Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

-and-

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PART I: OVERVIEW

"This is the season for change. The time is now."

~ Canadian Human Rights Tribunal[1]

"[It was] an "awkward time" in the federal funding cycle when all the available money [had] already been allocated."

~ Keith Conn,
regional executive for Ontario
with the First Nation and Inuit Health Branch of Health Canada[2]

1. If there is one horrible lesson to be taken from the last few months for all of the Parties to this hearing to take to heart, it is this: youth at risk of suicide will not wait for the fiscal year's end. They will not wait for jurisdictional disputes to be sorted, for legal processes to work their way towards remedies, or for Tribunal orders to be issued, and then ignored, and then enforced. They will not wait for us.

2. On January 26, 2016, the Canadian Human Rights Tribunal (the "Tribunal") issued a landmark decision which found that Indigenous and Northern Affairs Canada ("INAC") has racially discriminated against 163,000 First Nations children by underfunding child and family services on reserves.[3]

3. The Tribunal initially held off on ordering remedies in order to receive detailed submissions from the parties.[4] The Tribunal proposed that the parties address remedies in three stages: (1) immediate relief; (2) medium-term relief; and, (3) longer-term relief.

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[1] April 26, 2016 decision, para. 41.
[2] Affidavit of Dr. Kirlew, sworn January 27, 2017, at para. 16, and see also Exhibit D.
[3] 2016 CHRT 2.
[4] The involved Parties in these proceedings are: the Attorney General of Canada representing the Ministry of Indigenous and Northern Affairs ("INAC") [referred to as the Respondent, Canada, or INAC as the case may be]; the Canadian Human Rights Commission ["the Commission"]; the co-complainant, the First Nations Child and

4. More than a year has passed since the Tribunal's January 2016 decision, and the Parties are still discussing "immediate relief". Also in the months that have elapsed, INAC has repeatedly demonstrated that it *cannot* or *will not* comply with the Tribunal's immediate relief orders and specific requests for detailed information to support the same.

5. During the passage of time, a compliance hearing was scheduled. On motion of December 20, 2016, NAN sought immediate relief in respect of remoteness and agency-specific debt relief. But then NAN suffered an entirely preventable tragedy: the loss of two more of their children. On January 27, 2017, NAN amended its motion to seek immediate relief in response to two youth suicides in the community of Wapekeka First Nation.

6. From there, a bizarre and deeply tragic process unfolded. To keep the Tribunal updated with developments in the communities, specifically the escalating issue of youth suicide, NAN filed additional affidavits updating the Tribunal about the loss of another youth and then another youth. Following these losses, condolences came in from various parties, including the Tribunal, as a part of regular correspondence.

7. NAN seeks various orders as immediate relief in this factum. First, NAN seeks the creation of a Choose Life Order. This would be relief available to any First Nations with youth at risk of suicide, and a community health proposal ready and aimed at addressing this risk. A Choose Life Order, outlined in further detail below, would be available on application to the Tribunal, to ensure fulfillment of Jordan's principle and to ensure that community proposals would receive funding regardless of the timing of their submission.

Family Caring Society of Canada ["the Caring Society"]; the co-complainant, the Assembly of First Nations ["AFN"]; the interested party, the Chiefs of Ontario ("COO"); and the interested party, Nishnawbe Aski Nation ["NAN"].

8. Further, with regard to mental health, NAN is seeking a declaration of non-compliance: that INAC has failed to comply with the Tribunal's order in 2016 CHRT 2, in that INAC has not funded mental health services provided for under the *Child and Family Services Act*, R.S.O 1990 c. c-11. Further, NAN is seeking an order for immediate relief that INAC immediately fund mental health services in Ontario.

9. With regard to remoteness, NAN is seeking orders for: the provision of remoteness data already held by Canada in order to develop an accurate remoteness quotient; further orders that Canada fund the provisions of expert reports; and, further data collection from First Nations in Northern Ontario to ensure that any resulting policy is based on the best available empirical data. INAC has shown support for the development of a remoteness quotient, stating that "INAC recognizes that remoteness is one of the key challenges affecting the delivery of services in many northern communities ..." and that "INAC will engage on undertaking and providing support for research on this topic, building on the research contained in the Barnes report".[5] Although INAC has demonstrated a willingness to develop a remoteness quotient, NAN is still proceeding with seeking remoteness orders from the Tribunal.

10. Finally, with regard to agency debt relief, NAN is seeking an order that INAC fund the current debts and deficits of all child welfare agencies operating within NAN territory.

11. NAN's requested declarations and orders for immediate relief are all aimed at the same purpose: to get this bureaucracy moving. It is now necessary to act definitively as suicide reaches an almost pandemic state. Bureaucratic disorganization and inertia has been proven

[5] See immediate relief submissions of the Respondent, filed June 3, 2016, at para 4.

time and again to be fatal to our children. We must ensure that First Nations with youth at risk of suicide may seek a Choose Life Order so the timing to help them will never be awkward again.

PART II: FACTS

A. Brief Procedural History

12. Following the January 26, 2016, Tribunal decision, and during the spring and summer of 2016, the Parties exchanged voluminous submissions on the issue of immediate relief. The Tribunal issued its immediate relief decision on September 14, 2016 (the "September decision").[6]

13. Pursuant to the Tribunal's September decision, the Tribunal ordered INAC to file two compliance reports: one on September 30, 2016 and the second on October 31, 2017. Both compliance reports were to serve as a direct response to the Tribunal's orders and requests for further information contained in the Tribunal's September, 2016 decision.

14. INAC's two compliance reports were to be the subject of a case management conference in November 2016. Additionally, the case management conference was to be the Parties' opportunity to discuss and finalize all immediate relief matters. However, the case management conference did not proceed and was adjourned.

15. In lieu of a case management conference, the Complainant parties requested that the Tribunal hold a compliance hearing on March 22, 23, and 24, 2017 in order to put INAC's

[6] 2016 CHRT 16.

compliance with the Tribunal's immediate relief orders, or lack thereof, before the Tribunal for a decision.

16. Considering the length of time that has passed, and the procedural steps taken, NAN submits that INAC has had ample opportunity to: (1) comply with the Tribunal's immediate relief orders and (2) to respond to the Tribunal's requests for further information as articulated in the September decision. Specifically, INAC has filed two compliance reports pursuant to the Tribunal's September 2016 decision. Further, INAC has filed affidavit material in response to the various notices of motion filed by the complainant parties. In NAN's view, the Tribunal may review this material and proceed to both issue declarations of non-compliance and further immediate relief orders.

B. Declarations of Non-Compliance and Further Orders for Immediate Relief: The Lack of Mental Health Services in Ontario

i) The Tragedy in Wapekeka

17. As noted, on January 27, 2017, NAN amended its notice of motion to seek immediate relief for mental health services in Ontario. NAN took this action in response to the tragic deaths of two 12-year old girls who died by suicide in Wapekeka. Jolynn Winter died on January 8, 2017, and Chantel Fox died on January 10, 2017.

18. Before the loss of these children, Wapekeka had alerted the Federal Government, specifically Health Canada, to concerns about a suicide pact amongst a group of young girls. This information was contained in a July, 2016 proposal aimed at seeking funding for an in-community mental health team as a preventative measure (the "Wapekeka

proposal"). The Wapekeka proposal was left unaddressed by Canada for several months with a response coming only after the loss of Jolynn Winter and Chantel Fox.

19. In support of the amended notice of motion, NAN filed an affidavit by Doctor Michael Kirlew on January 27, 2017. Dr. Kirlew is a community and family physician for Wapekeka First Nation, a Staff Physician at the Sioux Lookout Meno Ya Win Health Center, and an Investigating Coroner for Ontario's northwest region. Further, NAN filed a reply affidavit by NAN's Health Advisor, Sol Mamakwa on February 13, 2017.

20. Dr. Kirlew's affidavit was intended to alert the Tribunal to the youth suicides in Wapekeka and to discuss his experience with delivering medical care to the residents of Wapekeka over the past ten years. In particular, Dr. Kirlew outlined the many challenges he has experienced with trying to obtain much needed mental health care and developmental supports for the residents of Wapekeka.

21. Dr. Kirlew swore his belief that the deaths of the two girls in Wapekeka were preventable.[7] Wapekeka had a longstanding and successful Survivors of Suicide ("SOS") initiative, designed to bring together expertise in the field of mental health, for 22 years until funding was lost in 2014. When faced with a crisis in the health of their youth, Wapekeka submitted a proposal seeking funding for a mental health team based within the community. This mental health team was intended to implement suicide prevention and intervention, alongside land-based and cultural activities. Dr. Kirlew's affidavit attached the 5-page Wapekeka proposal to his affidavit as Exhibit C.[8]

[7] Affidavit of Dr. Kirlew, sworn January 27, 2017 at paras. 4-5.
[8] *Ibid.* at paras14-15, and see also Exhibit C.

22. Dr. Kirlew explained that the Wapekeka proposal had not been funded by Health Canada, though the proposal was received. Keith Conn, Health Canada's regional executive for Ontario stated that the proposal went unfunded because it was received at an "awkward time" in the federal funding cycle.[9]

23. Dr. Kirlew's affidavit outlined the lack of mental health services available within the community of Wapekeka, compounded by the lack of developmental supports for children/youth and the infrequent mental health services that are periodically flown into the community.[10] This, compounded with the denial of travel requests by the Non-Insured Health Benefits ("NIHB") program has limited access to services available outside of the community of Wapekeka.[11]

ii) *Wapekeka is Everywhere: Tribunal Findings Regarding a Lack of Available Services*

24. The Tribunal has made a series of findings throughout its various decisions concerning a lack of mental health services in Ontario. Specifically, the Tribunal found that Ontario's *1965 Agreement*, does not fund mental health services, leading to a gap in services:

> In the provision of child and family services, the Panel finds the situation in Ontario falls short of the objective of the *1965 Agreement*… "to make available to the Indians in the province the full range of provincial welfare programs"[12]
>
> **…** AANDC does not have a mandate for mental health service and … 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

[9] *Ibid.* at para. 16, and see also Exhibit D.
[10] *Ibid.* at paras 18-22.
[11] *Ibid.* at paras 23-24.
[12] January 26, 2016, 2016 CHRT 2, Liability Decision, at para 246.

> programs do not specifically deal with children in care and do not cover mental health counselling.[13]
>
> …The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act*.
>
> The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.
>
> The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.[14]

25. Following these evidentiary findings in relation to the gaps and adverse impacts, denials and delays, the Tribunal directed that INAC provide specific information, in the form of compliance reports to the Tribunal. The Tribunal's specific direction to INAC was as follows:

> INAC is ordered to provide its rationale, data and other relevant information to assist this Panel in understanding INAC's Budget 2016 investments and how they are responsive to the needs of the First Nations children and how it addresses the findings in the Decision, in the short term, especially in terms of mental health services and Band Representatives.
>
> **…** the Panel wants to know how those findings are being addressed in the short term while the Agreement is being reformed.[15]

26. INAC filed a compliance report on October 31, 2016. INAC indicated that it was reviewing support for additional services, such as mental health services, under the *1965 Agreement* as part of the "longer-term engagement and reform process involving national and regional

---

[13] *Ibid*, at para 241.
[14] *Ibid*. At para 458. See also April Decision, 2016 CHRT 10 at para 25, and September Decision, 2016 CHRT 10 at paras 74.
[15] 2016 CHRT 10, at paras 73-74.

discussions."[16] INAC failed to identify how it was addressing mental health services in Ontario on the short term, as directed by the Tribunal.

27. Instead of providing a substantive response, INAC filed an affidavit providing platitudes: the assurance that any First Nations child identified to have unmet mental health needs, would have their needs met "like any other Jordan's Principle case."[17]

iii) *INAC's Response to the Wapekeka Crises: "...like any other Jordan's Principle case"*

28. Ms. Lee Cranton swore an affidavit on February 10, 2017, in response to the affidavit of Dr. Kirlew. Ms. Cranton is the Director of Northern Operations in the Ontario Region from the First Nations and Inuit Health Branch, is responsible for overseeing the regional operations in the Thunder Bay and Sioux Lookout zones.

29. Ms. Cranton's affidavit attached a budget for Wapekeka which identified that approximately $700,000 was allocated to Wapekeka through a block funding agreement. Additionally, the affidavit identified sources of funding available to other organizations which provide services to Wapekeka.[18] Further, Ms. Cranton pointed to various national funding announcements by Canada and stated that this additional funding would be used to address the mental health needs of First Nations and Inuit communities across the country.[19]

30. NAN filed a reply affidavit by NAN's Health Advisor, Sol Mamakwa on February 13, 2017. Mr. Mamakwa, as advised by Joshua Frogg (Wapekeka's Band Manager responsible

[16] INAC October 31, 2016 Compliance Report, at Page 9.
[17] Affidavit of Robin Buckland, sworn January 25, 2017, at para 24.
[18] Affidavit of Lee Cranton, sworn February 10, 2017, at paras. 4 & 6.
[19] *Ibid*, at paras. 5 & 7.

for the Wapekeka's financial management), stated that the various funding sources identified in the affidavit of Ms. Cranton created the impression of large sources of funding for mental health services in Wapekeka; however, Ms. Cranton's affidavit lacked specifics.[20] Mr. Mamakwa stated that several identified funding sources in Ms. Cranton's affidavit, are not provided with a community specific breakdown, nor do they indicate that the funds are for preventative mental health services.[21]

31. Counsel for NAN cross-examined Ms. Cranton on the issue of available mental health funding to Wapekeka. Ms. Cranton was unable to answer whether the Wapekeka proposal would be covered under Jordan's Principle;[22] however, she agreed that both the Wapekeka proposal[23] and the Survivors of Suicide initiative[24] were developed in order to address a gap within the community for services related to youth mental health. Ms. Cranton agreed that the SOS initiative was a successful initiative to address youth mental health services within Wapekeka.[25]

32. When asked about the specific funding sources identified at paragraphs 4 & 5 of her affidavit, Ms. Cranton acknowledged that her affidavit does not specify what portion of this funding is specifically for children and youth for mental health services.[26] When asked about the $54 million in funding allocated for First Nations mental health programs and services, referenced at paragraph 7 of her affidavit, Ms. Cranton acknowledged that this

[20] Affidavit of Sol Mamakwa, sworn February 13, 2017, at para 10.
[21] *Ibid.* at paras. 16-19
[22] Examination No. 17-0159, CV No. T1240/7008, Transcript Cross-Examination of Ms. Lee Cranton on an Affidavit sworn February 10, 2017, Date of Cross Examination: February 17, 2017, Pg. 19, at line 2 through to Pg. 20, at line 3 ["Cranton Cross-Examination, February 17, 2017"].
[23] *Ibid*, Pg. 15, para.47.
[24] *Ibid*, Pg. 21, para.86.
[25] Cranton Cross-Examination, February 17, 2017, Pg. 24, para.76
[26] *Ibid*, Pg. 55-6, para.198-201.

figure is not broken down by community. Ms. Cranton's affidavit does not indicate how much of this funding goes specifically to preventing suicide amongst children and youth.[27] Finally, when asked about whether the mental health services flown up to Wapekeka on a periodic basis, or whether the current funding to Wapekeka was sufficient to meet the need, Ms. Cranton stated that Health Canada does not know whether or not the services provided adequately meet the needs of the community[28] and further, that she is not aware of any full assessment of such needs.[29]

33. In addition to Ms. Cranton's evidence, INAC put forward as a witness, Ms. Robin Buckland, the Executive Director of the Office of Primary Health Care within Health Canada's First Nations Inuit Health Branch ("FNIHB").

34. Ms. Buckland was questioned on the Tribunal's findings that mental health services, in Ontario, are not eligible under the *1965 Agreement* and that the Health Canada's federal mandate to provide mental health services does not specifically cover children in care nor mental health counselling.[30] Ms. Buckland stated that the delivery of mental health services is not within her portfolio.[31] Ms. Buckland then acknowledged that children who are identified as suicide risks, have health issues.[32]

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[27] *Ibid*, Pg. 60-62, para.215-219.
[28] *Ibid*, Pg. 63, para.224-227.
[29] *Ibid*, Pg. 70-1, para.246-8.
[30] Examination No. 17-0109. 1A, CV No. T1240/7008, Transcript of Cross-Examination of Ms. Robyn Buckland on an Affidavit sworn January 25, 2017, Date of Cross Examination: February 6, 2017, Pg. 139-141, Para. 384-388. ["Buckland Cross-Examination, February 6, 2017"]
[31] *Ibid*, Pg. 141, Para. 388, Line 23-25.
[32] *Ibid*, Pg. 153-4, Para. 431.

35. Ms. Buckland was directed to the aforementioned Wapekeka proposal.[33] Ms. Buckland agreed that the Wapekeka proposal identified an example of a gap in services with children evincing a need, but could not say why this need was not met.[34]

> Q. Could you assist the Nishnawbe Aski Nation, the leadership, the members of the communities, my clients, why in September 2016 and going forward right up unto and including the time that Jolynn Winter and Chantel Fox took their lives that this need wasn't met?
>
> A. So can you repeat your question?
>
> Q. Could you articulate for the leadership of Nishnawbe Aski Nation, its community members, my clients, why, given the mandate you've indicated you have at Health Canada to meet the need, why the needs of Jolynn Winter and Chantel Fox who as you know ended their lives January 8th and January 10th, 2017, respectively, weren't met?
>
> A. No, I cannot respond. No, I cannot say why.[35]

36. Throughout Ms. Buckland's cross-examination, Ms. Buckland was unequivocal and steadfast in her statement that the Wapekeka crisis was an example of a clear need, resulting from a clear gap in mental health services, and therefore, the Wapekeka proposal would qualify as a Jordan's Principle case.[36] In particular, Ms. Buckland agreed that the gap in mental health services, created by the *1965 Agreement*, "could rightly be considered a Jordan's Principle case."[37] As the national lead for Jordan's Principle is of the view that the gaps in mental health services in Ontario can be covered by Jordan's Principle, NAN is seeking a Choose Life Order that Jordan's Principle funding should be granted to any

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[33] Affidavit of Dr. Michael Kirlew, sworn January 27, 2017, at Para 15. & Buckland Cross-Examination, February 6, 2017, Pg. 154-5, Para. 432-437.
[34] Buckland Cross-Examination, February 6, 2017, Pg. 155-6, Para. 438-440.
[35] *Ibid*, Pg. 156, Para. 441-2.
[36] See for example: Buckland Cross-Examination, February 6, 2017, Pg. 157-8, Para. 446-449 **AND** Pg. 175, Para. 505, Line 1-4 **AND** Page 180, Paras. 526-528 **AND** Pg. 189-190, Paras. 567-571.
[37] Buckland Cross-Examination, February 6, 2017, Pg. 216, Para 645. See also: Buckland Cross-Examination, February 6, 2017, Pg. 189, para. 567.

Indigenous community that files a proposal (akin to the Wapekeka proposal) identifying children and youth at risk of suicide.

37. Regarding the Wapekeka proposal, Ms. Buckland was pressed further as to why the proposal went unaddressed for several months. Ms. Buckland could not provide an answer.[38]

> Q. Ms. Buckland, what's missing from your answer, with respect, is you telling us what happened. It is close to inescapable that I have asked the same question repeatedly which is factually why did your people not address the clear need? That's the question that I've asked in many different ways and you're not giving me that answer. Why was it left unaddressed? That's the question I'm looking for an answer for.
>
> A. So when did I receive Dr. Kirlew's affidavit?
>
> Q. No, you advised us that you heard of this right away after it happened, that you saw Mr. Conn's statement in the media, and that you made inquiries about what happened.
>
> A. Sure.
>
> Q. And so I'm asking the question, what was the fruit of your inquiries? Why did they leave this unaddressed?
>
> A. And, and I don't know.
>
> Q. All right, thank you.
>
> A. I don't know.
>
> Q. Thank you. But that's the first time you've told me. It's been five to ten minutes and I've been asking the same question. So as matters currently stand, on February 6th, 2017, in your capacity as in charge of primary care as high-ranking executive for Health Canada, you do not know why the Wapekeka proposal went unaddressed for months on end in relation to children who were a high risk for suicide. Am I right, you don't know?
>
> A. I can speculate.

[38] Buckland Cross-Examination, February 6, 2017, Pg. 158, Para. 449-450.

> Q. No, I didn't ask for speculation. I simply wanted to know if you knew?
>
> A. So I do not know with 100 per cent certainty.[39]

38. Ms. Buckland was asked whether she agreed that the leadership and family members from NAN communities would expect Ms. Buckland to know the answer to the question of why the Wapekeka proposal went unaddressed, Ms. Buckland acknowledged, "I certainty think that it would be right and proper for them to expect me to find out." [40] Ms. Buckland then admitted that she had not read the Wapekeka proposal.[41]

39. Ms. Buckland stated that, in order to ensure that proposals do not fall through the cracks, proper communication is required to ensure that proposals, such as the Wapekeka proposal, can be processed through Jordan's Principle; however, Ms. Buckland further acknowledged that these statements are **aspirational**.

> Q. And your point is in the --
>
> A. And when I -- I had tried earlier to say, you had asked me what, **what have you done to put in place, to make sure that that doesn't happen again**.
>
> Q. Yes? Yes?
>
> A. And again, recognizing that we're still working on establishing all of the policies and procedures around First Nations, around JP, the JP initiative, we need --it's what we need to do on the go-forward. It's we need to make sure that it's -- we are clearly communicating with regional staff and I think I had mentioned this previously in my, in my response, that when you, when you see a proposal such as this, when you see that there is an identified need and it's -- it not able to be addressed through our current federal or provincial or territorial programs, that needs to be directed to the Jordan's Principle group so that it can be looked at and then processed through that system.

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[39] Buckland Cross-Examination, February 6, 2017, Pg. 163-4, Para 476-481.
[40] *Ibid*, Pg. 165, Para. 483.
[41] *Ibid*, Pg. 175-6, Paras. 506-513.

> Q. And I appreciate that answer and I thank you for the assistance. Can I ask this, though? **All of that is to say that that's aspirational. That's what you're planning to do, right? That's aspirational. Yes?**
>
> **A. What I just said was aspirational. And what needs to happen**.[42] [emphasis added]

iv) *INAC & Health Canada Do Not Understand Their Funding Obligations*

40. When Ms. Buckland was asked about the *1965 Agreement* and her understanding of the Tribunal's finding that the *1965 Agreement* does not cover mental health funding, Ms. Buckland stated that she is not fully familiar with nor does she fully understand the *1965 Agreement*:

> Q. Okay. But I have taken you through some of the passages, right, in terms of the Tribunal's reasons and you said you were familiar with them. **Do you want me to take you through a few more in terms of mental health services and the fact that the 1965 Agreement doesn't cover them or are we both agreed that you know that**?
>
> **A. So you're telling me that the 1965 Agreement does not cover mental health for First Nations children?**
>
> Q. Is this the first time you're learning of that?
>
> A. I am telling you I do not -- I have, I have asked for a high level briefing in terms of the 1965 Agreement. It's complicated. I don't understand it fully. Can I say with 100 per cent certainty that I know that? No. 90 per cent, I understand. And your insistence on repeating the points, I'm getting clear in terms of understanding it.[43] [emphasis added]

41. Later, Ms. Buckland acknowledged that her decisions around Jordan's Principle are made without the benefit of anyone with a comprehensive understanding of the *1965 Agreement* who directly reports to Ms. Buckland. [44]

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[42] Buckland Cross-Examination, February 6, 2017, Pg. 186-7, Para. 559-561.
[43] *Ibid*, Pg. 192, Para. 581-582.
[44] *Ibid*, Pg. 214-215, Para. 641.

42. Ms. Buckland was then asked if she met with INAC to discuss the gaps created by the *1965 Agreement,* to which Ms. Buckland responded that if anyone was going to sit down with INAC to discuss gaps in mental health services, it would be her; and that she has not met with INAC to discuss the gaps in mental health services.[45]

43. This evidence was repeated in the evidence provided byy Ms. Cassandra Lang. Following the cross-examinations of Ms. Buckland and Ms. Lang, the evidence revealed the following state of affairs:

- The *1965 Agreement* does not provide for mental health services in Ontario;
- Health Canada has not conducted an analysis of the gaps in services created by the *1965 Agreement* in respect of mental health services and how those gaps could be filled by Jordan's Principle;
- INAC has not conducted an analysis of the gaps in services created by the *1965 Agreement* in respect of mental health services and how those gaps could be filled by Jordan's Principle;
- There is no mechanism in place, by either INAC or Health Canada to address the gaps in mental health services created by the *1965 Agreement,* beyond a general commitment to broad reform and continued engagement with relevant partners; and,
- INAC has no plans to address the gap in mental health services in Ontario on the short term. INAC unilaterally views mental health services as part of longer term reform.

[45] Buckland Cross-Examination, February 6, 2017, Pg. 216-218, Para. 645-649.

44. NAN seeks a declaration of non-compliance in that INAC has failed to comply with the Tribunal's orders accompanied with an order that INAC fund mental health services is clearly required to prompt INAC to act. Further, light of the recent tragedies in Wapekeka, NAN is also seeking a Choose Life Order. The Choose Life Order would direct that Jordan's Principle funding be issued to any Indigenous community that files a proposal (akin to the Wapekeka proposal) identifying children and youth at risk of suicide.

C. Specific Immediate Relief: Orders to Support Creation of Remoteness Quotient

45. NAN's December 20, 2016 notice of motion sought immediate relief for remoteness as follows: that the remoteness quotients identified in the *Barnes Report* be applied to all funding for NAN child welfare agencies and that INAC fund jointly-appointed experts to obtain remoteness data and develop a remoteness quotient.

46. On January 27, 2017, NAN amended its notice of motion in order to particularize the sought remoteness relief, in light of exploratory discussions between NAN and two experts: Dr. Thomas Wilson and Mr. David Barnes. In support of this amended notice of motion, NAN filed a joint affidavit by both Dr. Wilson and Mr. Barnes on January 27, 2017.

47. INAC has not filed any responding affidavits with respect to remoteness. However, INAC's legal position indicates that this evidentiary silence, may be an expression of support. From surveying the record with regard to the creation of a remoteness quotient, it is obvious that the Parties, who differ on many issues, commonly see the value in this relief.

i) Immediate Relief Sought by NAN: Data to Drive Good Policy

48. In the Tribunal September 14, 2016 decision on immediate relief, the Tribunal ruled in support of NAN's position that a "remoteness quotient needs to be developed as part of

medium to long term relief and that data needs to be appropriately collected."[46] In support of the Tribunal's direction that the development of a remoteness quotient needs to be developed as medium to long-term relief, NAN has identified immediate steps that can be taken, as outlined in NAN's amended notice of motion:

- that INAC disclose any and all data collected by INAC with respect to the geography, demographics, and socioeconomic characteristics of First Nation communities that is relevant to an analysis of remoteness, community needs, and/or child welfare infrastructure;

- that INAC disclose any and all data held by Health Canada with respect to remoteness expenses in the context of providing health services to First Nations;

- that INAC disclose any and all data held by Public Safety Canada with respect to remoteness expenses in the context of providing policing services to First Nations;

- that INAC fund an immediate update of the Barnes Report, using data from the 2006 census, 2011 national household survey, and from INAC, as set out in the Affidavit of Thomas A. Wilson and David Barnes;

- that INAC fund a second update of the Barnes Report, using data from the 2016 census and from INAC, when the 2016 data becomes available, as set out in the Affidavit of Thomas A. Wilson and David Barnes;

[46] 2016 CHRT 16, at para. 80.

- that INAC fund the design and implementation of a direct survey of First Nations in northern Ontario with respect to community child welfare needs and infrastructure, as set out in the Affidavit of Thomas A. Wilson and David Barnes; and,

- that INAC fund the collection of all data set out in paragraph 21 of the Affidavit of Thomas A. Wilson and David Barnes, for analysis and use in the development of a more robust remoteness coefficient in the medium-to-long term.

ii) *INAC Collects Remoteness Data for its Own Employees*

49. The Tribunal has ordered INAC to provide detailed information in its compliance reports "to clearly demonstrate how it is determining funding for remote FNCFS Agencies that allows [remote agencies] to meet the actual needs of the communities they serve."[47]

50. In response, INAC conceded in its October 31, 2016, compliance report that INAC does not account for remoteness in funding the needs of Indigenous children in remote northern communities in Ontario. INAC further conceded that they do not have or currently collect sufficient data/information to create a remoteness quotient.[48]

51. All three witnesses for INAC (Robin Buckland, Cassandra Lang and Lee Cranton) were cross-examined on their understanding of how remoteness factors into increasing the costs of service delivery to remote communities. All three witnesses demonstrated a basic

[47] 2016 CHRT 16, para. 81.
[48] INAC October 31, 2016 Compliance Report, pg. 9, Section G.

understanding that service delivery to remote communities is costlier because of certain factors, such a geographic distance, isolation, weather, etc.

52. Ms. Buckland indicated that remoteness is factored into the salaries for some Health Canada employees (nurses and doctors in particular), in the form of an 'Isolated Post Allowance' Ms. Buckland indicated that this allowance is granted in recognition of the higher costs of living in remote communities.[49] Ms. Lang and Ms. Cranton also confirmed that they had heard of or were aware of the same isolated post allowance referred to by Ms. Buckland.[50]

53. The evidence before the Tribunal concerning remoteness in Ontario indicates that remoteness is not factored into funding for child and family services in Ontario. This is in contrast to the fact that remoteness is factored into the salaries of federal employees in the form of an isolated post allowance.

54. The creation of good policy requires the best information available. NAN seeks orders ensuring access to that information in order to aid the development of an accurate and effective remoteness quotient.

D. Specific Immediate Relief: Orders to Support NAN Child Welfare Agencies

55. NAN is seeking agency-specific immediate relief for the three child welfare agencies which operate within NAN territory: Payukotayno James and Hudson Bay Family Services ("Payukotayno"); Tikinagan Child and Family Services ("Tikinagan"); and, Kunowanimano Child and Family Services ("Kunowanimano").

[49] Buckland Cross Examination: February 6, 2017, Pg. 231-233, Para. 694-704.
[50] Buckland Cross Examination: February 6, 2017, Pg. 232, Lines 1-11 & Pg. 233.

56. NAN seeks the following orders for immediate relief for all three child welfare agencies: (1) that INAC fund the current debts and deficits of these agencies; and, (2) that INAC fund a capital needs assessment study for each agency.

i) The Immediate Need for Agency Specific Relief

57. In the Tribunal's January 26, 2016 ruling, the Tribunal found that the current funding model in Ontario does not reflect the needs of Indigenous communities and agencies for many reasons, including insufficient resources for services, shortage or lack of funding for administrative requirements, and lack of funding to invest in necessary infrastructure.[51] Regarding capital infrastructure, the Tribunal found that the *1965 Agreement* has not provided for cost-sharing of capital expenditures since 1975.[52]

58. In the Tribunal's September Decision on Immediate Relief, the Tribunal directed that Agency Debt Relief would "form part of the upcoming in-person case management discussions,"[53] and that "…as part of INAC's immediate relief investments, …INAC should develop an interim strategy to deal with the infrastructure needs of FNCFS Agencies. The Panel expects a detailed response from INAC on this issue and will discuss the issue with all parties at the upcoming in-person case management meeting."[54]

59. The Tribunal further directed that this topic of agency-specific relief would be discussed at the November case management conference; however, this discussion was never held as the case management conference was adjourned.

[51] 2016 CHRT 2, at para 244.
[52] 2016 CHRT 2, at para 245.
[53] 2016 CHRT 16, at para 106.
[54] 2016 CHRT 16, at para 97.

60. The need, identified by the Tribunal, yet remains and was addressed by all three child welfare agencies operating within NAN territory, as outlined below.

ii) The Need as Evidenced by Child Welfare Agencies Operating within NAN

61. Thelma Morris is the Executive Director of Tikinagan. Michael Miller is the Executive Director of Kunowanimano. Charlene Reuben is the Executive Director of Payukotayno.

62. All three Executive Directors provided affidavits which addressed the lack of adequate funding for each agency and the negative impact on service delivery. All three Executive Directors identified a non-exhaustive list of remoteness factors which increase the cost of service delivery to remote and isolated communities.

63. The accumulated funding shortfalls faced by each NAN child welfare agency are as follows:

- **Tikinagan**: As of March 31, 2016, Tikinagan has an operating deficit of $4,492,793 arising from accumulated prior and current year operating expenditures. Ms. Morris indicated that Tikinagan has routinely faced significantly historical budgeting shortfalls and that Tikinagan is chronically underfunded at source.[55]

- **Kunowanimano**: For this current fiscal year 2016/2017, Kunuwanimano was allocated $8,284,320 with a 10% holdback of $920,480. Kunuwanimano is forecasting to spend $9,204,800 for the 2016-17 fiscal year, due to an increase of children in care and ongoing protection files from the previous year. If the funds in

[55] Affidavit of Thelma Morris, Sworn December 20, 2017, at paras. 12-16.

the 10% holdback are not released, Kunuwanimano will face a budget deficit of approximately $920,480 by the end of fiscal year 2016/17.[56]

- **Payukotayno**: In 2015/16, Payukotayno's deficit was $1,279,537. In 2016/17, Payukotayno is anticipating a deficit of approximately $2.2 million.[57] Payukotayno's deficit is largely the result of increased demand for services and the cost of high-needs children in care. While facing these demands for services, Kunowanimano's budget has not increased to meet the greater demands for services.

64. Additionally, these agency-specific affidavits addressed the necessity of a capital needs assessment study for each agency.[58] All three Executive Directors indicated that each agency is facing chronic capital needs which remain unaddressed. All three Executive Directors indicated that a capital needs assessment study would be a helpful immediate relief step for the purposes of assessing each agency's capital needs. Further, each Executive Director indicated that they were aware of a letter sent to Agencies by Canada requesting agency specific information by June 30, 2017. Each stated that this letter of engagement is not a proper substitute for a comprehensive capital needs assessment study.

65. Once these capital needs are fully assessed and identified, these needs will be the subject of medium and long-term relief.

[56] Affidavit of Micheal Miller, Sworn December 20, 2017, at paras 14-20.
[57] Affidavit of Charlene Reuben, Sworn December 20, 2017, at paras. 14-20.
[58] Affidavit of Thelma Morris, sworn December 20, 2016, at paras 17-27; Affidavit of Micheal Miller, Sworn December 20, 2017, at paras 21-32; and; Affidavit of Charlene Reuben, Sworn December 20, 2017, at paras. 21-32.

66. The evidence of the three Executive Directors of the child welfare agencies operating within NAN territory remain uncontested by INAC. In response to the issue of agency debt relief, INAC maintains that it does not have a direct funding relationship with the agencies in Ontario; however, this response does not preclude that INAC could issue funds directly to the agencies to make each agency solvent.

67. In response to the issue of a capital needs assessment, INAC maintains that anything related to capital needs is medium to long term relief; however, NAN has identified an obvious first step that could be ordered as immediate relief: the ordering of capital needs assessment studies for each NAN child welfare agency.

PART III: ISSUES AND THE LAW

68. NAN submits that the Tribunal has the jurisdiction to make the requested orders by virtue of its statutory jurisdiction under the *Canadian Human Rights Act*[59] ("*CHRA*"); and the relevant jurisprudence interpreting the Tribunal's powers.

A. The Tribunal's Statutory Jurisdiction to Make the Requested Orders

69. The Tribunal has the authority to order the remedies requested by NAN under sections 16(1), 16(3) and 53(2)(a)(i) of the CHRA.

70. Section 16(1) of the CHRA permits the Tribunal to consider a variety of remedies including ordering a "special program, plan or arrangement".

> 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

[59] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

> 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.

71. 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).

> Collection of information relating to prohibited grounds
>
> 16(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).

72. Where a discrimination complaint 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).

> 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).

73. It is NAN's submission that the above provisions under the *CHRA* are broad enough to permit the Tribunal to make the requested orders without exceeding the Tribunal's statutory authority.

B. The Jurisprudence outlining the Tribunal's Jurisdiction to make the Requested Orders

74. The *CHRA* is to be interpreted broadly and liberally, in order to achieve the *CHRA*'s legislative intent:

> to give effect… to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…[60]

75. In the *National Capital Alliance on Race Relations v. Canada (Department of Health & Welfare)*, 1997 CanLII 1433 (CHRT)[61], this Tribunal affirmed that it has the authority, under sections 16(1) and 53(2)(a) of the *CHRA*, to issue a broad and expansive array of remedies:

> …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]

76. The Supreme Court of Canada affirmed this Honourable Tribunal's authority to order expansive remedies in *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 1987 CanLII 109 (SCC)[63]. In addition to an order to cease certain discriminatory hiring and employment practices, the Tribunal had issued a 'Special Temporary Measures Order' which included an explicit hiring target and data collection. The Supreme Court ultimately found that the Tribunal's remedial powers were broad enough to include all parts of this 'Special Temporary Measures Order'.

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[60] *CHRA*, Section 2.
[61] NAN Book of Authorities, at Tab 7.
[62] NAN Book of Authorities, Tab 7, at para 31.
[63] NAN Book of Authorities, at Tab 4.

77. In its January 26, 2016, decision in these proceedings, this Panel affirmed its broad authority to make remedial orders:

> [469] It is also important to reiterate that the CHRA gives rise to rights of vital importance. Those rights must be given full recognition and effect through the Act. In crafting remedies under the CHRA, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the Act are obtained. Applying a purposive approach, remedies under the CHRA should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination…[64]

78. In its April 26, 2016, decision[65], the Tribunal provided a comprehensive outline of jurisprudence on remedial principles concerning the Tribunal's flexible and broad powers to craft effective and meaningful orders. NAN relies on the following paragraphs of the Tribunal's April, 2016 decision as the basis upon which the Tribunal may craft orders to address the discriminatory practices identified in the Tribunal's decisions:

> [10] It is worth reiterating some of the Tribunal's remedial principles in order to foster a common understanding of the Panel's goals and authorities in crafting a remedy in response to the *Decision*.
>
> [11] Human rights legislation expresses fundamental values and pursues fundamental goals. In fact, the Supreme Court of Canada has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at pp. 89-90 [*Robichaud*]; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62 [*Mowat*]). In line with this special status, the *CHRA* must be interpreted in a broad, liberal and purposive manner so that the rights enunciated therein are given their full recognition and effect (see *Mowat* at paras. 33 and 62).
>
> [12] Likewise, when crafting a remedy following the substantiation of a complaint, the Tribunal's powers under section 53 of the *CHRA* must

[64] 2016 CHRT 2, para. 469.
[65] 2016 CHRT 10.

be interpreted so as to best ensure the objects of the *Act* are obtained. Pursuant to section 2, the purpose of the *CHRA* is to give effect to the principle that:

> all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…

[13] It is the Tribunal's responsibility to consider this dominant purpose in crafting an order under section 53 of the *CHRA*. Consistent with that purpose, the aim in making an order under section 53 is not to punish the person found to be engaging or to have engaged in a discriminatory practice, but to eliminate and prevent discrimination (see *Robichaud* at para. 13; and *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134 [*Action Travail des Femmes*]).

[14] On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination (see *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 25 and 55; and *Action Travail des Femmes* at p. 1134).

[15] That said, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task. Indeed, as the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility."

[16] Aside from orders of compensation, this flexibility in fashioning effective remedies arises mainly from sections 53(2)(a) and (b) of the *CHRA*. Those sections provide the Tribunal with the authority to order measures to redress the discriminatory practice or prevent the same or similar practice from occurring in the future [see s. 53(2)(a)]; and to order that the victim of a discriminatory practice be provided with the rights, opportunities or privileges that are being or were denied [see s. 53(2)(b)].

[17] The application of these broad remedial authorities can override an organization's right to manage its own enterprise and, with particular

> regard to section 53(2)(b), can afford the victim of a discriminatory practice a remedy in specific performance (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 165 and 167, varied on other grounds in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110; and *Canada (Attorney General) v. McAlpine* (1989), 12 CHRR D/253 (FCA) at para. 6). In line with ensuring remedial orders are effective in promoting the rights it protects, section 53(2)(a) can also be used to craft remedies designed to educate individuals about the rights enshrined in the *CHRA* (see *Schuyler v. Oneida Nation of the Thames*, 2006 CHRT 34 at paras. 166-170; and *Robichaud v. Brennan* (1989), 11 CHRR D/194 (CHRT) at paras. 15 and 21).
>
> [18] With specific regard to the circumstances of this case, section 53(2)(a) of the *CHRA* has been described as being designed to meet the problem of systemic discrimination (see *Action Travail des Femmes* at p. 1138 referring to the *CHRA*, S.C. 1976-77, c. 33, s. 41(2)(a) [now s. 53(2)(a)]). To combat systemic discrimination, "it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged" (*Action Travail des Femmes* at p. 1139). That is, for the Tribunal to redress and prevent systemic discriminatory practices, it must consider any historical patterns of discrimination in order to design appropriate strategies for the future (see *Action Travail des Femmes* at p. 1141).
>
> [19] It is with these remedial principles in mind that the Panel approaches the task of continuing to craft an effective and meaningful order to address the discriminatory practices identified in the *Decision*.[66]

C. Principles Governing Compliance with Tribunal Orders

79. The decision of *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342 (CanLII)[67] provides guidance on when it is appropriate to order immediate relief. *Pictou Landing* is a case of judicial review of an INAC funding decision. INAC decided to not reimburse the Pictou Landing Band Council ("PLBC") for in-home health care for a teenager from Pictou Landing First Nation. Jeremy Meawasige had been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism leaving him with high care needs.

[66] 2016 CHRT 10, at paras. 10-19.
[67] NAN Book of Authorities, at Tab 6.

INAC refused to reimburse Jeremy's family for his care beyond what was determined to be a normative standard of care. The Federal Court in *Pictou Landing* ultimately found that Jeremy's case should fall under Jordan's Principle, and on this basis, issued a directed verdict instead of remitting the matter back to INAC to reassess and render a decision.

80. While the Federal Court of Appeal has determined that directed verdicts are only to be issued in exceptional circumstances (*Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31 (CanLII))[68], the Federal Court in *Pictou Landing* determined that such an order was appropriate as care for Jeremy used up 80% of PLBC's entire funding provided for its Assisted Living Program (ALP) and Home and Community Care Program (HCCP), funded by INAC.

81. NAN submits that the Tribunal should draw an analogy from the *Pictou Landing* case and make a directed order for the immediate relief remedies sought by NAN. The *Pictou Landing* case involved a child with a clear need and the evidence was that this need should be funded; however, rather than sending the matter back to INAC to reassess and render a decision, the Court proceeded to make the decision itself, via a directed verdict.

82. In the herein proceedings, NAN has requested a series of orders which have been left unaddressed by INAC. There is ample evidence before the Tribunal that NAN's sought relief is tied to clear needs arising from the found discrimination. The Tribunal has repeatedly sought information from INAC about how it is addressing these needs; however, the needs continues to be unmet. Rather than request yet more information from INAC, NAN submits

[68] NAN Book of Authorities, at Tab 8.

that the Tribunal should issue its version of a directed verdict: a directed order with concrete timeframes.

83. Just as the Federal Court found that there could be no acceptable or appropriate basis for INAC continuing to deny Pictou Landing Band Council re-imbursement funding for care to Jeremy, this Tribunal should similarly find that INAC has no legitimate basis for continuing to drag its feet on implementing measures that would meet the needs of children and families in NAN communities. In light of this, the Tribunal is positioned to make a directed order, in the same way the Federal Court issued a directed verdict in *Pictou Landing.*

84. The leading case that sets the parameters on making a directed verdict is the Supreme Court of Canada's decision in *Giguère v. Chambre des notaires du Québec*, [2004] 1 SCR 3, 2004 SCC 1 (CanLII)[69]. At paragraph 66, the decision states that "a case may not be sent back to the competent authority if it is no longer fit to act". Based on INAC's continued demonstration of an inability to remedy its discriminatory practice after more than a year since the Tribunal's January decision, INAC cannot be said to be fit to act without the Tribunal's explicit directions.

85. In *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55 (CanLII)[70] at paras 13-14, the Federal Court of Appeal noted that directed verdicts fall within the general law of *mandamus*, or a court's authority to render a mandatory order. While NAN recognizes that the Tribunal does not have the powers of mandamus, NAN argues that the Tribunal has mandamus-like powers in making its orders, and should therefore use the Federal Court's

[69] NAN Book of Authorities, at Tab 5.
[70] NAN Book of Authorities, at Tab 3.

jurisprudence on mandamus for instructive purposes. In light of this, the Tribunal should continue to consider the "directed verdict" analogy in order to support its authority to make a directed order.

86. In support of this, the Tribunal should rely on the Federal Court's recent decision in *Southern Chiefs Organization Inc. v. Dumas*, 2016 FC 837 (CanLII)[71] for guidance. In *Southern Chiefs*, the Federal Court sets out the parameters on mandamus. At paragraph 52 of *Southern Chiefs* the Federal Court sets out the criteria for a mandamus order: the following:

> The Federal Court of Appeal summarized the necessary criteria to issue a mandamus order in Canada (Attorney General) v Arsenault, 2009 FCA 300 (CanLII)[72] at para 32:
>
> 1. There must be a public legal duty to act;
> 2. The duty must be owed to the applicant;
> 3. There is a clear right to the performance of that duty, in particular:
>   a. the applicant has satisfied all conditions precedent giving rise to the duty;
>   b. here was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied;
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>   a. in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>   b. mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
>   c. in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
>   d. mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

[71] NAN Book of Authorities, at Tab 9.
[72] NAN Book of Authorities, at Tab 2.

e. mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty;

5. No other adequate remedy is available to the applicant;
6. The order sought will be of some practical value or effect;
7. The court in the exercise of its discretion finds no equitable bar to the relief sought;
8. On a "balance of convenience" an order in the nature of mandamus favours the applicant.

87. The framework supports the argument that due to the fact that INAC has been found to be discriminating against 163, 000 First Nations children on reserve, the Tribunal should make directed orders that point to specific actions that INAC must undertake as immediate relief measures to relieve ongoing discrimination. This criteria, while not binding on the Tribunal provides a usable and appropriate framework of analysis. If we consider the issue of mental health services in Ontario as but one example, it is clear that INAC has a public legal duty to act to end the found discrimination caused by not funding this much needed service. INAC has had a reasonable timeframe to come up with a plan to fund mental health services in Ontario. The nearly 13 months of non-action (and in some cases, unilateral actions) by INAC can be reasonably interpreted as refusals to the specific relief sought by NAN and COO, expressly or implied. In the case of mental health services in Ontario, INAC's inaction is both unfair and oppressive to children and families in need. There are no other adequate remedies available other then funding mental health services in Ontario.

88. Without specific orders from the Tribunal, there will be further delay for immediate relief and the found discrimination will continue. Here again, the analogy that NAN argues the Tribunal should consider is the "administrative delay". In this vein, NAN draws the Tribunal's attention to the Supreme Court of Canada's decision in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307

(*Blencoe*)[73]. At para 160 of *Blencoe* the Court explores how to assess the reasonableness of an administrative delay. Ultimately, the court states that the following should be considered:

- the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;

- the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and

- the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.

89. Applying these three factors, the time it has taken for INAC to comply with immediate relief is inordinate, especially in light of the fact that these proceedings have been ongoing for more than 10 years. The impact of INAC's continued delay is ongoing discrimination against

[73] NAN Book of Authorities, at Tab 1.

an exceptionally vulnerable subset of the population, namely, First Nations children in need of protection.

PART IV: ORDERS REQUESTED

90. NAN seeks the following relief:

A. Mental Health

a. An order that INAC has failed to comply with the Tribunal's order at 2016 CHRT 2, in that INAC has not funded mental health services under the *Child and Family Services Act* R.S.O. 1990 c, c-11.

b. An order that INAC immediately fund mental health services in Ontario pursuant to the *Child and Family Services Act*, R.S.O. 1990 c. c-11 and any act which amends or replaces that Act.

c. The Choose Life Order: an order that any Indigenous community that files a proposal (akin to the Wapekeka proposal) identifying children and youth at risk of suicide, should be funded under Jordan's Principle.

B. Remoteness

a. that INAC apply the remoteness quotients identified in the *Barnes Report*, to all funding for Payukotayno James and Hudson Bay Family Services, Tikinagan Child and Family Services and Kunowanimano Child and Family Services ("NAN-mandated child welfare agencies");

b. that INAC fund jointly-appointed experts to: (1) obtain remoteness data; and (2) develop a remoteness quotient;

c. that INAC disclose any and all data collected by INAC with respect to the geography, demographics, and socioeconomic characteristics of First Nation communities that is relevant to an analysis of remoteness, community needs, and/or child welfare infrastructure;

d. that INAC disclose any and all data held by Health Canada with respect to remoteness expenses in the context of providing health services to First Nations;

e. that INAC disclose any and all data held by Public Safety Canada with respect to remoteness expenses in the context of providing policing services to First Nations;

f. that INAC fund an immediate update of the Barnes Report, using data from the 2006 census, 2011 national household survey, and from INAC, as set out in the Affidavit of Thomas A. Wilson and David Barnes;

g. that INAC fund a second update of the Barnes Report, using data from the 2016 census and from INAC, when the 2016 data becomes available, as set out in the Affidavit of Thomas A. Wilson and David Barnes;

h. that INAC fund the design and implementation of a direct survey of First Nations in northern Ontario with respect to community child welfare needs and infrastructure, as set out in the Affidavit of Thomas A. Wilson and David Barnes; and

i. that INAC fund the collection of all data set out in paragraph 21 of the Affidavit of Thomas A. Wilson and David Barnes, for analysis and use in the development of a more robust remoteness coefficient in the medium-to-long term.

C. Agency-Specific Relief

a. that INAC fund the current debts and deficits of all NAN-mandated child welfare agencies; and,

b. that INAC fund a Capital Needs Assessment Study for all NAN-mandated child welfare agencies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

THIS 28th DAY OF FEBRUARY, 2017

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SCHEDULE "A" – LIST OF AUTHORITIES

TAB	AUTHORITY
1	*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44
2	*Canada (Attorney General) v Arsenault*, 2009 FCA 300
3	*Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55
4	*CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 1987 CanLII 109 (SCC)
5	*Giguère v. Chambre des notaires du Québec*, [2004] 1 SCR 3, 2004 SCC 1
6	*Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342
7	*National Capital Alliance on Race Relations v. Canada* (Department of Health & Welfare), 1997
8	*Rafuse v Canada (Pension Appeals Board)* 2002 FCA 31
9	*Southern Chiefs Organization Inc. v. Dumas*, 2016 FC 837

SCHEDULE "B" – STATUTES AND REGULATIONS

Canadian Human Rights Act (R.S.C., 1985, c. H-6)

Purpose of Act

2. to give effect… to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…

…

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]

…

Collection of information relating to prohibited grounds

16(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).