program on employer — Tribunal's order setting employment goal and fixing hiring quota — Whether the Tribunal had jurisdiction to make such order — Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 15(1), 41(2)(a).

* Chouinard J. took no part in the judgment.

Action Travail des Femmes *Appelante*

c.

Compagnie des chemins de fer nationaux du Canada *Intimée*

et

Commission canadienne des droits de la personne *Mise en cause*

et

Le procureur général du Canada *Intervenant*

et entre

Commission canadienne des droits de la personne *Appelante*

c.

Compagnie des chemins de fer nationaux du Canada *Intimée*

et

Action Travail des Femmes, Denis Lemieux, Nicole Duval-Hesler, Joan Wallace et le procureur général du Canada *Mis en cause*

RÉPERTORIÉ: COMPAGNIE DES CHEMINS DE FER NATIONAUX DU CANADA *c.* CANADA (COMMISSION CANADIENNE DES DROITS DE LA PERSONNE)

N^os^ du greffe: 19499, 19500.

1986: 5, 6 novembre; 1987: 25 juin.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard*, Lamer, Wilson, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Libertés publiques — Discrimination — Emploi — Discrimination systémique contre un groupe identifiable — Imposition par un tribunal des droits de la personne d'un programme d'équité en matière d'emploi à un employeur — Ordonnance du tribunal fixant un objectif d'emploi et des contingentements d'embauche — Le tribunal est-il compétent pour rendre une telle ordonnance? — Loi canadienne sur les droits de la personne, S.C. 1976-77, chap. 33, art. 2, 15(1), 41(2)a).

* Le juge Chouinard n'a pas pris part au jugement.

Statutes — Interpretation — Human rights legislation — Legislation to be given a broad interpretation to fulfil its purposes — Canadian Human Rights Act, S.C. 1976-77, c. 33.

Action Travail des Femmes alleged that CN was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the *Canadian Human Rights Act* by denying employment opportunities to women in certain unskilled blue-collar positions. A Human Rights Tribunal constituted under s. 39 of the Act studied the complaint, found that the evidence indicated clearly that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue-collar jobs, and concluded that it was essential to impose upon CN a special employment program. In particular, paragraph 2 of the Special Temporary Measures Order required CN to increase to 13 per cent—the national average—the proportion of women working in non-traditional occupations, and until that goal was achieved, to hire at least one woman for every four non-traditional jobs filled in the future. CN's application to the Federal Court of Appeal under s. 28 of the *Federal Court Act* to review the Tribunal's decision was allowed and paragraph 2 of the Special Temporary Measures Order was set aside. The majority of the Court held that the Tribunal exceeded its jurisdiction under s. 41(2)(*a*) of the *Canadian Human Rights Act* in making that part of the Order because the Tribunal's power under that section is limited to prescribing measures for the purpose of preventing in the future the recurrence of discriminatory practices which had been found to exist and not to remedy the consequences of past discrimination. This appeal is to determine whether the Tribunal has the power under s. 41(2)(*a*) to impose upon an employer an "employment equity program" to address the problem of "systemic discrimination" in the hiring and promotion of a disadvantaged group, in this case women.

Held: The appeal is allowed and the cross-appeal dismissed.

The Order made by the Tribunal was within its jurisdiction under s. 41(2)(*a*) of the Act. The purpose of the Act, stated in s. 2, is not to punish wrongdoing but to prevent discrimination against identifiable protected groups and the Act must receive a fair, large and liberal interpretation to advance and fulfil its purpose. Under s. 41(2)(*a*), the Tribunal may order the "adoption of a special program ... referred to in subsection 15(1)", a

Législation — Interprétation — Législation sur les droits de la personne — Interprétation large de la législation pour qu'elle réalise ses objets — Loi canadienne sur les droits de la personne, S.C. 1976-77, chap. 33.

Action Travail des Femmes prétend que le CN s'est rendu coupable d'actes discriminatoires en matière d'embauche et de promotions, contrairement à l'art. 10 de la *Loi canadienne sur les droits de la personne*, en refusant aux femmes la possibilité d'occuper certains emplois manuels non spécialisés. Un tribunal des droits de la personne constitué en vertu de l'art. 39 de la Loi a étudié la plainte, constaté qu'il y avait des preuves manifestes que les politiques de recrutement, d'embauche et de promotion du CN empêchaient et décourageaient les femmes d'occuper des emplois manuels et a conclu qu'il était essentiel d'imposer au CN un programme spécial d'emploi. En particulier, le deuxième paragraphe des mesures temporaires spéciales de l'ordonnance enjoint au CN d'augmenter à 13 pour 100—la moyenne nationale—la main-d'œuvre féminine dans les postes non traditionnels et, jusqu'à ce que ce but soit atteint, d'embaucher au moins une femme sur quatre postes non traditionnels à être comblés à l'avenir. La demande d'examen et d'annulation de la décision du tribunal, que le CN a adressée à la Cour d'appel fédérale en vertu de l'art. 28 de la *Loi sur la Cour fédérale*, a été accueillie et le paragraphe 2 des mesures temporaires spéciales a été radié. La Cour, à la majorité, a jugé que le tribunal avait excédé la compétence que lui confère l'al. 41(2)*a*) de la *Loi canadienne sur les droits de la personne* en rendant cette ordonnance, car son pouvoir en vertu de cet article se limitait à prescrire des mesures destinées à prévenir la récurrence des actes discriminatoires constatés et non de remédier aux conséquences d'actes discriminatoires antérieurs. Le pourvoi a pour objet de déterminer si le tribunal a le pouvoir, en vertu de l'al. 41(2)*a*), d'imposer à un employeur un «programme d'équité en matière d'emploi» pour répondre au problème de la «discrimination systémique» dans l'embauche et la promotion d'un groupe désavantagé, dans ce cas-ci les femmes.

Arrêt: Le pourvoi est accueilli et le pourvoi incident rejeté.

Le tribunal, en rendant son ordonnance, a respecté les limites de la compétence que lui confère l'al. 41(2)*a*) de la Loi. L'objet de la Loi, énoncé à l'art. 2, n'est pas de punir une faute mais bien de prévenir la discrimination au détriment de groupes identifiables protégés, et elle doit recevoir une interprétation juste, large et libérale afin de promouvoir cet objet. En vertu de l'al. 41(2)*a*), le tribunal peut ordonner «l'adoption d'une proposition

section designed to meet the problem of systemic discrimination, "to prevent the same or a similar [discriminatory] practice occurring in the future". An employment equity program, such as the one in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears. In any employment equity program, there simply cannot be a radical dissociation of "remedy" and "prevention" for there is no prevention without some form of remedy. Although the dominant purpose of such programs is always to improve the situation of the target group in the future, it is essential, in attempting to combat systemic discrimination, to look to the past patterns of discrimination and to destroy those patterns. In this case, it is an uncontradicted fact that the hiring and promotion policies of CN and the enormous problems faced by the tiny minority of women in the blue-collar work force amounted to a systematic denial of women's equal employment opportunities. The employment equity program ordered by the Tribunal, including paragraph 2 of the Special Temporary Measures, was rationally designed to combat such systemic discrimination by preventing "the same or similar practice occurring in the future" and, therefore, fell within the scope of s. 41(2)(*a*).

relative à des programmes [. . .] spéciaux visés au paragraphe 15(1)», paragraphe conçu pour répondre à la discrimination systémique, pour «prévenir les actes [discriminatoires] semblables». Un programme d'équité en matière d'emploi, comme celui ordonné par le tribunal en l'espèce, est conçu pour rompre le cercle vicieux de la discrimination systémique. L'objectif n'est pas d'indemniser les victimes ni même d'ouvrir de nouveaux horizons à des individus particuliers qui, par le passé, se sont vu refuser inéquitablement un emploi ou une promotion. Plutôt, le programme d'équité en matière d'emploi tente de faire en sorte qu'à l'avenir les postulants et les travailleurs du groupe touché n'aient pas à faire face aux mêmes barrières insidieuses qui ont arrêté leurs prédécesseurs. Toutefois, dans tout programme d'équité en matière d'emploi, on ne peut tout simplement pas dissocier radicalement la «réparation» de la «prévention», puisqu'il ne peut y avoir prévention sans une forme quelconque de réparation. Si l'objet dominant de ces programmes est toujours d'améliorer la situation future du groupe visé, il est essentiel de s'attaquer aux anciens régimes discriminatoires et de les détruire. En l'espèce, c'est un fait incontesté que les politiques d'embauche et de promotion du CN et les problèmes considérables auxquels doit faire face la faible minorité de femmes dans les emplois manuels reviennent à dénier systématiquement aux femmes l'égalité des chances en matière d'emploi. Le programme d'équité en matière d'emploi ordonné par le tribunal, y compris le paragraphe 2 des mesures spéciales temporaires, était logiquement conçu pour combattre une telle discrimination systémique par la prévention d'«actes semblables» et, donc, est conforme à l'al. 41(2)*a*).

Cases Cited

Referred to: *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, aff'g [1983] 2 F.C. 531; *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission*, [1985] 3 W.W.R. 717.

Statutes and Regulations Cited

Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 10, 15(1), 39, 41(2)(*a*), (*b*), (*c*), (*d*).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28.
Interpretation Act, R.S.C. 1970, c. I-23, s. 11.
Ontario Human Rights Code, R.S.O. 1980, c. 340.

Jurisprudence

Arrêts mentionnés: *Bhinder c. Compagnie des chemins de fer nationaux du Canada*, [1985] 2 R.C.S. 561, conf. [1983] 2 C.F. 531; *Insurance Corporation of British Columbia c. Heerspink*, [1982] 2 R.C.S. 145; *Winnipeg School Division No. 1 c. Craton*, [1985] 2 R.C.S. 150; *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536; *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission*, [1985] 3 W.W.R. 717.

Lois et règlements cités

Code ontarien des droits de la personne, L.R.O. 1980, chap. 340.
Loi canadienne sur les droits de la personne, S.C. 1976-77, chap. 33, art. 2, 10, 15(1), 39, 41(2)*a*), *b*), *c*), *d*).
Loi d'interprétation, S.R.C. 1970, chap. I-23, art. 11.
Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), chap. 10, art. 28.

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Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

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Tarnopolsky, Walter S. *Discrimination and the Law in Canada*. Toronto: R. De Boo, 1982.

APPEAL from a judgment of the Federal Court of Appeal, [1985] 1 F.C. 96, 20 D.L.R. (4th) 668, 61 N.R. 354, allowing CN's application under s. 28 of the *Federal Court Act* and setting aside part of the Human Rights Tribunal's Order. Appeal allowed and cross-appeal dismissed.

Hélène Lebel, Q.C., for Action Travail des Femmes.

Alphonse Giard, Q.C., Rolland Boudreau, Q.C., and *Anne Bétournay*, for the Canadian National Railway Co.

René Duval and *Anne Trotier*, for the Canadian Human Rights Commission.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This case raises the important question whether a Human Rights Tribunal appointed under s. 39 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 (the Act), has the power under s. 41(2)(*a*) to impose upon an employer, in this case Canadian National Railway Co., a program tailored specifically to address the problem of "systemic discrimination" in the hiring and promotion of a disadvantaged group, in this case women. I am content to adopt the vocabulary of the *Report of the Commission on Equality in Employment* (1984), authored by Judge Rosalie

Doctrine citée

Abella, Rosalie S. *Rapport de la Commission sur l'égalité en matière d'emploi*, Ottawa: Ministère des Approvisionnements et Services du Canada, 1984.

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POURVOI contre un arrêt de la Cour d'appel fédérale, [1985] 1 C.F. 96, 20 D.L.R. (4th) 668, 61 N.R. 354, qui a accueilli la demande du CN fondée sur l'art. 28 de la *Loi sur la Cour fédérale* et annulé en partie l'ordonnance du Tribunal des droits de la personne. Pourvoi accueilli et pourvoi incident rejeté.

Hélène Lebel, c.r., pour Action Travail des Femmes.

Alphonse Giard, c.r., Rolland Boudreau, c.r., et *Anne Bétournay*, pour la Compagnie des chemins de fer nationaux du Canada.

René Duval et *Anne Trotier*, pour la Commission canadienne des droits de la personne.

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF—Cette affaire pose l'importante question de savoir si un tribunal des droits de la personne constitué en vertu de l'art. 39 de la *Loi canadienne sur les droits de la personne*, S.C. 1976-77, chap. 33 (ci-après la Loi), a le pouvoir, en vertu de l'al. 41(2)*a*), d'imposer à un employeur, en l'occurrence la Compagnie des chemins de fer nationaux du Canada (ci-après le «Canadien National» ou le «CN»), un programme conçu expressément pour répondre au problème de la «discrimination systémique» dans l'embauche et la promotion d'un groupe désavantagé, dans ce

Abella (the Abella Report) and to describe such programs as "employment equity programs".

Action Travail des Femmes, a public interest pressure group originally funded by the federal government but now incorporated and financed independently, alleged that Canadian National was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the Act by denying employment opportunities to women in certain unskilled, blue-collar positions. Section 10 of the Act reads:

10. It is a discriminatory practice for an employer or an employee organization

(*a*) to establish or pursue a policy or practice, or

(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

I

The Facts

A Human Rights Tribunal was constituted in July 1981 to study the complaint lodged by Action Travail des Femmes. The complaint reads as follows:

A.T.F. has reasonable grounds to believe that CN in the St. Lawrence Region has established or pursued a policy or practice that deprives or tends to deprive a class of individuals of employment opportunities because they are female.

The complaint was not that of a single complainant or even of a series of individual complainants; it was a complaint of systemic discrimination practised against an identifiable group.

The Tribunal received testimony from 50 witnesses during 33 days of hearings and, in due course, rendered a decision of some 175 pages. The decision records in detail the evidence of Mr. Yvon

cas-ci les femmes. Je me contenterai d'adopter le vocabulaire du *Rapport de la Commission sur l'égalité en matière d'emploi* (1984), dont l'auteur est le juge Rosalie Abella (ci-après le rapport Abella), et de désigner de tels programmes sous le nom de «programmes d'équité en matière d'emploi».

Action Travail des Femmes, un groupe de pression d'intérêt public qui était financé à l'origine par le gouvernement fédéral, mais qui est maintenant constitué en société et assure son propre financement, prétend que le Canadien National s'est rendu coupable d'actes discriminatoires en matière d'embauche et de promotion, contrairement à l'art. 10 de la Loi, en refusant aux femmes la possibilité d'occuper certains emplois manuels non spécialisés. L'article 10 de la Loi porte:

10. Constitue un acte discriminatoire le fait pour l'employeur ou l'association d'employés

a) de fixer ou d'appliquer des lignes de conduite, ou

b) de conclure des ententes, touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel

pour un motif de distinction illicite, d'une manière susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus.

I

Les faits

Un tribunal des droits de la personne a été constitué en juillet 1981 pour examiner la plainte déposée par Action Travail des Femmes. Voici le texte de cette plainte:

[TRADUCTION] A.T.F. a des motifs raisonnables de croire que le CN de la région du St-Laurent a fixé ou appliqué des lignes de conduite susceptibles d'annuler les chances d'emploi ou d'avancement d'individus pour le motif qu'il s'agit de personnes de sexe féminin.

La plainte n'est pas le fait d'une seule plaignante ni même de plusieurs plaignantes individuelles; il s'agit d'une plainte de discrimination systémique dont fait l'objet un groupe identifiable.

Le tribunal a entendu les témoignages de 50 personnes au cours de 33 jours d'audience et a finalement rendu une décision de quelque 175 pages. La décision rapporte en détail le témoi-

Masse, Vice-President of the St. Lawrence Region of Canadian National. Mr. Masse spoke of a study, apparently prepared in 1974 at the request of the then President of CN, Mr. Robert Bandeen, entitled "Canadian National Action Programs—Women", and commonly referred to as the Boyle/Kirkman Report. The Report identified three problems:

1. Lack of Definitive Executive Management Commitment

Top management's interest on the issue of women has not been communicated effectively nor have direct actions demonstrated their concern. The majority of managers are understandably perplexed regarding the current and future role of women within CN. CN managers across the system await a definitive policy statement with specific action programs. Executive management must commit themselves to begin to encourage their subordinates to change the environment to one which truly provides equal opportunity. They must convince both men and women that a special emphasis program is needed to utilize the talents of CN women. These actions must begin now in order to assure CN of a new, qualified management resource in the future.

2. Traditional beliefs by managers and women in the many negative myths and stereotypes about working women

Our interviews revealed a disturbing degree of negative attitudes resulting in obvious discriminatory behavior. For example, the majority of women seeking employment are channeled into secretarial positions, whereas, men are guided toward clerical positions which most often lead to promotions to higher level clerical jobs and/or middle management positions. In job bidding situations, women are frequently strongly discouraged from bidding on traditional men's job. Until the negative environment that these attitudes create is improved, equal opportunity for women will never occur.

3. Current personnel policies and procedures

These policies are limited and ineffective as they relate to the majority of women at CN.

The Report revealed that in the early 1970s women workers comprised one third of the total

gnage de M. Yvon Masse, vice-président de la région du St-Laurent du Canadien National. Monsieur Masse a parlé d'une étude, qui aurait été rédigée en 1974 à la demande du président du CN de l'époque, M. Robert Bandeen, intitulée «Canadian National Action Programs—Women», communément désignée sous le nom de rapport Boyle-Kirkman. Le rapport a reconnu l'existence de trois problèmes:

[TRADUCTION]

1. Absence d'engagement définitif de la part des cadres supérieurs

L'intérêt des cadres supérieurs pour la question des femmes ne s'est pas traduit dans les faits ni par aucune action directe. La majorité des cadres reste, on le comprendra, perplexe face au rôle actuel et futur des femmes au CN. Les cadres du CN, à tous les échelons, attendent encore l'énoncé d'une politique définitive comportant des programmes d'action spécifiques. Les cadres supérieurs doivent s'engager à encourager leurs subordonnés à modifier l'environnement de façon à ce qu'il y ait égalité réelle des chances. Ils doivent convaincre tant les hommes que les femmes de la nécessité d'un programme mettant spécialement l'accent sur l'utilisation des talents des femmes au CN. Ces actions doivent commencer dès maintenant si l'on veut assurer au CN de nouvelles ressources qualifiées en gestion pour l'avenir.

2. Persistance au sein de la direction et chez les femmes d'un grand nombre de mythes et de stéréotypes négatifs traditionnels au sujet des femmes au travail

Nos entrevues ont révélé un nombre troublant d'attitudes négatives à la source d'un comportement discriminatoire évident. Par exemple, la majorité des femmes qui sollicitent un emploi sont dirigées vers des postes de secrétaire, alors que les hommes sont guidés vers des emplois de bureau qui conduisent la plupart du temps à des promotions à des postes plus élevés et à des postes de cadres intermédiaires. En matière de postulation, les femmes sont souvent fortement découragées de solliciter des emplois traditionnellement réservés aux hommes. Tant que l'environnement négatif que ces attitudes créent ne sera pas amélioré, l'égalité des chances pour les femmes ne pourra se réaliser.

3. Politiques et méthodes actuelles relatives au personnel

Ces politiques sont limitées et inefficaces pour ce qui est de la majorité des femmes au CN.

Le rapport révèle qu'au début des années 1970, le tiers de la main-d'œuvre totale du Canada était

labour force in Canada, holding 14.3 per cent of managerial positions, 41.2 per cent of professional and technical positions, and 72 per cent of all clerical jobs nation-wide. In contrast to the national employment statistics, women constituted approximately 4 per cent of the total CN work force and held less than 0.5 per cent of the senior management jobs.

The attitudes of male personnel at CN towards women were reviewed extensively in the Report. Examples follow:

1. "Women are generally disruptive to the work-force."
2. "Women aren't tough enough to handle supervisory jobs. They fail miserably under pressure."
3. "The best jobs for women are coach cleaners—That's second nature to them."
4. "One big problem adding women to train crews would be policing the morals in the cabooses."
5. Work in the yards is too physically demanding. The weather is too harsh."
6. "Women cannot do the physical aspects of a CN conductor's job. There's too much handling of drunks, transients and undesirables."
7. "Women have no drive, no ambition, no initiative."
8. "A woman can't combine a career and family responsibilities."
9. "The 'old boy network' for promotions is very strong at CN. This naturally inhibits women's advancement."
10. "My department is all male—they don't want a woman snooping around."
11. "Railroading is a man's sport—there's no room for women."
12. "Unless I'm forced, I won't take a woman."

The Report also included a small number of comments from male CN employees which tended to

composé de femmes qui étaient titulaires de 14,3 pour 100 des postes de direction, de 41,2 pour 100 des postes de techniciens et de professionnels et de 72 pour 100 des postes de commis de bureau dans l'ensemble du pays. Comparativement à ces statistiques nationales en matière d'emploi, les femmes ne représentaient qu'environ 4 pour 100 de la main-d'œuvre totale du CN et n'y détenaient que moins de 0,5 pour 100 des postes de cadres supérieurs.

Le rapport étudie en profondeur les attitudes du personnel masculin du CN envers les femmes. Voici quelques exemples:

[TRADUCTION]

1. «Les femmes ont une influence néfaste sur la main-d'œuvre.»
2. «Les femmes n'ont pas la force de caractère suffisante pour occuper des postes de surveillance. Elles cèdent misérablement sous l'effet de la contrainte.»
3. «Les meilleurs emplois pour les femmes consistent à nettoyer les wagons, c'est chez elles une seconde nature.»
4. «L'un des gros problèmes que susciterait la présence de femmes dans les équipages de trains serait de veiller au maintien des bonnes mœurs dans les fourgons de queue.»
5. «Le travail dans les gares de triage est trop exigeant physiquement. Le climat est trop dur.»
6. «Les femmes ne peuvent assumer les aspects physiques du métier de conducteur au CN. Il y a trop d'ivrognes, de vagabonds et d'indésirables dont il faut s'occuper.»
7. «Les femmes manquent de dynamisme, d'ambition, d'initiative.»
8. «Une femme ne peut combiner carrière et responsabilités familiales.»
9. «Le réseau des «vieux copains» pour les promotions est très fort au CN. Cela nuit naturellement à l'avancement des femmes.»
10. «Il n'y a que des hommes dans mon département, ils ne veulent pas de femmes qui s'immisceront dans leurs affaires.»
11. «Les chemins de fer, ça regarde les hommes, il n'y a pas de place pour les femmes.»
12. «À moins qu'on m'y force, je n'accepterai pas de femmes.»

Le rapport comporte aussi un petit nombre d'observations d'employés du CN qui tendent à favori-

favour the participation of women in the CN work force:

1. "Women are a vast, untapped resource we have overlooked until now."
2. "Women are the same as men—as long as they do the job, they should get hired, developed and promoted."
3. "We are guilty of unconscious discrimination against women by never identifying and developing their talents."

Women at CN were very conscious of the generally negative attitude of male supervisors, the Report revealed:

1. "We always hear—'You're taking a job from a man.' "
2. "We're at the mercy of the individual supervisor. If he's against women, we're sunk."
3. "When my Supervisor heard that he had to take two women, you should have heard the uproar he made in front of us."

The Boyle/Kirkman Report concluded with specific recommendations concerning the recruitment of women to CN:

CN needs to adopt a well-planned, aggressive program for the recruitment of women.

The following are some suggested actions which could be included in the recruitment program:

A. Establish numeric objectives by level for the recruitment of women.
B. Train all the personnel recruiters about how to interview women effectively.
C. Develop new avenues for locating women:
   (1) Advertise in women's periodicals
   (2) Work with women's search agencies
   (3) Specify women candidates wanted from all search agencies
   (4) Encourage women referrals from employees
   (5) Identify an individual within Personnel who could provide immediate follow-up on resumes

scer l'intégration des femmes à la main-d'œuvre du CN:

[TRADUCTION]

1. «Les femmes constituent une vaste ressource inexploitée dont nous n'avons pas tenu compte jusqu'à maintenant.»
2. «Les femmes sont comme les hommes, si elles peuvent faire le travail, elles devraient être embauchées, formées et obtenir des promotions.»
3. «Nous nous rendons coupables de discrimination inconsciente envers les femmes en ne cherchant jamais à connaître et à développer leurs talents.»

Les femmes au CN sont très conscientes de l'attitude généralement négative des surveillants; voici ce que le rapport révèle:

[TRADUCTION]

1. «On nous dit toujours: «Vous prenez la place d'un homme.»»
2. «Nous sommes à la merci de notre surveillant. S'il est contre les femmes, nous sommes foutues.»
3. «Lorsque mon surveillant a appris qu'il lui faudrait accepter deux femmes, vous auriez dû entendre la tempête de protestations qu'il a faites devant nous.»

En conclusion, le rapport Boyle-Kirkman fait des recommandations précises concernant le recrutement des femmes au CN:

[TRADUCTION] Il est nécessaire que le CN adopte un programme dynamique et bien planifié de recrutement pour les femmes.

Voici quelques suggestions de mesures qui pourraient être prises dans le cadre de ce programme de recrutement:

A. Fixer des objectifs numériques par niveau de travail pour le recrutement de femmes.
B. Former tous les recruteurs du bureau du personnel sur la façon d'interviewer les femmes efficacement.
C. Mettre au point de nouveaux moyens d'aller chercher des femmes:
   (1) Faire de la publicité dans les périodiques destinés aux femmes
   (2) Coopérer avec les agences de placement pour femmes
   (3) Spécifier que toutes les agences de placement sont invitées à soumettre des candidates
   (4) Encourager la recommandation de femmes par les employés
   (5) Confier spécifiquement à un membre du bureau du personnel la tâche d'assurer le suivi

and other leads regarding potential women candidates. Be prepared to act fast.

In July, 1978 a document entitled "Equal Opportunities Program" was sent to senior managers of the St. Lawrence Region of CN by Mr. Masse, enumerating three overarching objectives with respect to the participation of women in CN:

1. An increase in the total number of female employees at CN;
2. An increase in the number of female management employees;
3. An increase in the number of females in positions for which men only were traditionally hired.

The 1978 document contained a rather general program of action with five elements:

1. Hire female employees;
2. Increase receptiveness to female employees at CN;
3. Support the female employees at CN in their efforts to adapt and progress;
4. Project a public image of a company that is in favour of hiring female employees;
5. Periodically analyse the evolution of female manpower at CN.

It should be noted that these objectives were far less rigorous than those recommended in the CN-commissioned Boyle/Kirkman Report.

In January 1979, CN published a study entitled "Women in CN Status Report" which concluded that, systemically, progress had been slow, and in fact hardly merited being called "progress" at all. In spite of a decrease in the number of men in the CN work force, the number of women as a percentage of the work force had only increased by 1.61 per cent since 1974 when the Boyle/Kirkman Report was prepared. One section of the 1979 review carried this rubric: "Lingering Belief that Men Have First Claim to Jobs".

By February 18, 1982, 155 complaints against CN had been lodged with the Human Rights Commission. In due course, the Commission set up

immédiat aux curriculum vitae et autres renseignements concernant d'éventuelles candidates. Être prêt à agir rapidement.

En juillet 1978, M. Masse a envoyé aux cadres supérieurs de la région du St-Laurent du CN, un document intitulé «Programme possibilités égales» qui énumérait trois objectifs généraux concernant la participation des femmes au CN:

1. hausser le nombre total de femmes à l'emploi du CN;
2. hausser le nombre de femmes cadres;
3. hausser le nombre de femmes dans des emplois traditionnellement réservés aux hommes.

Le document de 1978 énonçait un programme d'action plutôt général en cinq points:

1. Engager du personnel féminin;
2. Approfondir notre attitude réceptive envers les femmes au travail au CN;
3. Supporter les femmes à l'emploi du CN dans leur adaptation et efforts de progrès;
4. Donner à la société l'image d'une entreprise favorable à l'embauche des femmes;
5. Analyser périodiquement l'évolution de la main-d'œuvre féminine au CN.

On remarquera que ces objectifs étaient beaucoup moins rigoureux que les recommandations du rapport Boyle-Kirkman qui a fait suite à l'étude commandée par le CN.

En janvier 1979, le CN a publié une étude intitulée «Women in CN Status Report» qui concluait que, dans l'ensemble, les progrès avaient été lents et en fait ne méritaient guère d'être qualifiés de «progrès». En dépit de la diminution du nombre d'hommes dans la main-d'œuvre du CN, le nombre de femmes, en tant que pourcentage de la main-d'œuvre, ne s'était accru que de 1,61 pour 100 depuis 1974, c'est-à-dire depuis le moment où le rapport Boyle-Kirkman avait été rédigé. Une section de l'étude de 1979 portait le titre suivant: [TRADUCTION] «Persistance de la conviction que les hommes doivent avoir la priorité en matière d'emploi».

Le 18 février 1982, 155 plaintes contre le CN avaient été déposées devant la Commission des droits de la personne. Finalement, la Commission

the Human Rights Tribunal to consider the "class" complaint set out above.

Thirteen women testified before the Tribunal as to their experience as candidates or employees with CN. One of the witnesses, Ms. Carla Nemeroff, detailed some of the problems she faced as the only woman in her work place:

They told me they did not want me there. How did they behave? Well, they tried to confuse me. Instead of telling me things like two or three moves at a time, which is all you have to do, they would tell me about 15 moves in a row, like talking really quickly, using the numbers, like this "take a locomotive, put it there, go here, go there", you know, like really—so that I would get confused, or they would tell me to jump off the train at a switch, I would get off at the switch, and they would leave me at the switch, and they would not tell me what they were doing, they would leave me there, or they would just go off on break, and they would not tell me they were going on break. Sometimes they would leave me at a switch, or at an engine. They would say "go release the brakes on that engine and wait for my signal"; I would never hear the signal, they would go off and eat lunch and leave me there. They used to do that all the time.

According to the testimony, women were subjected to extremely unpleasant treatment by their male colleagues:

Another time, a few guys—we were on break sort of hanging around outside because it was warm out; a few guys jumped me and pretended they were going to rape me. I found that quite offensive.

Then, another time, I was bringing a train into the shop—you see, I was not a cleaner any more; I was signalling, and I was bringing a train into the shop. The boss yelled out something obscene to distract me from my work, and it was very dangerous.

By the end of 1981, there were only 57 women in "blue-collar" posts in the St. Lawrence Region of CN, being a mere 0.7 per cent of the blue-collar labour force in the region. There were 276 women occupying unskilled jobs in all the regions where CN operated, again amounting to only 0.7 per cent of the unskilled work force. By contrast, women represented, in 1981, 40.7 per cent of the total Canadian labour force. At the time, women constituted only 6.11 per cent of the total work force

a constitué un tribunal des droits de la personne pour examiner la plainte «collective» précitée.

Treize femmes sont venues raconter devant le tribunal leurs expériences comme candidates ou employées du CN. L'une des témoins, Mlle Carla Nemeroff, a exposé en détail certains des problèmes auxquels elle a dû faire face en tant qu'unique femme dans son milieu de travail:

[TRADUCTION] Ils m'ont dit qu'ils ne voulaient pas de moi. Comment se sont-ils comportés? Et bien, ils ont essayé de m'embrouiller. Au lieu de m'apprendre deux ou trois choses à la fois, ce qui est tout ce que vous avez à faire, ils m'enseignaient 15 manœuvres de suite, comme en parlant très rapidement, en utilisant des chiffres, comme «prenez une locomotive, amenez-la là-bas, venez ici, allez là-bas.» Vous comprenez? Vraiment! Pour m'embrouiller. Ou ils me disaient de sauter du train à un poste d'aiguillage; je descendais à l'aiguillage et ils me laissaient là. Ils ne me disaient pas ce qu'ils faisaient, ils me laissaient là, ou ils partaient tout simplement à la pause sans me dire où ils allaient. Parfois, ils me laissaient à un poste d'aiguillage ou près d'une locomotive. Ils disaient «allez relâcher les freins de cette locomotive et attendez mon signal». Le signal n'arrivait jamais; ils s'en allaient et ils allaient manger et ils me laissaient là. Ils faisaient cela tout le temps.

D'après ce témoignage, les femmes faisaient l'objet d'un traitement extrêmement déplaisant de la part de leurs collègues masculins.

[TRADUCTION] Une autre fois, quelques gars—c'était la pause et nous flânions en quelque sorte à l'extérieur parce qu'il faisait chaud—quelques gars m'ont sauté dessus en faisant semblant qu'ils allaient me violer. J'ai trouvé cela des plus offensant.

Puis, une autre fois, j'amenais un train à l'atelier—vous voyez, je n'étais plus préposée au nettoyage; j'étais à la signalisation et je faisais entrer un train à l'atelier. Le chef m'a crié quelque chose d'obscène pour me distraire de mon travail, et c'était très dangereux.

À la fin de 1981, seulement 57 femmes occupaient des emplois manuels dans la région du St-Laurent du CN, ce qui représentait à peine 0,7 pour 100 des travailleurs manuels de cette région. Il y avait 276 femmes qui occupaient des emplois non spécialisés dans l'ensemble des régions où le CN exerce ses activités, ce qui représentait ici encore à peine 0,7 pour 100 de la main-d'œuvre non spécialisée. En 1981, par contre, les femmes représentaient 40,7 pour 100 de l'ensemble de la

of CN. Among blue-collar workers in Canada, 13 per cent were women during the period January to May 1982, yet female applicants for blue-collar jobs at CN constituted only 5 per cent of the total applicant pool.

The markedly low rate of female participation in so-called "non-traditional" occupations at Canadian National, namely occupations in which women typically have been significantly under-represented considering their proportion in the work force as a whole, was not fortuitous. The evidence before the Tribunal established clearly that the recruitment, hiring and promotion policies at Canadian National prevented and discouraged women from working on blue-collar jobs. The Tribunal held, a finding not challenged in this Court, that CN had not made any real effort to inform women in general of the possibility of filling non-traditional positions in the company. For example, the evidence indicated that Canadian National's recruitment program with respect to skilled crafts and trade workers was limited largely to sending representatives to technical schools where there were almost no women. When women presented themselves at the personnel office, the interviews had a decidedly "chilling effect" on female involvement in non-traditional employment; women were expressly encouraged to apply only for secretarial jobs. According to some of the testimony, women applying for employment were never told clearly the qualifications which they needed to fill the blue-collar job openings. Another hurdle placed in the way of some applicants, including those seeking employment as coach cleaners, was to require experience in soldering. Moreover, the personnel office did not itself do any hiring for blue-collar jobs. Instead, it forwarded names to the area foreman, and Canadian National had no means of controlling the decision of the foreman to hire or not to hire a woman. The

main-d'œuvre au Canada. À l'époque, les femmes ne représentaient que 6,11 pour 100 de l'ensemble de la main-d'œuvre du CN. Au cours de la période comprise entre janvier et mai 1982, les femmes constituaient 13 pour 100 de la main-d'œuvre ouvrière au Canada et pourtant les candidates pour des emplois manuels au CN ne représentaient que 5 pour 100 du nombre total de candidats.

Ce taux remarquablement faible de la participation féminine dans les métiers dit «non traditionnels» au Canadien National, notamment dans des métiers où les femmes ont habituellement été fort sous-représentées compte tenu du pourcentage de la main-d'œuvre globale qu'elles représentent, n'est pas fortuit. La preuve dont le tribunal a été saisi établit clairement que les politiques de recrutement, d'embauche et de promotion du Canadien National ont empêché et découragé les femmes d'occuper des emplois manuels. Le tribunal en est venu à la conclusion, qui n'a pas été contestée devant cette Cour, que le CN n'avait pas vraiment fait d'efforts pour informer les femmes en général de la possibilité d'occuper des emplois non traditionnels au sein de la compagnie. Par exemple, il ressort de la preuve que le programme de recrutement du Canadien National dans le cas des corps de métiers était largement limité à l'envoi de représentants dans les écoles techniques où il n'y avait presque aucune femme. Lorsque des femmes se présentaient au bureau du personnel, les entrevues avaient décidément un «effet de douche froide» sur la participation de femmes dans des secteurs non traditionnels; on encourageait expressément les femmes à ne postuler que des emplois de secrétaire. D'après certains témoignages, on ne disait jamais clairement aux femmes qui sollicitaient un emploi quelles étaient les conditions à remplir pour obtenir les emplois manuels disponibles. Un autre obstacle imposé à certaines candidates, y compris celles sollicitant un poste de préposé au nettoyage des wagons, consistait à exiger une expérience de la soudure. En outre, le bureau du personnel ne s'occupait pas lui-même de l'embauche de travailleurs manuels. Au lieu de cela, il faisait parvenir les noms des candidats au contremaître du secteur et ainsi le Canadien National n'avait aucun moyen de contrôler la décision du contremaître d'engager ou non une femme. Il est

evidence indicated that the foremen were typically unreceptive to female candidates.

II

The Earlier Judgments

1. *The Human Rights Tribunal*

The Human Rights Tribunal concluded that it was essential to impose upon CN a special employment program if the proportion of women in blue-collar jobs at CN was to mirror even roughly the proportion of women in similar jobs across the country, namely 13 per cent. It should be stressed that this goal appears to be modest considering that the 13 per cent participation rate of women in blue-collar jobs across Canada at the time arguably constituted a significant under-representation of women in that segment of the labour market.

For greater clarity, the Tribunal stated that its objective was simply to increase to 13 per cent the female work force in non-traditional jobs at CN in the St. Lawrence Region. To that end, the Tribunal made the following order:

ORDER

FOR THE ABOVE REASONS this Tribunal, concluding that there are in the St Lawrence Region of CN certain hiring policies or practices that are discriminatory for the purpose of section 10 of the Canadian Human Rights Act, and that these practices are not based on *bona fide* occupational requirements for the purpose of section 14 of the said Act, makes the following order, according to the powers conferred upon it by section 41:

PERMANENT MEASURES FOR NEUTRALIZATION OF CURRENT POLICIES AND PRACTICES

1. CN shall immediately discontinue the use of the Bennett test for entry level positions other than apprentice positions, and, within one year of the time of this decision and for the same positions, shall discontinue all mechanical aptitude tests that have a negative impact on

ressorti de la preuve que les contremaîtres étaient habituellement défavorables aux femmes candidates.

II

Les jugements antérieurs

1. *Le tribunal des droits de la personne*

Le tribunal des droits de la personne a conclu qu'il était essentiel d'imposer au CN un programme spécial d'emploi si l'on voulait que le pourcentage des femmes détenant des emplois manuels au CN reflète au moins approximativement le pourcentage de celles détenant des emplois similaires dans l'ensemble du pays, soit 13 pour 100. On devrait souligner que cet objectif semble modeste si l'on considère que ce 13 pour 100 de femmes cols bleus dans l'ensemble du Canada à l'époque constituait certes une forte sous-représentation des femmes dans ce secteur du marché du travail.

Pour plus de clarté, le tribunal a déclaré que son objectif consistait simplement à hausser jusqu'à 13 pour 100 la main-d'œuvre féminine occupant des postes non traditionnels au CN dans la région du St-Laurent. À cette fin, le tribunal a rendu l'ordonnance suivante:

ORDONNANCE

POUR LES MOTIFS PRÉCITÉS, ce tribunal, concluant à l'existence au CN, dans la région du St-Laurent, de certaines pratiques ou lignes de conduite d'embauche qui sont discriminatoires au sens de l'article 10 de la Loi canadienne sur les droits de la personne, et concluant de plus que ces lignes de conduite ne sont pas fondées sur des exigences professionnelles normales au sens de l'article 14 de ladite loi, rend l'ordonnance suivante, selon les pouvoirs qui lui sont conférés par l'article 41 de ladite loi:

MESURES PERMANENTES DE NEUTRALISATION DE POLITIQUES ET PRATIQUES COURANTES

1. Le CN devra cesser immédiatement l'utilisation du test Bennett pour les postes d'entrée autres que les postes d'apprentis de même que, dans un délai d'un an à compter de la présente décision et à l'endroit des mêmes postes, cesser l'utilisation de tous tests d'aptitude méca-

women and are not warranted by the aptitude requirements of the positions being applied for.

2. CN shall immediately discontinue all practices pursued by foremen or others in which female candidates undergo physical tests not required of male candidates, mainly the test which consists of lifting a brakeshoe with one arm.

3. CN shall immediately discontinue the requirement for welding experience for all entry level positions, with the exception of apprentice positions.

4. CN shall modify its system for the dissemination of information on positions available. More specifically, within the period of one year it shall take the most suitable measures to inform the general public of all positions available.

5. CN shall immediately change the reception practices in its employment office to give female candidates complete, specific and objective information on the real requirements of non-traditional positions.

6. CN shall immediately modify its system of interviewing candidates; in particular, it shall ensure that those responsible for conducting such interviews are given strict instructions to treat all candidates in the same way, regardless of their sex.

7. Should CN wish to continue to grant foremen the power to refuse to hire persons already accepted by the employment office, it shall immediately issue a specific directive to the effect that no one shall be rejected on the basis of sex.

8. CN shall continue to implement the measures already adopted in its directive on sexual harassment with a view to eliminating from the workplace all forms of sexual harassment and discrimination.

SPECIAL TEMPORARY MEASURES

1. Within the period of one year and until the percentage of women in non-traditional jobs at CN has reached 13, CN shall undertake an information and publicity campaign inviting women in particular to apply for non-traditional positions.

2. Whereas we feel that the process of change in CN's St Lawrence Region must be accelerated and preferential measures for women are required;

nique qui ont un impact négatif pour les femmes sans être justifiés par les aptitudes requises pour les emplois postulés par les candidates.

2. Le CN devra cesser immédiatement toute pratique des contremaîtres ou de tout autre responsable visant à exiger des candidates féminines des tests physiques non imposés aux candidats masculins et notamment le test consistant à soulever d'une main une mâchoire de freins.

3. Le CN devra cesser immédiatement d'exiger des candidats une expérience déjà acquise en soudure pour tous les postes d'entrée, à l'exception des postes d'apprentis.

4. Le CN devra modifier son système de diffusion des renseignements relatifs aux emplois disponibles. Plus particulièrement, il devra, dans un délai d'un an, prendre les moyens d'information et de publicité les plus appropriés auprès du public en général pour annoncer tout poste disponible.

5. Le CN devra modifier dès maintenant les pratiques d'accueil du bureau d'embauche pour donner aux candidates féminines des informations complètes, précises et objectives sur les exigences réelles des emplois non traditionnels.

6. Le CN devra modifier dès maintenant son système d'entrevue des candidats; plus particulièrement, il devra veiller à ce que les responsables de ces entrevues aient de strictes instructions visant à traiter de la même façon tous les candidats, sans égard à leur sexe.

7. Dans la mesure où le CN voudrait continuer d'accorder aux contremaîtres le pouvoir de refuser d'embaucher des personnes déjà acceptées par le bureau d'embauche, le CN devra émettre dans l'immédiat une directive précise à leur endroit, à l'effet que nul ne peut être refusé pour des motifs de discrimination sexuelle.

8. Le CN devra poursuivre les mesures déjà adoptées dans le cadre de sa directive sur le harcèlement sexuel visant à éliminer du lieu de travail toute forme de harcèlement et de discrimination sexuels.

MESURES SPÉCIALES TEMPORAIRES

1. Le CN devra, dans un délai d'un an et jusqu'à ce que le pourcentage de femmes dans les emplois non traditionnels au CN ait atteint 13%, entreprendre une campagne d'information et de publicité pour inviter en particulier les femmes à poser leur candidature à des postes non traditionnels.

2. Considérant qu'il nous apparaît que le processus de changement dans la région du St-Laurent au CN doit être accéléré et que des mesures préférentielles visant les femmes s'imposent.

—Whereas the employer must be given a certain measure of flexibility in view of the uncertainty surrounding the question of how many qualified female workers are available;

—Whereas ideally, in order to create as soon as possible a critical mass that would allow the system to continue to correct itself, we would be inclined to require over the coming years, until the objective of 13% is achieved, the hiring of women to fill at least one non-traditional position out of every three;

Whereas for the sake of giving more latitude and flexibility to CN in the methods employed to achieve the desired objective, we feel that it would be more prudent to require a ratio lower than one in three for the hiring of women for non-traditional positions at CN;

ACCORDINGLY, Canadian National is ordered to hire at least one woman for every four non-traditional positions filled in the future. This measure shall take effect only when CN employees who have been laid off but who are subject to recall have been recalled by CN, but not before one year has elapsed from the time of this decision, in order to give CN a reasonable length of time to adopt measures to comply with this order. When it is in effect, daily adherence to the one-in-four ratio will not be required, in order to give the employer more choice in the selection of candidates. However, it must be complied with over each quarterly period until the desired objective of having 13% of non-traditional positions filled by women is achieved.

3. Within a period of two months of this decision, CN shall appoint a person responsible with full powers to ensure the application of the special temporary measures and to carry out any other duties assigned to him by CN to implement this decision.

SUBMISSION OF DATA

CN SHALL SUBMIT TO THE COMMISSION:

1. Within 20 days of the introduction of the above-mentioned special temporary measures, an initial inventory of the number of blue-collar workers in the CN's St Lawrence Region, by sex and by position.

2. Within 20 days of the end of each quarterly period after the above-mentioned special temporary measures have begun to be applied, and for the entire duration of

Considérant par ailleurs qu'il faut laisser à l'employeur une certaine flexibilité vu l'incertitude devant laquelle nous nous trouvons sur l'ampleur du bassin de main-d'œuvre féminine qualifiée disponible.

Considérant qu'idéalement, pour créer le plus tôt possible une masse critique qui permettrait au système de continuer à se corriger par lui-même, nous serions enclins à exiger qu'au cours des prochaines années, et jusqu'à ce que l'objectif de 13% soit atteint, au moins un poste non traditionnel sur trois soit confié, à l'embauche, à une femme.

Considérant cependant qu'afin de donner plus de latitude et de flexibilité au CN dans les moyens à prendre pour atteindre l'objectif désiré, il nous apparaît plus prudent de fixer un nombre minimal d'embauche féminine plus faible qu'un sur trois des postes non traditionnels à être comblés au CN dorénavant.

EN CONSÉQUENCE, il est ordonné au Canadien National d'embaucher au moins une femme sur quatre postes non traditionnels à être comblés à l'avenir. Cette mesure n'entrera en vigueur que lorsque les employés du CN actuellement mis à pied mais sujets à rappel auront été rappelés par le CN, mais, dans tous les cas, pas avant l'expiration d'un délai d'un an à compter de la présente décision, afin de donner au CN un délai raisonnable pour adopter les mesures nécessaires pour se conformer à cette ordonnance. Une fois en vigueur, la proportion d'un sur quatre n'aura pas à être respectée quotidiennement, ce afin de permettre à l'employeur un meilleur choix dans la sélection des candidats. Elle devra cependant être respectée dans l'ensemble de chaque période trimestrielle, jusqu'à ce que l'objectif désiré de 13% de femmes dans les postes non traditionnels soit atteint.

3. Dans un délai de deux mois à compter de la présente décision, le CN devra nommer un responsable avec pleins pouvoirs pour assurer la mise en vigueur des mesures spéciales temporaires et réaliser tout autre mandat qui pourrait lui être confié par le CN relativement à la mise en œuvre de la présente décision.

PRODUCTION DE DONNÉES

LE CN DEVRA SOUMETTRE À LA COMMISSION:

1. Dans les vingt (20) jours suivant la mise en application des mesures spéciales temporaires susdites, un relevé initial du nombre d'employés «cols bleus» dans la région du St-Laurent au CN, par sexe et par fonction.

2. Dans les vingt (20) jours suivant la fin de chaque période trimestrielle à compter de la mise en application des mesures spéciales temporaires susdites et pendant

the said measures, after forwarding a copy to ATF, a report containing:

(a) a list indicating the name, sex, title and duties, date hired and employment sector of every person hired in the St Lawrence Region during the previous quarter;

(b) a detailed statement of the efforts made by CN to recruit female candidates for non-traditional positions during the previous quarter;

(c) a breakdown, by sex, of: the total number of persons who applied for non-traditional positions at CN during the previous quarter; and the total number of persons who completed, underwent or failed every test or written examination to fill a non-traditional position. This list shall include the score and rank of every person who passed the test or examination;

(d) the name, sex and changes in titles and duties, or changes in status of every employee hired for non-traditional positions after the special temporary measures come into force.

3. A statement giving the name, official title and date of appointment of the person in charge of applying the above-mentioned special temporary measures, within twenty days of his or her appointment.

It will be observed that the first part of the Order required CN to cease certain discriminatory hiring and employment practices and to alter others; the second part set a goal of 13 per cent female participation in the targeted job positions, and established a requirement to hire at least one woman to fill every four job openings until that goal was reached; and the third part required the filing of periodic reports with the Commission.

toute la durée desdites mesures, après en avoir transmis une copie à ATF, un rapport comprenant:

a) une liste indiquant les noms, sexe, titres et fonctions, date d'embauche et secteur de travail de toute personne embauchée dans la région du St-Laurent pendant le trimestre précédent;

b) une déclaration détaillée faisant état des efforts entrepris par le CN pour recruter des candidates féminines dans des postes non traditionnels pendant le trimestre précédent;

c) le nombre total de personnes ayant posé leur candidature à des postes non traditionnels au CN pendant le trimestre précédent, par sexe; le nombre total de personnes ayant complété, passé ou échoué tout test ou examen écrit pour fins d'embauche à un poste non traditionnel. Cette liste devra comprendre les résultats et le rang de toute personne ayant réussi le test ou examen;

d) les noms, sexe et tous changements de titres et fonctions, ou changement de statut des employés embauchés à des postes non traditionnels après l'entrée en vigueur des mesures spéciales temporaires.

3. Dans les vingt (20) jours suivant sa nomination, une déclaration indiquant le nom, le titre officiel et la date de nomination du responsable chargé de l'application des mesures temporaires spéciales susdites.

On remarquera que la première partie de l'ordonnance enjoint au CN de mettre fin à certaines pratiques discriminatoires en matière d'embauche et d'emploi et d'en modifier d'autres; la seconde partie fixe à 13 pour 100 le pourcentage cible de femmes dans les postes visés et oblige à embaucher au moins une femme pour combler un poste vacant sur quatre jusqu'à ce que cet objectif soit atteint; enfin, la troisième partie exige le dépôt de rapports périodiques auprès de la Commission.

2. *The Federal Court of Appeal*

Canadian National made an application to the Federal Court of Appeal under s. 28 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, to review and set aside the Decision of the Tribunal on the following grounds:

1. That the Tribunal appointed by the Canadian Human Rights Commission erred in law by basing its Decision on erroneous findings of fact, made without regard for the material before it. Such findings are contrary to, and unsupported by the evidence.

2. *La Cour d'appel fédérale*

Le Canadien National s'est fondé sur l'art. 28 de la *Loi sur la Cour fédérale*, S.R.C. 1970 (2e Supp.), chap. 10, pour demander à la Cour d'appel fédérale d'examiner et d'annuler la décision du tribunal sur la foi des moyens suivants:

[TRADUCTION]

1. Le tribunal constitué par la Commission canadienne des droits de la personne a commis une erreur de droit en fondant sa décision sur des constatations de fait erronées qui ne tiennent aucun compte des pièces dont il était saisi. Ces constatations sont contraires à la preuve soumise qui ne les étaye pas.

2. That the Tribunal appointed by the Canadian Human Rights Commission erred in law and exceeded its jurisdiction by imposing upon your Applicant a specific and detailed program containing mandatory quotas to redress alleged discriminatory practices, contrary to Section 41 of the Canadian Human Rights Act.

3. That the Tribunal appointed by the Canadian Human Rights Commission erred in law and exceeded its jurisdiction by ordering that your Applicant carry out said program without consultation with the Canadian Human Rights Commission as required by Section 41(2)(a) of the Canadian Human Rights Act.

2. Le tribunal constitué par la Commission canadienne des droits de la personne a commis une erreur de droit et a outrepassé sa compétence en imposant à la requérante un programme précis et détaillé comportant des quotas obligatoires pour remédier aux actes discriminatoires allégués, contrairement à l'art. 41 de la Loi canadienne sur les droits de la personne.

3. Le tribunal constitué par la Commission canadienne des droits de la personne a commis une erreur de droit et a outrepassé sa compétence en ordonnant à la requérante de mettre en œuvre ledit programme sans consulter la Commission canadienne des droits de la personne, comme le requiert l'al. 41(2)a) de la Loi canadienne sur les droits de la personne.

In fact, both before the Federal Court of Appeal and before this Court, issue was joined primarily on the second ground of appeal, the jurisdiction of the Tribunal under s. 41(2)(*a*) of the *Canadian Human Rights Act* to make the impugned order.

En fait, tant devant la Cour d'appel fédérale que devant nous, la contestation a été liée principalement quant au second moyen d'appel, soit la compétence du tribunal, en vertu de l'al. 41(2)*a*) de la *Loi canadienne sur les droits de la personne*, pour rendre l'ordonnance contestée.

Section 41(2) reads:

41. (1) ...

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(*a*) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;

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

(*c*) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

(*d*) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facili-

Le paragraphe 41(2) porte:

41. (1) ...

(2) À l'issue de son enquête, le tribunal qui juge la plainte fondée peut, sous réserve du paragraphe (4) et de l'article 42, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire

a) de mettre fin à l'acte et de prendre des mesures destinées à prévenir les actes semblables, et ce, en consultation avec la Commission relativement à l'objet général de ces mesures; celles-ci peuvent comprendre l'adoption d'une proposition relative à des programmes, des plans ou des arrangements spéciaux visés au paragraphe 15(1);

b) d'accorder à la victime, à la première occasion raisonnable, les droits, chances ou avantages dont, de l'avis du tribunal, l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des pertes de salaire et des dépenses entraînées par l'acte; et

d) d'indemniser la victime de la totalité, ou de la fraction qu'il fixe, des frais supplémentaires causés, pour recourir à d'autres biens, services, installations

ties or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

Hugessen J. allowed the application and set aside part of the Tribunal's Order, [1985] 1 F.C. 96. Insofar as the Tribunal's findings of discrimination were concerned, Hugessen J. was satisfied that no ground had been shown which would justify intervention by the Court under the provisions of s. 28 of the *Federal Court Act*. Likewise, he was not persuaded that the Tribunal committed any excess of jurisdiction in Parts 1 and 3 of the Order under review.

The only part of the Order which gave him concern was the "Special Temporary Measures" section contained in Part 2 and, in particular, paragraph 2 thereof, which imposed a hiring goal of 25 per cent on CN until such time as the goal of 13 per cent female involvement in the non-traditional work force had been achieved.

Justice Hugessen's judgment turned on his interpretation of the words "take measures . . . to prevent" in the English text, and "*prendre des mesures destinées à prévenir*" in the French text of s. 41(2)(*a*). The crux of the judgment, it appears to me, is found in the following short paragraph which draws a sharp and determinative distinction between "prevention" and "cure" (at p. 102):

> The sole permissible purpose for the order is prevention: it is not cure. The text requires that the order look to the avoidance of future evil. It does not allow restitution for past wrongs.

Hugessen J. quoted s. 15(1) of the Act, to which s. 41(2)(*a*) makes reference. It is the subsection which deals expressly with employment equity programs and it reads:

> **15.** (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical

ou moyens d'hébergement, et des dépenses entraînées par l'acte.

Le juge Hugessen a accueilli la demande et annulé en partie l'ordonnance du tribunal: [1985] 1 C.F. 96. En ce qui concernait les constatations de discrimination du tribunal, le juge Hugessen était convaincu qu'on n'avait établi aucun motif justifiant l'intervention de la cour en vertu des dispositions de l'art. 28 de la *Loi sur la Cour fédérale*. De même, on n'a pas réussi à le persuader que le tribunal avait outrepassé sa compétence dans les première et troisième parties de l'ordonnance en cause.

La seule partie de l'ordonnance qui le préoccupait était la section intitulée «Mesures spéciales temporaires» contenue dans la deuxième partie et, notamment, son paragraphe 2, qui impose au CN un objectif d'embauche de 25 pour 100 jusqu'à ce que l'objectif de 13 pour 100 de main-d'œuvre féminine dans des emplois non traditionnels ait été atteint.

L'opinion du juge Hugessen reposait sur son interprétation des termes «prendre des mesures destinées à prévenir» de la version française et «*take measures* [. . .] *to prevent*» de la version anglaise, qui figurent à l'al. 41(2)*a*). On trouve le fondement de son opinion, me semble-t-il, dans le petit paragraphe suivant qui établit une distinction nette et décisive entre «prévention» et «réparation» (à la p. 102):

> Le seul objectif permis que peut viser l'ordonnance est la prévention et non la réparation. Le texte de loi exige de l'ordonnance qu'elle prévienne la répétition d'actes discriminatoires. Il ne permet pas de réparer les préjudices déjà causés.

Le juge Hugessen a cité le par. 15(1) de la Loi, auquel renvoie l'al. 41(2)*a*). C'est ce paragraphe qui traite expressément des programmes d'équité en matière d'emploi; il est ainsi conçu:

> **15.** (1) Ne constitue pas un acte discriminatoire le fait d'adopter ou de mettre en œuvre des programmes ou des plans ou de prendre des arrangements spéciaux destinés à supprimer, diminuer ou prévenir les désavantages que subit ou peut vraisemblablement subir un groupe d'individus pour des motifs fondés directement ou indirectement sur leur race, leur origine nationale ou ethnique, leur couleur, leur religion, leur âge, leur sexe,

handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

Hugessen J. dealt with s. 15(1) by stating that the programs which s. 15(1) protects as non-discriminatory are voluntary in nature; by contrast, the measures which s. 41(2)(*a*) permits are imposed by order of the Tribunal. Section 41(2)(*a*) is limited to prevention in the future whereas s. 15(1) allows "the sins of the fathers to be visited upon the sons". He therefore held that when the Tribunal exercises its power under s. 41 to order the adoption of a program envisaged by s. 15, it can only order that kind of program which will meet the purposive requirements of s. 41. Hugessen J. was willing to concede that the fixing of a goal of 13 per cent women in non-traditional posts in CN in the St. Lawrence Region was a legitimate means of setting a measurable standard against which the achievement of the ultimate purpose of the order could be tested, but he emphasized that the purpose, as required by law, could only be the prevention of future acts of discrimination.

The judge went on to examine the requirement that until the goal was achieved, CN had to hire one woman for each four entries into its unskilled blue-collar labour force. He quoted *inter alia* the following passage from the decision of the Tribunal:

> It will be difficult in the case of CN to remedy the marked disparity resulting from years of discriminatory practices. It is to be hoped that, with time, the imbalance will be reduced. However, it is our view that this will not be possible without the imposition of an affirmative action program.

He concluded (at p. 104):

> There is nothing of prevention in this. The measure imposed is, and is stated to be, a catch-up provision whose purpose can only be to remedy the effects of past discriminatory practices. That purpose is not one which is permitted by section 41.

Hugessen J. confessed to a "certain sense of frustration" in coming to the conclusion that the Tri-

leur situation de famille ou leur handicap physique en améliorant leurs chances d'emploi ou d'avancement ou en leur facilitant l'accès à des biens, des services, installations ou moyens d'hébergement.

Le juge Hugessen a traité le par. 15(1) en disant que les programmes que cette disposition considère comme non discriminatoires sont volontaires par nature; par contre, les mesures que vise l'al. 41(2)*a*) sont imposées par ordonnance du tribunal. L'alinéa 41(2)*a*) se limite à la prévention des actes à venir alors que le par. 15(1) permet de «punir les enfants pour les péchés de leurs pères». Il conclut donc que, lorsque le tribunal exerce le pouvoir que lui confère l'art. 41 d'ordonner l'adoption d'un programme envisagé à l'art. 15, il ne peut ordonner que l'adoption de programmes conformes aux objectifs visés par l'art. 41. Le juge Hugessen était disposé à admettre que le fait de fixer un objectif de 13 pour 100 de femmes dans des postes non traditionnels au CN, pour la région du St-Laurent, constituait un moyen légitime d'établir une norme mesurable permettant de vérifier si l'objectif ultime de l'ordonnance avait été atteint, mais il a souligné que cet objectif, suivant la Loi, ne pouvait être que la prévention de futurs actes discriminatoires.

Il a ensuite examiné l'obligation qui était imposée au CN d'embaucher, jusqu'à ce que cet objectif soit atteint, une femme sur quatre nouveaux employés venant s'ajouter à sa main-d'œuvre manuelle non spécialisée. Il a cité notamment le passage suivant de la décision du tribunal:

> Il sera difficile dans le cas du CN de remédier à la disproportion marquée qui résulte de pratiques suivies depuis des années. Il faut espérer qu'avec le temps, le déséquilibre sera réduit, mais il nous apparaît que la chose ne sera pas possible sans l'imposition d'un programme d'action positive dans le cas qui nous occupe.

Il a conclut en disant ceci (à la p. 104):

> Cela n'a rien à voir avec la prévention. Suivant les mots mêmes du tribunal, la mesure imposée est une mesure de rattrapage dont l'objectif ne peut être que de remédier aux conséquences des actes discriminatoires déjà commis. Or, cet objectif ne fait pas partie de ceux que l'article 41 autorise.

Le juge Hugessen a avoué ressentir «un certain sentiment d'insatisfaction» à conclure que le tribu-

bunal had exceeded its powers in making the order, stating: "On a purely impressionistic basis, neither the goal of 13% nor the imposed hiring quota of 25% strike me as being *per se* unreasonable".

I have dealt at some length with the judgment of Hugessen J. because (i) it is the majority judgment of the Court and (ii) with great respect, I disagree with it. Pratte J., in a short judgment, sided with Hugessen J. in the view that the Tribunal's power was limited to prescribing measures for the purpose of preventing the recurrence of the discriminatory practices which had been found to exist and not to remedy the consequences of past discrimination. Pratte J. would have gone further than Hugessen J., however, and would also have set aside the second and third parts of the Order of the Tribunal. MacGuigan J. wrote a strong and cogent dissent to which I will make reference below, concluding that the Order of the Tribunal was within its jurisdiction under s. 41(2)(*a*). It is a view which I share.

The Attorney General of Canada did not file a factum or make any representations in the proceedings before our Court.

III

Interpreting Human Rights Legislation

Let me emphasize at the outset that the Human Rights Tribunal's findings of fact that the hiring practices of Canadian National in the St. Lawrence Region constituted systemic discrimination are not at issue before this Court. Moreover, the argument that the Human Rights Tribunal lacked jurisdiction because the Commission failed first to consult with CN in breach of s. 41(2)(*a*) was not pursued with great vigour. In my view, the lack of emphasis upon that argument was wise for it holds no merit. The real controversy relates solely to the legality of the remedial order issued by the Human Rights Tribunal.

nal a outrepassé ses pouvoirs en rendant l'ordonnance, disant: «De prime abord, ni l'objectif de 13 %, ni le quota d'embauchage de 25 % ne m'apparaissent, en eux-mêmes, déraisonnables».

J'ai traité assez longuement de l'opinion du juge Hugessen parce que: (i) elle représente l'arrêt des juges formant la majorité de la Cour et (ii), avec beaucoup d'égards, je ne la partage pas. Le juge Pratte, dans une courte opinion, s'est rallié au juge Hugessen en se disant d'avis que le pouvoir du tribunal se limitait à prescrire des mesures destinées à prévenir la récurrence des actes discriminatoires constatés et non de remédier aux conséquences d'actes discriminatoires antérieurs. Toutefois, il serait allé plus loin que le juge Hugessen et aurait aussi annulé les seconde et troisième parties de l'ordonnance du tribunal. Le juge MacGuigan a inscrit une dissidence énergique et convaincante, à laquelle je me référerai plus loin, concluant que l'ordonnance du tribunal était conforme à sa compétence en vertu de l'al. 41(2)*a*). C'est une opinion que je partage.

Le procureur général du Canada n'a pas produit de mémoire et ne s'est pas fait entendre au cours du débat devant cette Cour.

III

L'interprétation de la législation sur les droits de la personne

Qu'il me soit permis, au départ, de souligner que les constatations de fait du tribunal des droits de la personne suivant lesquelles les pratiques d'embauche du Canadien National dans la région du St-Laurent constituent de la discrimination systémique, ne sont pas en cause devant nous. De plus, l'argument portant que le tribunal des droits de la personne n'avait pas compétence parce que la Commission n'a pas consulté le CN, contrairement à l'al. 41(2)*a*), n'a pas été invoqué avec beaucoup de vigueur. À mon avis, on a bien fait de ne pas insister là-dessus car l'argument est sans fondement. Le vrai litige porte uniquement sur la légalité de l'ordonnance réparatrice rendue par le tribunal des droits de la personne.

I do not think the answer to the question posed in this appeal will be found by applying strict grammatical construction to the last twelve words of s. 41(2)(*a*). I say this for at least three reasons. First, such an approach renders meaningless the specific reference back to s. 15(1) contained in s. 41(2)(*a*). Section 15(1) of the Act is designed to save employment equity programs from attack on the ground of "reverse discrimination". If s. 41(2)(*a*) is read to limit the scope of such programs, no effective mandatory employment equity program could be undertaken in any circumstances, and the legislative protection offered to the principle of employment equity would be nullified. Second, in focussing solely upon the limited purposive aspect of s. 41(2)(*a*) itself, the dominant purpose of the *Canadian Human Rights Act* is ignored. Yet, we are not left in the dark as to the purpose of the Act as a whole. The drafters saw fit to include a specific statement of purpose in s. 2:

2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(*a*) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap . . . .

Third, the case-law of this Court, some of which post-dates the judgment of the Federal Court of Appeal in the present proceedings, has a direct bearing on the outcome of this appeal. The Court has spoken on the proper interpretive attitude towards human rights codes and acts.

Je ne pense pas qu'on puisse répondre à la question soulevée dans le présent pourvoi au moyen d'une interprétation grammaticale stricte de l'expression «prévenir les actes semblables» de l'al. 41(2)*a*), et ce, pour au moins trois raisons. En premier lieu, une telle solution fait perdre tout son sens à la référence expresse au par. 15(1) que fait l'al. 41(2)*a*). Le paragraphe 15(1) de la Loi vise à protéger les programmes d'équité en matière d'emploi contre toute contestation pour le motif qu'ils constituent de la «discrimination à rebours». Si l'al. 41(2)*a*) était interprété de façon à limiter la portée de ces programmes, aucun programme d'équité en matière d'emploi obligatoire et efficace ne pourrait être mis en œuvre dans quelques circonstances que ce soit et la garantie législative apportée au principe de l'équité en matière d'emploi se trouverait annulée. En deuxième lieu, en ne s'intéressant qu'à l'aspect limité des objectifs de l'al. 41(2)*a*) lui-même, on oublie le but premier de la *Loi canadienne sur les droits de la personne*. Pourtant, on ne nous a pas laissé dans l'incertitude quant à l'objet général de la Loi. Ses rédacteurs ont jugé bon d'inclure une déclaration d'intention expresse à l'art. 2:

2. La présente loi a pour objet de compléter la législation canadienne actuelle en donnant effet, dans le champ de compétence du Parlement du Canada, aux principes suivants:

a) tous ont droit, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, la situation de famille ou l'état de personne graciée ou, en matière d'emploi, de leurs handicaps physiques;

En troisième lieu, la jurisprudence de cette Cour, dont une partie est postérieure à l'arrêt rendu par la Cour d'appel fédérale en l'espèce, a une incidence directe sur l'issue du présent pourvoi. La Cour s'est prononcée sur l'attitude à adopter quand il s'agit d'interpréter des lois et des codes sur les droits de la personne.

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that 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. See s. 11 of the *Interpretation Act*, R.S.C. 1970, c. I-23, as amended. As Elmer A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87 has written:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, *inter alia*, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness. No doubt, some people who discriminate do so out of wilful ignorance or animus. Many of the first anti-discrimination statutes focussed solely upon the behaviour of such individuals, requiring proof of "intent" to discriminate before imposing any sanctions. See Walter S. Tarnopolsky, *Discrimination and the Law in Canada* (1982), at pp.

La législation sur les droits de la personne vise notamment à favoriser l'essor des droits individuels d'importance vitale, lesquels sont susceptibles d'être mis à exécution, en dernière analyse, devant une cour de justice. Je reconnais qu'en interprétant la Loi, les termes qu'elle utilise doivent recevoir leur sens ordinaire, mais il est tout aussi important de reconnaître et de donner effet pleinement aux droits qui y sont énoncés. On ne devrait pas chercher par toutes sortes de façons à les minimiser ou à diminuer leur effet. Bien que cela puisse sembler banal, il peut être sage de se rappeler ce guide qu'offre la *Loi d'interprétation* fédérale lorsqu'elle précise que les textes de loi sont censés être réparateurs et doivent ainsi s'interpréter de la façon juste, large et libérale la plus propre à assurer la réalisation de leurs objets. Voir l'article 11 de la *Loi d'interprétation*, S.R.C. 1970, chap. I-23 et ses modifications. Comme Elmer A. Driedger l'a écrit à la p. 87 de *Construction of Statutes* (2nd ed. 1983):

> [TRADUCTION] De nos jours, un seul principe ou méthode prévaut pour l'interprétation d'une loi: les mots doivent être interprétés selon le contexte, dans leur acception logique courante en conformité avec l'esprit et l'objet de la loi et l'intention du législateur.

Les objets de la Loi sembleraient tout à fait évidents, compte tenu des termes puissants de l'art. 2. Pour que tous puissent avoir des chances égales d'«épanouissement», la Loi cherche à interdire «les considérations» fondées notamment sur le sexe. C'est l'acte discriminatoire lui-même que l'on veut prévenir. La Loi n'a pas pour objet de punir la faute, mais bien de prévenir la discrimination.

Ce dernier point est important et mérite d'être souligné. Rien n'indique que l'objet de la *Loi canadienne sur les droits de la personne* soit d'attribuer une responsabilité morale ou de la punir. Il ne fait pas de doute que certaines personnes qui établissent des distinctions illicites le font délibérément ou par ignorance volontaire. Parmi les premières lois antidiscriminatoires, beaucoup s'intéressaient uniquement au comportement des personnes de ce genre et exigeaient la preuve de l'«intention» d'établir une distinction illicite pour

109-122. There were two major difficulties with this approach. One semantic problem was a continuing confusion of the notions of "intent" and "malice". The word "intent" was deprived of its meaning in common parlance and was used as a surrogate for "malice". "Intent" was not the simple willing of a consequence, but rather the desiring of harm.

This imputed meaning was coherent in the context of a statute designed to punish moral blameworthiness. However, as the second problem with a fault-based approach was revealed—that moral blame was too limited a concept to deal effectively with the problem of discrimination—an attempt was made by legislatures and courts to cleanse the word "intent" of its moral component. The emphasis upon formal causality was restored and the intent required to prove discrimination became the intent to cause a discriminatory result. The judgment of the Federal Court of Appeal in *Canadian National Railway Co. v. Canadian Human Rights Commission and Bhinder*, [1983] 2 F.C. 531, is an example of this approach (aff'd on different grounds in *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561). The difficulty with this development was that "intent" had become so encrusted with the moral overtones of "malice" that it was often difficult to separate the two concepts. Moreover, the imputation of a requirement of "intent", even if unrelated to moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen. The stated purpose of human rights legislation (in the case of the Canadian Act, to prevent "discriminatory practices") was not fully implemented.

The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in *Insurance Corporation of British Columbia v. Heerspink*,

que puissent être imposées des sanctions. Voir Walter S. Tarnopolsky, *Discrimination and the Law in Canada* (1982), aux pp. 109 à 122. Cette conception soulevait deux difficultés majeures. Il y avait d'abord un problème de sémantique: la confusion permanente entre la notion d'«intention» et celle d'«intention de nuire». Le terme «intention» perdait son sens ordinaire pour devenir synonyme d'«intention de nuire». L'«intention» ne consistait plus simplement à vouloir une conséquence, c'était vouloir nuire.

Le sens attribué était logique dans le contexte d'une loi conçue pour punir la responsabilité morale. Toutefois, avec la révélation du second problème que suscitait une conception basée sur la faute, savoir que le blâme moral était un concept trop limité pour résoudre vraiment la question de la discrimination, les législateurs et les tribunaux ont tenté de dépouiller le terme «intention» de sa connotation morale. L'insistance sur la causalité formelle a été rétablie et l'intention requise pour prouver la discrimination est devenue l'intention d'arriver à un résultat discriminatoire. L'arrêt de la Cour d'appel fédérale *Compagnie des chemins de fer nationaux du Canada c. Commission canadienne des droits de la personne et Bhinder*, [1983] 2 C.F. 531, est un exemple de cette conception (confirmé pour des motifs différents dans l'arrêt *Bhinder c. Compagnie des chemins de fer nationaux du Canada*, [1985] 2 R.C.S. 561). La difficulté que posait ce changement, c'est que l'«intention» s'entourait tellement de la connotation morale d'«intention de nuire» qu'il devenait souvent difficile de séparer les deux concepts. De plus, l'imputation d'une exigence d'«intention», même non liée à la faute morale, ne répondrait pas adéquatement aux nombreux cas où des politiques et pratiques ont un effet discriminatoire, même si cet effet n'a été ni voulu ni prévu. L'objectif arrêté de la législation sur les droits de la personne (qui, dans le cas de la Loi canadienne, est d'empêcher les «actes discriminatoires») n'était pas entièrement réalisé.

Le premier énoncé judiciaire complet de l'attitude à adopter au sujet de l'interprétation de la législation sur les droits de la personne se retrouve dans l'arrêt *Insurance Corporation of British*

[1982] 2 S.C.R. 145, at p. 158, where Lamer J. emphasized that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at p. 156:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

The emphasis upon the "special nature" of human rights enactments was a strong indication of the Court's general attitude to the interpretation of such legislation.

In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, the Court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous Court, McIntyre J. held, at pp. 546-47:

> It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . ., and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary—and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

There can be no doubt that Canadian human rights legislation is now typically drafted to avoid reference to intention. As noted previously, the

Columbia c. Heerspink, [1982] 2 R.C.S. 145, à la p. 158, où le juge Lamer souligne qu'un code des droits de la personne ne doit pas être considéré «comme n'importe quelle autre loi d'application générale, il faut le reconnaître pour ce qu'il est, c'est-à-dire une loi fondamentale.» Ce principe d'interprétation a été précisé davantage par le juge McIntyre, au nom d'une Cour unanime, dans l'arrêt *Winnipeg School Division No. 1 c. Craton*, [1985] 2 R.C.S. 150, à la p. 156:

> Une loi sur les droits de la personne est de nature spéciale et énonce une politique générale applicable à des questions d'intérêt général. Elle n'est pas de nature constitutionnelle, en ce sens qu'elle ne peut pas être modifiée, révisée ou abrogée par la législature. Elle est cependant d'une nature telle que seule une déclaration législative claire peut permettre de la modifier, de la réviser ou de l'abroger, ou encore de créer des exceptions à ses dispositions.

L'accent mis sur la «nature spéciale» des textes législatifs portant sur les droits de la personne constituait une forte indication de l'attitude générale que prendrait la Cour au sujet de l'interprétation de tels textes.

Dans l'arrêt *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536, la Cour énonce explicitement les principes applicables à l'interprétation des lois sur les droits de la personne. S'exprimant encore une fois au nom de la Cour à l'unanimité, le juge McIntyre conclut, aux pp. 546 et 547:

> Ce n'est pas, à mon avis, une bonne solution que d'affirmer que, selon les règles d'interprétation bien établies, on ne peut prêter au Code un sens plus large que le sens le plus étroit que peuvent avoir les termes qui y sont employés. Les règles d'interprétation acceptées sont suffisamment souples pour permettre à la Cour de reconnaître, en interprétant un code des droits de la personne, la nature et l'objet spéciaux de ce texte législatif [. . .] et de lui donner une interprétation qui permettra de promouvoir ses fins générales. Une loi de ce genre est d'une nature spéciale. Elle n'est pas vraiment de nature constitutionnelle, mais elle est certainement d'une nature qui sort de l'ordinaire. Il appartient aux tribunaux d'en rechercher l'objet et de le mettre en application. Le Code vise la suppression de la discrimination.

Il ne peut y avoir de doute que la législation canadienne sur les droits de la personne est normalement rédigée aujourd'hui de façon à éviter toute

Canadian Human Rights Act is addressed to "discriminatory practices". The *Ontario Human Rights Code*, R.S.O. 1980, c. 340, seeks to uphold the "equal dignity" of all men and women by preventing discrimination. In *Simpsons-Sears*, at p. 547, this Court spoke clearly as to the purpose of the Ontario Code, holding that the reach was wider than intentional discrimination:

> It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

The emphasis upon discriminatory effects was also held by this Court to be central to the purposes of the *Canadian Human Rights Act*: *Bhinder*, at p. 586, *per* McIntyre J. (with whom all other members of the Court concurred on this point).

A necessary implication of the focus upon discriminatory effects was recognized by the Court in *Simpsons-Sears*. At page 551, McIntyre J. held that, in determining whether an individual or entity had practised discrimination under the relevant legislation, it was appropriate for the Court to consider "adverse effect discrimination", which may be described as the imposition of obligations, penalties or restrictive conditions that result from a policy or practice which is on its face neutral but which has a disproportionately negative effect on an individual or group because of a special characteristic of that individual or group.

The rejection of a necessity to prove intent and the unequivocal adoption of the idea of "adverse effect discrimination" by the courts is the result of a commitment to the purposive interpretation of human rights legislation. An instructive example of the contemporary trend is found in the judgment of the Court of Appeal of Saskatchewan in *Canadian Odeon Theatres Ltd. v. Saskatchewan*

référence à l'intention. Comme on l'a déjà constaté, la *Loi canadienne sur les droits de la personne* vise certains «actes discriminatoires». Le *Code ontarien des droits de la personne*, L.R.O. 1980, chap. 340, veut promouvoir «l'égale dignité» de l'ensemble des hommes et des femmes par la prévention de la discrimination. Dans l'arrêt *Simpsons-Sears*, à la p. 547, cette Cour s'est exprimée clairement sur l'objet du Code ontarien, jugeant que sa portée va plus loin que la discrimination volontaire:

> C'est le résultat ou l'effet de la mesure dont on se plaint qui importe. Si elle crée effectivement de la discrimination, si elle a pour effet d'imposer à une personne ou à un groupe de personnes des obligations, des peines ou des conditions restrictives non imposées aux autres membres de la société, elle est discriminatoire.

La Cour a également jugé que l'accent mis sur les effets discriminatoires est primordial pour les fins de la *Loi canadienne sur les droits de la personne*: arrêt *Bhinder*, à la p. 586, le juge McIntyre (à l'avis duquel souscrivent, sur ce point, tous les autres membres de la Cour).

Dans l'arrêt *Simpsons-Sears*, la Cour a reconnu l'existence d'une conséquence nécessaire de l'accent mis sur les effets discriminatoires. À la page 551, le juge McIntyre conclut que pour déterminer si une personne morale ou physique s'est livrée à de la discrimination au sens de la loi pertinente, il convenait que la Cour examine la question de la «discrimination par suite d'un effet préjudiciable», qu'on peut définir comme l'imposition d'obligations, de peines ou de conditions restrictives résultant d'une politique ou d'une pratique qui est neutre à première vue, mais qui a un effet négatif disproportionné sur un individu ou un groupe d'individus en raison d'une caractéristique spéciale de cet individu ou de ce groupe d'individus.

Le rejet de la nécessité de prouver l'intention et l'adoption non équivoque de l'idée de «discrimination par suite d'un effet préjudiciable» par les tribunaux résultent de l'adoption de l'interprétation fondée sur l'objet de la législation sur les droits de la personne. On trouve un exemple instructif de la tendance contemporaine dans l'arrêt de la Cour d'appel de la Saskatchewan *Canadian*

Human Rights Commission, [1985] 3 W.W.R. 717, where Vancise J.A. wrote at p. 735:

Generally human rights legislation has been given a broad interpretation to ensure that the stated objects and purposes are fulfilled. A narrow restrictive interpretation which would defeat the purpose of the legislation, that is, the elimination of discrimination, should be avoided.

As discussed above, the Supreme Court in the *Simpsons-Sears* and *Bhinder* decisions has already recognized that Canadian human rights legislation is directed not only at intentional discrimination, but at unintentional discrimination as well. In particular, the prohibition of discrimination in the *Canadian Human Rights Act* has been held to reach situations of "adverse effect discrimination": *Bhinder*. But unintentional discrimination may occur in another form, with potentially greater consequences in terms of the number of people who are disadvantaged. Section 15(1) of the Act and, by extension s. 41(2)(*a*), was designed to meet this second problem of "systemic discrimination".

IV

Systemic Discrimination and the Special Temporary Measures Order

A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report:

Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ....

Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission, [1985] 3 W.W.R. 717, où le juge Vancise écrit, à la p. 735:

[TRADUCTION] En général, la législation sur les droits de la personne a reçu une interprétation large afin d'assurer que ses objectifs déclarés soient atteints. Une interprétation restrictive contraire à l'objet de la législation, qui est d'éliminer la discrimination, devrait être évitée.

Comme nous l'avons vu, la Cour suprême, dans les arrêts *Simpsons-Sears* et *Bhinder*, a déjà reconnu que la législation canadienne sur les droits de la personne vise non seulement la discrimination volontaire mais aussi la discrimination involontaire. En particulier, il a été jugé que la prohibition de la discrimination par la *Loi canadienne sur les droits de la personne* vise aussi les cas de «discrimination par suite d'un effet préjudiciable»: arrêt *Bhinder*. Mais la discrimination involontaire peut prendre une autre forme et avoir des conséquences potentiellement plus graves sur le plan du nombre d'individus désavantagés. Le paragraphe 15(1) de la Loi et, par extension l'al. 41(2)*a*), ont été conçus pour répondre à ce second problème de «discrimination systémique».

IV

La discrimination systémique et l'ordonnance de mesures spéciales temporaires

On trouve une étude exhaustive de la «discrimination systémique» au Canada dans le rapport Abella sur l'égalité en matière d'emploi. La Commission royale avait pour mandat «d'enquêter sur les moyens les plus efficaces et équitables de promouvoir les chances d'emploi, d'éliminer la discrimination systémique et d'assurer à tous les mêmes possibilités de prétendre à un emploi ...» (Décret C.P. 1983-1924 du 24 juin 1983.) Quoique le juge Abella ait choisi de ne pas donner une définition précise de la discrimination systémique, on peut en glaner l'essentiel dans les commentaires suivants, que l'on trouve à la p. 2 de son rapport:

... la discrimination s'entend des pratiques ou des attitudes qui, de par leur conception ou par voie de conséquence, gênent l'accès des particuliers ou des groupes à des possibilités d'emplois, en raison de caractéristiques qui leur sont prêtées à tort ...

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

This is why it is important to look at the results of a system . . . .

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged. The Tribunal sought to accomplish this objective through its "Special Temporary Measures" Order. Did it have the authority to do so?

Section 41(2) of the *Canadian Human Rights Act* lists the orders that a Tribunal may make if it determines that a person has engaged in a discriminatory practice. Among the potential orders is an order for "measures" to be taken under s. 41(2)(*a*) "including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future." The "program, plan or arrangement" referred to in s. 15(1) is any mechanism "designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to" *inter alia*, sex.

Because of his stated emphasis upon the "ordinary grammatical construction" of s. 41(2)(*a*),

La question n'est pas de savoir si la discrimination est intentionnelle ou si elle est simplement involontaire, c'est-à-dire découlant du système lui-même. Si des pratiques occasionnent des répercussions néfastes pour certains groupes, c'est une indication qu'elles sont peut-être discriminatoires. Voilà pourquoi il est important d'analyser les conséquences des pratiques et des systèmes d'emploi.

En d'autres termes, la discrimination systémique en matière d'emploi, c'est la discrimination qui résulte simplement de l'application des méthodes établies de recrutement, d'embauche et de promotion, dont ni l'une ni l'autre n'a été nécessairement conçue pour promouvoir la discrimination. La discrimination est alors renforcée par l'exclusion même du groupe désavantagé, du fait que l'exclusion favorise la conviction, tant à l'intérieur qu'à l'extérieur du groupe, qu'elle résulte de forces «naturelles», par exemple que les femmes «ne peuvent tout simplement pas faire le travail» (voir le rapport Abella, aux pp. 9 et 10). Pour combattre la discrimination systémique, il est essentiel de créer un climat dans lequel tant les pratiques que les attitudes négatives peuvent être contestées et découragées. Le tribunal a tenté d'atteindre cet objectif par son ordonnance de «mesures spéciales temporaires». Avait-il le pouvoir de le faire?

Le paragraphe 41(2) de la *Loi canadienne sur les droits de la personne* énumère les ordonnances qu'un tribunal peut rendre quand il constate qu'il y a eu acte discriminatoire. Parmi les ordonnances possibles, il y a l'ordonnance de «mesures» à prendre en vertu de l'al. 41(2)*a*), pour «prévenir les actes semblables,» y compris «l'adoption d'une proposition relative à des programmes, des plans ou des arrangements spéciaux visés au paragraphe 15(1)». Les «programmes, plans ou arrangements» dont il est question au par. 15(1), ce sont tous les mécanismes «destinés à supprimer, diminuer ou prévenir les désavantages que subit ou peut vraisemblablement subir un groupe d'individus pour des motifs fondés directement ou indirectement sur» le sexe notamment.

En raison de son insistance expresse sur «l'interprétation grammaticale ordinaire» de l'al. 41(2)*a*),

Hugessen J., for the majority in the Federal Court of Appeal, offered this reading of the paragraph (at p. 102):

> Reduced to its essentials, this text permits the Tribunal to order the taking of measures aimed at preventing the future occurrence of a discriminatory practice on the part of a person found to have engaged in such a practice in the past.

He stressed that "[t]he sole permissible purpose for the order is prevention" and that the text "does not allow restitution for past wrongs." Therefore, the "program, plan or arrangement" authorized by reference to s. 15(1) would necessarily be limited by the language of s. 41(2)(*a*) to a mechanism designed "to prevent the same or a similar practice occurring in the future". Hugessen J. recognized the special difficulties involved in dealing with systemic discrimination (at p. 105):

> . . . I recognize that by its very nature systemic discrimination may require creative and imaginative preventive measures. Such discrimination has its roots, not in any deliberate desire to exclude from favour, but in attitudes, prejudices, mind sets and habits which may have been acquired over generations. It may well be that hiring quotas are a proper way to achieve the desired result.

Hugessen J. simply did not believe, without some precise factual showing, that specific hiring goals could be related to prevention, and thereby fall within s. 41(2)(*a*). The Special Temporary Measures ordered by the Tribunal were struck down because the employment objectives imposed in the Order were expressed in terms which, in Justice Hugessen's view, indicated that the objective was remedial and not preventive.

To evaluate this argument it is important to remember exactly what was ordered by the Human Rights Tribunal. The impugned section of the Order was headed "Special Temporary Measures" and the heart of the employment equity program was contained in paragraph 2:

> . . . Canadian National is ordered to hire at least one woman for every four non-traditional positions filled in the future . . . .When it is in effect, daily adherence to the one-in-four ratio will not be required in order to give the employer more choice in the selection of candidates.

le juge Hugessen, au nom de la majorité de la Cour d'appel fédérale, propose cette interprétation de l'alinéa (à la p. 102):

> En substance, ce texte permet au tribunal d'ordonner à la personne qu'il a trouvée coupable d'un acte discriminatoire de prendre des mesures destinées à prévenir la répétition de cet acte.

Il souligne que «[l]e seul objectif permis que peut viser l'ordonnance est la prévention» et que le texte «ne permet pas de réparer les préjudices déjà causés.» Par conséquent, les «programmes [. . .] plans [. . .] ou [. . .] arrangements» visés au par. 15(1) qui peuvent être adoptés seraient nécessairement limités, par le texte de l'al. 41(2)*a*), à un mécanisme conçu pour «prévenir les actes semblables». Le juge Hugessen reconnaît que la discrimination systémique soulève des difficultés particulières (à la p. 105):

> . . . je reconnais que, de par sa nature même, la discrimination systémique peut nécessiter l'adoption de mesures préventives innovatrices et imaginatives. De tels actes discriminatoires prennent leur source, non dans une volonté délibérée de défavoriser, mais dans les attitudes, préjugés, manières de penser, et habitudes qui ont pu s'installer au cours de plusieurs générations. Il se peut bien que les quotas d'embauchage soient une bonne façon de parvenir au résultat désiré.

Le juge Hugessen n'a tout simplement pas cru, en l'absence de faits précis, que des objectifs d'embauche spécifiques pouvaient être liés à la prévention et ainsi relever de l'al. 41(2)*a*). Les mesures spéciales temporaires ordonnées par le tribunal ont été annulées parce que les objectifs d'emploi y sont exprimés en des termes qui, aux yeux du juge Hugessen, indiquent qu'ils ont pour but de réparer et non de prévenir.

Pour évaluer cet argument, il importe de se souvenir exactement de la teneur de l'ordonnance du tribunal des droits de la personne. La section contestée de l'ordonnance est intitulée «Mesures spéciales temporaires» et le principe du programme d'équité en matière d'emploi est énoncé au deuxième paragraphe:

> . . . il est ordonné au Canadien National d'embaucher au moins une femme sur quatre postes non traditionnels à être comblés à l'avenir [. . .] Une fois en vigueur, la proportion d'un sur quatre n'aura pas à être respectée quotidiennement, ce afin de permettre à l'employeur un

However, it must be complied with over each quarterly period until the desired objective of having 13% of non-traditional positions filled by women is achieved.

It should be underscored once again that the objective of 13 per cent female participation was not arbitrary, for it corresponded to the national average of women involved in the non-traditional occupations.

In his dissenting opinion in the Federal Court of Appeal, MacGuigan J. accepted, as I do, that s. 41(2)(*a*) was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination in order to design appropriate strategies for the future. He noted the deep roots of discrimination against women at CN. It is an uncontradicted fact that the hiring and promotion policies of CN and the enormous problems faced by the tiny minority of women in the blue-collar work force amounted to a systematic denial of women's equal employment opportunities.

Justice MacGuigan's point is made abundantly clear when one considers the context in which the challenged order was issued. It bears repeating that the Tribunal had found that at the end of 1981 only 0.7 per cent of blue-collar jobs in the St. Lawrence Region of Canadian National were held by women. The Tribunal found furthermore that the small number of women in non-traditional jobs tended to perpetuate exclusion and, in effect, to cause additional discrimination. Moreover, Canadian National knew that its policies and practices, although perhaps not discriminatory in intent, were discriminatory in effect, yet had done nothing substantial to rectify the situation. When confronted with such a case of "systemic discrimination", it may be that the type of order issued by the Tribunal is the only means by which the purpose of the *Canadian Human Rights Act* can be met. In any program of employment equity,

meilleur choix dans la sélection des candidats. Elle devra cependant être respectée dans l'ensemble de chaque période trimestrielle, jusqu'à ce que l'objectif désiré de 13 % de femmes dans les postes non traditionnels soit atteint.

Il est bon de rappeler une fois encore que cet objectif de 13 pour 100 de participation féminine n'était pas arbitraire; il correspondait à la moyenne nationale des femmes occupant des emplois non traditionnels.

Dans son opinion dissidente en Cour d'appel fédérale, le juge MacGuigan a reconnu, tout comme je le fais, que l'al. 41(2)*a*) a été conçu pour permettre aux tribunaux des droits de la personne d'empêcher que des groupes protégés identifiables ne soient à l'avenir victimes de discrimination, mais il a jugé que le terme «prévention» est fort général et qu'il est souvent nécessaire de se référer à des régimes historiques de discrimination pour concevoir les stratégies appropriées à l'avenir. Il a constaté que la discrimination dont étaient victimes les femmes au CN avait des racines profondes. C'est un fait incontesté que les politiques d'embauche et de promotion du CN et les problèmes considérables auxquels doit faire face la faible minorité de femmes cols bleus reviennent à dénier systématiquement aux femmes l'égalité des chances en matière d'emploi.

Cette remarque du juge MacGuigan devient on ne peut plus claire lorsqu'on considère le contexte dans lequel l'ordonnance contestée a été rendue. Il vaut la peine de répéter que le tribunal avait constaté qu'à la fin de 1981 seulement 0,7 pour 100 des emplois manuels dans la région du St-Laurent du Canadien National étaient occupés par des femmes. Le tribunal a aussi constaté que le petit nombre de femmes occupant des emplois non traditionnels avait tendance à perpétuer leur exclusion et, en fait, à constituer une cause supplémentaire de discrimination. De plus, le Canadien National savait que ses politiques et pratiques, même si elles n'étaient peut-être pas volontairement discriminatoires, étaient effectivement discriminatoires, et pourtant il n'avait rien fait d'important pour remédier à la situation. Lorsqu'on a affaire à un tel cas de «discrimination systémique», il se peut qu'une ordonnance comme celle rendue

there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed there is no prevention without some form of remedy. The point was explained clearly by Professors Greschner and Norman in their Case Comment on the majority judgment of the Federal Court of Appeal in this case, found at (1985), 63 *Can. Bar Rev.* 805, at p. 812. They emphasize that an employment equity program

> . . . tries to break the causal links between past inequalities suffered by a group and future perpetuation of the inequalities. It simultaneously looks to the past and to the future, with no gap between cure and prevention. Any such program will remedy past acts of discrimination against the group and prevent future acts at one and the same time. That is the very point of affirmative action.
>
> This point demands repetition . . . .When a program is said to be aimed at remedying past acts of discrimination, such as by bringing women into blue-collar occupations, it necessarily is preventing future acts of discrimination because the presence of women will help break down generally the notion that such work is man's work and more specifically, will help change the practices within that workplace which resulted in the past discrimination against women. From the other perspective, when a program is said to be aimed at preventing future acts of discrimination (again by bringing women into blue-collar occupations), it necessarily is also remedying past acts of discrimination because women as a group suffered from the discrimination and are now benefitting from the program.

Unlike the remedies in s. 41(2)(*b*)-(*d*), the "remedy" under s. 41(2)(*a*) is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future, so that a successful employment equity program will render itself otiose.

To see more clearly why the Special Temporary Measures Order is prospective, it would be helpful

par le tribunal soit le seul moyen de réaliser l'objet de la *Loi canadienne sur les droits de la personne*. Dans tout programme d'équité en matière d'emploi, on ne peut tout simplement pas dissocier radicalement la «réparation» et la «prévention». En fait, il ne peut y avoir de prévention sans une forme quelconque de réparation. Les professeurs Greschner et Norman ont expliqué cela clairement dans leur commentaire de l'arrêt majoritaire de la Cour d'appel fédérale en l'espèce, qu'on trouve à (1985), 63 *R. du B. can.* 805, à la p. 812. Ils soulignent qu'un programme d'équité en matière d'emploi

> [TRADUCTION] . . . tente de rompre les liens de causalité entre les inégalités antérieures, subies par un groupe, et leur perpétuation dans l'avenir. Il regarde simultanément vers le passé et vers le futur, sans qu'aucun fossé n'existe entre réparation et prévention. Tout programme de ce genre remédiera aux actes de discrimination antérieurs dont le groupe a été victime et empêchera en même temps que de tels actes soient accomplis à l'avenir. C'est le principe même de l'action positive.
>
> Cela mérite d'être répété [. . .] Lorsqu'on dit qu'un programme vise à remédier à des actes discriminatoires antérieurs, en amenant des femmes à occuper des emplois manuels, il empêche forcément les actes de discrimination futurs du fait que la présence de femmes facilitera en général la disparition de la notion que ce genre de travail est un travail d'homme et, plus précisément, favorisera la disparition des pratiques qui, sur ces lieux du travail, occasionnaient par le passé la discrimination envers les femmes. Dans une autre perspective, lorsqu'on dit qu'un programme vise à empêcher les actes de discrimination futurs (en favorisant encore une fois l'accès des femmes à des postes manuels), il remédie par le fait même aussi aux actes de discrimination antérieurs parce que les femmes en tant que groupe ont été victimes de discrimination alors qu'elles profitent maintenant du programme.

Contrairement aux formes de réparation prévues aux al. *b*) à *d*) du par. 41(2), la «réparation» de l'al. 41(2)*a*) vise un groupe et est donc non seulement compensatoire, mais est elle-même prospective. L'avantage est toujours conçu pour améliorer la situation du groupe à l'avenir, de sorte que le programme d'équité en matière d'emploi qui réussit se rend lui-même inutile.

Pour mieux voir pourquoi l'ordonnance de mesures spéciales temporaires est prospective, il serait

to review briefly the theoretical underpinnings of employment equity programs. I have already stressed that systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and "proper role" of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false. An employment equity program, such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.

An employment equity program thus is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless. To the extent that some intentional discrimination may be present, for example in the case of a foreman who controls hiring and who simply does not want women in the unit, a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman. His battle is lost.

Secondly, by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping. For example, if women are seen to be doing the job

utile d'étudier brièvement les fondements théoriques des programmes d'équité en matière d'emploi. J'ai déjà souligné que la discrimination systémique est souvent involontaire. Elle résulte de pratiques et de politiques établies qui, en fait, ont une incidence négative sur les perspectives d'embauche et d'avancement d'un groupe particulier. À cela s'ajoutent les attitudes des administrateurs et des collègues de travail qui acceptent une vision stéréotypée des compétences et du «rôle approprié» du groupe touché, laquelle vision conduit à la conviction ferme que les membres de ce groupe sont incapables de faire un certain travail, même si cette conclusion est objectivement fausse. Un programme d'équité en matière d'emploi, comme celui ordonné par le tribunal en l'espèce, est conçu pour rompre le cercle vicieux de la discrimination systémique. L'objectif n'est pas d'indemniser les victimes du passé ni même d'ouvrir de nouveaux horizons à des individus particuliers qui, par le passé, se sont vu refuser inéquitablement un emploi ou une promotion, quoique certains de ces individus puissent profiter d'un régime d'équité en matière d'emploi. Plutôt, le programme d'équité en matière d'emploi tente de faire en sorte qu'à l'avenir les postulants et les travailleurs du groupe touché n'aient pas à faire face aux mêmes barrières insidieuses qui ont arrêté leurs prédécesseurs.

Un programme d'équité en matière d'emploi comporte donc trois aspects. En premier lieu, en contrecarrant les effets cumulatifs de la discrimination systémique, un tel programme rend vaine toute discrimination supplémentaire. Dans la mesure où il existe une certaine discrimination volontaire, par exemple dans le cas d'un contremaître qui contrôle l'embauche et qui ne veut tout simplement pas de femmes dans son unité, le régime obligatoire d'équité en matière d'emploi permet d'avoir des femmes dans l'unité malgré les intentions discriminatoires du contremaître qui perd ainsi la bataille.

En second lieu, en plaçant des membres du groupe antérieurement exclu dans le milieu de travail et en leur permettant de prouver leurs capacités, le régime d'équité en matière d'emploi s'attaque au problème des attitudes stéréotypées. Par exemple, si l'on se rend compte que des

of "brakeman" or heavy cleaner or signaller at Canadian National, it is no longer possible to see women as capable of fulfilling only certain traditional occupational roles. It will become more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women.

Thirdly, an employment equity program helps to create what has been termed a "critical mass" of the previously excluded group in the work place. This "critical mass" has important effects. The presence of a significant number of individuals from the targeted group eliminates the problems of "tokenism"; it is no longer the case that one or two women, for example, will be seen to "represent" all women. See Carol Agocs, "Affirmative Action, Canadian Style" (1986), 12 *Canadian Public Policy—Analyse de politiques* 148, at p. 149. Moreover, women will not be so easily placed on the periphery of management concern. The "critical mass" also effectively remedies systemic inequities in the process of hiring:

> There is evidence that when sufficient minorities/women are employed in a given establishment, the informal processes of economic life, for example, the tendency to refer friends and relatives for employment, will help to produce a significant minority [or female] applicant flow.

(Alfred W. Blumrosen, "Quotas, Common Sense and Law in Labour Relations: Three Dimensions of Equal Opportunity", in Walter S. Tarnopolsky, ed., *Some Civil Liberties Issues of the Seventies* (1975), Toronto: Osgoode Hall Law School/York University, 5, at p. 15).

If increasing numbers of women apply for non-traditional jobs, the desire to work in blue-collar occupations will be less stigmatized. Personnel offices will be forced to treat women's applications for non-traditional jobs more seriously. In other words, once a "critical mass" of the previously excluded group has been created in the work force, there is a significant chance for the continuing self-correction of the system.

femmes sont «serre-freins» ou préposées aux gros travaux de nettoyage ou à la signalisation au Canadien National, il ne sera plus possible de considérer les femmes comme n'étant capables que d'occuper certains postes traditionnels. Il deviendra de plus en plus difficile d'attribuer à une seule personne les caractéristiques stéréotypées dont on affuble toutes les femmes.

En troisième lieu, un programme d'équité en matière d'emploi facilite la création de ce qu'on a appelé une «masse critique» du groupe antérieurement exclu de ce milieu de travail. Cette «masse critique» a des effets importants. La présence d'un nombre important de membres du groupe visé élimine les problèmes de «symbolisme»; on ne peut plus, par exemple, considérer qu'une ou deux femmes «représentent» toutes les femmes. Voir Carol Agocs, «Affirmative Action, Canadian Style» (1986), 12 *Canadian Public Policy—Analyse de politiques* 148, à la p. 149. En outre, il ne sera pas aussi facile pour la direction de reléguer la question des femmes au second rang de ses soucis. La «masse critique» remédie efficacement aussi aux inéquités systémiques dans l'embauche:

> [TRADUCTION] Il y a des preuves que lorsqu'un nombre suffisant d'individus minoritaires ou de femmes sont employés dans un établissement donné, le processus informel de la vie économique, par exemple la tendance à recommander des amis ou des parents comme candidat à l'emploi, facilite la production d'un flot important de candidats [féminins ou] minoritaires.

(Alfred W. Blumrosen, «Quotas, Common Sense and Law in Labour Relations: Three Dimensions of Equal Opportunity», dans Walter S. Tarnopolsky (éd.), *Some Civil Liberties Issues of the Seventies* (1975), Toronto: Osgoode Hall Law School/York University, 5, à la p. 15.)

Si un nombre croissant de femmes postulent des emplois non traditionnels, le goût d'occuper des emplois manuels paraîtra moins infamant. Les bureaux de personnel seront forcés de considérer plus sérieusement les candidatures des femmes pour des emplois non traditionnels. En d'autres termes, une fois qu'une «masse critique» du groupe antérieurement exclu aura été créée au sein de la main-d'œuvre, il y aura de bonnes chances pour que le système continue à se corriger lui-même.

When the theoretical roots of employment equity programs are exposed, it is readily apparent that, in attempting to combat systemic discrimination, 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. It is for this reason that the language of the Tribunal's Order for Special Temporary Measures may appear "remedial". In any case, as was stressed by MacGuigan J. in his dissent, the important question is not whether the Tribunal's order tracked the precise wording of s. 41(2)(*a*), but whether the actual measures ordered could be construed fairly to fall within the scope of the section. One should look to the substance of the order and not merely to its wording.

Lorsque les fondements théoriques des programmes d'équité en matière d'emploi sont énoncés, il appert rapidement que, lorsqu'on tente de combattre la discrimination systémique, il est essentiel de s'attaquer aux anciens régimes discriminatoires et de les détruire afin d'empêcher à l'avenir la résurgence de cette même discrimination. C'est pour cette raison que, dans sa formulation, l'ordonnance de mesures spéciales temporaires par le tribunal peut paraître «réparatrice». Quoi qu'il en soit, comme l'a souligné le juge MacGuigan dans ses motifs de dissidence, la question qui importe est de savoir non pas si l'ordonnance du tribunal suit le texte même de l'al. 41(2)*a*), mais plutôt si les mesures qu'on ordonne réellement de prendre peuvent, selon une interprétation honnête, tomber sous le coup de cette disposition. Ce qu'il faut examiner c'est le contenu de l'ordonnance et non simplement sa formulation.

For the sake of convenience, I will summarize my conclusions as to the validity of the employment equity program ordered by the Tribunal. To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programs is always to improve the situation of the target group in the future. MacGuigan J. stressed in his dissent that "the prevention of systemic discrimination will reasonably be thought to require systemic remedies" (p. 120). Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals, as Hugessen J. recognized, are a rational attempt to impose a systemic remedy on a systemic problem. The Special Temporary Measures Order of the Tribunal thus meets the requirements of s. 41(2)(*a*) of the *Canadian Human Rights Act*. It is a "special program, plan or arrangement" within the meaning of s. 15(1) and therefore can be ordered under s. 41(2)(*a*). The employment equity order is rationally designed to combat systemic discrimination in the Canadian National St. Law-

Pour des motifs de commodité, je vais résumer mes conclusions sur la validité du programme d'équité en matière d'emploi ordonné par le tribunal. Pour rendre vaine toute discrimination future, détruire les stéréotypes discriminatoires et créer la «masse critique» requise d'intégration du groupe visé à la main-d'œuvre, il est essentiel de combattre les effets de la discrimination systémique antérieure. Ce faisant, on crée des possibilités d'amélioration permanente des chances d'emploi pour le groupe autrefois exclu. L'objet dominant des programmes d'équité en matière d'emploi est toujours d'améliorer la situation future du groupe visé. Le juge MacGuigan souligne, dans ses motifs de dissidence, qu'«on peut raisonnablement s'attendre à ce que la prévention de la discrimination systémique exige des sanctions à caractère systémique» (p. 120). Les sanctions systémiques doivent être fondées sur l'expérience du passé, afin d'empêcher la discrimination future. Des objectifs d'embauche précis, comme l'a reconnu le juge Hugessen, constituent une tentative rationnelle d'imposer un correctif systémique à un problème systémique. L'ordonnance de mesures spéciales temporaires du tribunal est donc conforme à l'al. 41(2)*a*) de la *Loi canadienne sur les droits de la personne*. Elle constitue un «programme, plan ou arrangement spécial» au sens du par. 15(1), qui peut donc être ordonné en vertu de l'al. 41(2)*a*). L'ordonnance

rence Region by preventing "the same or a similar practice occurring in the future".

A secondary problem must now be addressed, the fact that the Order of the Tribunal was expressed in terms of an employment goal, rather than a hiring goal. This methodology might increase the belief that the Order was remedial and not, properly speaking, preventive. The Tribunal held, however, that the systemic discrimination at CN occurred not only in hiring but once women were on the job as well. The evidence revealed that there was a high level of publicly expressed male antipathy towards women which contributed to a high turnover rate amongst women in blue-collar jobs. As well, many male workers and supervisors saw any female worker in a non-traditional job as an upsetting phenomenon and as a "job thief". To the extent that promotion was dependent upon the evaluations of male supervisors, women were at a significant disadvantage. Moreover, because women generally had a low level of seniority, they were more likely to be laid off. For the employment equity program to be effective in creating the "critical mass" and in destroying stereotypes, the goals had to be expressed in terms of actual employment. Otherwise the reasonable objectives of the scheme would have been defeated. The dominant purpose remained to improve the employment situation for women at CN in the future.

d'équité en matière d'emploi est logiquement conçue pour combattre la discrimination systémique dans la région du St-Laurent du Canadien National par la prévention d'«actes semblables».

Il faut maintenant s'attaquer à un problème secondaire, savoir le fait que l'ordonnance du tribunal est exprimée en termes d'objectifs d'emploi plutôt que d'objectifs d'embauche. Cette méthodologie est susceptible d'apporter de l'eau au moulin de ceux qui croient que l'ordonnance est réparatrice et non, à proprement parler, préventive. Le tribunal a toutefois jugé qu'il y avait discrimination systémique au CN non seulement au moment de l'embauche, mais aussi en milieu de travail. La preuve a révélé une large mesure d'antipathie masculine exprimée publiquement à l'égard des femmes, ce qui a contribué à un taux élevé de roulement du personnel féminin dans les emplois manuels. De même, un bon nombre de travailleurs et de surveillants masculins considèrent qu'une femme dans un emploi non traditionnel est un phénomène dangereux et une «voleuse de job». Dans la mesure où les promotions dépendaient des évaluations de surveillants masculins, les femmes étaient en désavantage marqué. De plus, étant donné que les femmes en général avaient peu d'ancienneté, elles risquaient davantage d'être mises à pied. Pour que le programme d'équité en matière d'emploi parvienne à créer une «masse critique» et à détruire les stéréotypes, les objectifs devaient être exprimés en termes d'emplois véritables. Autrement, les objectifs raisonnables du régime auraient été contrecarrés. L'objectif dominant était toujours d'améliorer la situation future des femmes en matière d'emploi au CN.

V

The Cross-Appeal

Canadian National filed a cross-appeal by which it sought to set aside the entire decision and Order of the Tribunal for the reasons set out in the judgment of Pratte J. in the Federal Court of Appeal. In view of my disposition of the appeal, it is obviously unnecessary to discuss the merits of the cross-appeal.

V

Le pourvoi incident

Le Canadien National a formé un pourvoi incident en vue d'obtenir l'annulation de toute la décision et ordonnance du tribunal pour les raisons énoncées dans les motifs du juge Pratte de la Cour d'appel fédérale. Vu la solution que j'apporte au litige, il n'est manifestement pas nécessaire de se prononcer sur le fond du pouvoir incident.

VI

Conclusion

I would allow the appeal with costs, reverse the decision of the Federal Court of Appeal and restore in its entirety the Order of the Human Rights Tribunal. The cross-appeal is therefore dismissed with costs.

Appeal allowed with costs and cross-appeal dismissed with costs.

Solicitors for Action Travail des Femmes: Rivest, Castiglio, Castiglio, LeBel & Schmidt, Montréal.

Solicitors for the Canadian National Railway Co.: Alphonse Giard and Rolland Boudreau, Montréal.

Solicitors for the Canadian Human Rights Commission: René Duval and Anne Trotier, Ottawa.

VI

Conclusion

Je suis d'avis d'accueillir le pourvoi avec dépens, d'infirmer l'arrêt de la Cour d'appel fédérale et de rétablir en son entier l'ordonnance du tribunal des droits de la personne. Le pourvoi incident est donc rejeté avec dépens.

Pourvoi accueilli avec dépens et pourvoi incident rejeté avec dépens.

Procureurs d'Action Travail des Femmes: Rivest, Castiglio, Castiglio, LeBel & Schmidt, Montréal.

Procureurs de la Compagnie des chemins de fer nationaux du Canada: Alphonse Giard et Rolland Boudreau, Montréal.

Procureurs de la Commission canadienne des droits de la personne: René Duval et Anne Trotier, Ottawa.

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Complainants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BOOK OF AUTHORITIES OF THE INTERVENOR, NISHNAWBE ASKI NATION

FALCONERS LLP
Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A9

Julian N. Falconer (L.S.U.C.#29465R)
Akosua Matthews (L.S.U.C.#65621V)
Anthony Morgan (L.S.U.C. # 64163F)

Tel: (416) 964-0495
Fax: (416) 929-8179

Lawyers for Nishnawbe Aski Nation