Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 6
Date: February 11, 2021
File No.: T1340/7008

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 -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Member: Sophie Marchildon
Edward P. Lustig

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Compensation Process Ruling on Four Outstanding Issues in Order to Finalize the *Draft Compensation Framework*

I. Context

[1] This ruling arises in the context of a complaint filed by the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) that Canada provided inequitable and discriminatory funding for First Nations children living on reserve and in the Yukon. In particular, this discrimination is found in inadequate funding for child welfare services and inappropriate application of Jordan's Principle. The Tribunal agreed with the Caring Society and the AFN that Canada's conduct was discriminatory for reasons provided in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Merit Decision*). The Tribunal retained jurisdiction to address the complex remedial matters in this case (see especially *Merit Decision*, paras. 493-94 and 2016 CHRT 10, paras. 1-5).

[2] The Tribunal found the complaint was substantiated. More specifically, the Tribunal found that Canada's conduct was systemic and discriminatory because it's design, management and control of the First Nations Child and Family Services Program (FNCFS Program), along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves across Canada. The Tribunal identified a number of discriminatory harms from Canada's funding approach, management and control of the Program. Furthermore, the Tribunal found that Canada provided inadequate funding for a variety of child and family services provided to First Nations children. For example, Canada provided inadequate and fixed funding for operational costs and prevention services. Accordingly, First Nations Child and Family Services Agencies (FNCFS Agencies) were unable to provide provincially and territorially mandated levels of service. The funding formula further contained an incentive to remove children from their home rather than provide supports to promote their wellbeing in the care of their parents or existing caregivers. The failure to coordinate the FNCFS Program with other programs, whether federal, provincial or territorial, created gaps, delays and denials

of services for First Nations children. Moreover, the narrow definition and inadequate implementation of Jordan's Principle resulted in service gaps, delays and denials for First Nations children and families.

[3] The Tribunal agreed with the Caring Society and the AFN that Canada's conduct was discriminatory for reasons provided in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [the *Merit Decision*]. The Tribunal retained jurisdiction to address the complex remedial matters in this case (see especially *Merit Decision*, paras. 493-94 and 2016 CHRT 10, paras. 1-5).

[4] The Tribunal ordered Canada to pay compensation to the First Nations children who have experienced the pain and suffering of being separated from their homes, families and communities or have experienced gaps, delays and denials in services as a result of the discrimination found in the *Merit Decision* and their parents or grandparents caregivers who have experienced the pain and suffering of having their children unnecessarily removed from their homes, families and communities or have experienced gaps, delays and denials in services as a result of the discrimination found in the *Merit Decision* (see *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)*, 2019 CHRT 39 [the *Compensation Decision*]) In the *Compensation Decision*, the Tribunal directed the parties to negotiate a culturally sensitive and trauma informed process to compensate the victims of the discriminatory practice (para. 269). The Tribunal remained available to resolve any disagreements that arose in the process of drafting the compensation framework. The parties have engaged in a collaborative process to create the *Framework for the Payment of Compensation under 2019 CHRT 39* (the *Draft Compensation Framework*). The parties have requested direction from the Tribunal when they were unable to agree (e.g. 2020 CHRT 7, 2020 CHRT 15, and 2020 CHRT 20). The parties indicate they are close to finalizing the *Draft Compensation Framework* in order to submit it to the Tribunal for approval.

[5] This ruling addresses four issues that arise from the *Draft Compensation Framework* submitted by the parties on October 2, 2020. The parties specifically requested the Tribunal

to provide direction concerning a contested issue between the parties regarding the creation of a trust fund for some categories of beneficiaries. The AFN, the Caring Society and the NAN argue the *Canadian Human Rights Act*, RSC 1985 c H-6 [*CHRA* or the *Act*] provides jurisdiction to implement a trust fund for victims who were legally unable to manage their own finances. Second, Nishnawbe Aski Nation (NAN) requested an amendment to the *Draft Compensation Framework* to reflect its participatory rights as an intervening interested party in this case. Third, NAN requested an amendment to the *Draft Compensation Framework* to change the time period for which First Nations children would be eligible for Jordan's Principle compensation. Finally, the Tribunal requested submissions to ensure that the Tribunal's role in the *Draft Compensation Framework* was within the Tribunal's jurisdiction.

[6] The Tribunal issued a letter ruling dated December 14, 2020 to the parties with reasons to follow. This is analogous to an oral decision with reasons to follow, which the Panel used to expedite the process of finalizing the compensation framework. This ruling provides the reasons contemplated in the Panel's December 14, 2020 letter. Following this letter ruling, the parties were able to finalize the *Draft Compensation Framework* and, on December 23, 2020 they submitted the final version to obtain a final consent order on the issue of the compensation process.

II. Trust Provisions

(i) Context

[7] The *Compensation Decision* determined that compensation would be payable directly to the victims of the discriminatory practice instead of into a fund that would provide services for their benefit. However, the Tribunal recognized "that it is not appropriate to pay $40,000 to a 3-year-old" and that a process for paying funds to minor beneficiaries was required (para. 261). The Tribunal determined in 2020 CHRT 7 that the provincial or territorial age of majority would determine when First Nations children would receive direct control of their compensation funds (paras. 8-36).

[8] The *Draft Compensation Framework* contains provisions for payments for individuals who lack the legal capacity to manage their own finances. These provisions apply only to individuals who lack the legal capacity to manage their own finances:

> 10.1. Where the beneficiary has the legal capacity to manage their own financial affairs, the compensation shall be paid directly to the beneficiary.
>
> …
>
> 10.3. Where the beneficiary does not have the legal capacity to manage their own financial affairs, the compensation shall be held in trust for the beneficiary.

[9] Section 10.3 also stipulates that for these beneficiaries, their compensation shall be held in trust.

[10] Sections 10.4 and 10.5 provide for the appointment of up to three Appointed Trustees to manage the trust funds in accordance with a Trust Agreement:

> 10.4. The Parties will select up to three (3) business entities that specialize in holding, administering and distributing funds held in trust for the benefit of the beneficiaries who do not have the legal capacity to manage their own financial affairs (the "**Appointed Trustees**"). **The administration fees charged by the Appointed Trustees shall be paid for by Canada and shall not encroach on the beneficiaries' entitlement.**
>
> (emphasis added).
>
> 10.5. The Appointed Trustees shall hold the funds in trust pursuant to a trust agreement agreed to by the Parties (the "**Trust Agreement**"). The Trust Agreement shall outline the following requirements:
>
> a) The powers, responsibilities and requirements of the trustee to hold and manage the funds for the benefit of the beneficiaries;
> b) The distribution provisions for income and capital;
> c) The criteria for encroachment on capital;
> d) The removal and replacement of trustees;
> e) The accounting and report requirements; and
> f) Any other appropriate related provisions.

[11] Canada does not agree with the proposed appointment of Appointed Trustees pursuant to a Trust Agreement and accordingly the parties request the Tribunal's adjudication of these provisions in the *Draft Compensation Framework*.

A. Position of the Parties

(ii) Canada

[12] Canada objects to the provisions in the *Draft Compensation Framework* relating to paying funds into trust for children who do not have legal capacity to manage their own affairs. Canada acknowledges the advantages of the proposed measures but disputes that the Tribunal has the jurisdiction to implement them. Canada contends that the measures in the *Draft Compensation Framework* would inevitably cover ground fully covered by express provisions in the *Indian Act*, RSC 1985, c I-5 or provincial law relating to children's property.

[13] Canada argues that under the *Indian Act*, the Minister has exclusive authority to deal with the property of any beneficiary who lacks the legal capacity to manage their own property. For adults who lack legal capacity, that authority is found under section 51. For children, the authority is under section 52, with the additional stipulations in sections 52.1 and 52.2 that contemplate a role for Band Councils and parents.

[14] Canada cites Saskatchewan, British Columbia and Ontario legislation to identify who should have control of a child's property under provincial jurisdiction. It does not address any other provincial legislation. Section 45 of the *Children's Law Act 2020*, S.S. 2020, c. 2, gives authority over a child's property in Saskatchewan to the parents, unless otherwise ordered by a court. Sections 47 to 51 of the Ontario *Children's Law Reform Act*, RSO 1990, c. C-12 give preference to parents as the guardians of a child's property. The British Columbia *Family Law Act*, SBC 2011, c. 25 provides, at sections 175-181, that a trustee of a child's property must be appointed by a court.

[15] Canada argues that there are many specific laws dealing with the property of minors. Subsections 53(2) and (3) of the *CHRA* do not demonstrate an intention by Parliament to allow the Tribunal to impose the trust provisions in the *Draft Compensation Framework.* Furthermore, the provincial and *Indian Act* provisions demonstrate that it is not necessary for the Tribunal to impose a trust framework. Canada further adds that the Tribunal must respect the existing property laws applicable to beneficiaries.

(iii) The Caring Society

[16] The Caring Society supports the trust provisions in the *Draft Compensation Framework.* The Caring Society submits that these provisions provide a clear, uniform, and culturally and trauma informed approach that would be lacking if Canada's position is adopted.

[17] The Caring Society views beneficiaries who lack legal capacity as among the most vulnerable victims in this case. The proposed Appointed Trustee would protect compensation for this group. The centralized approach will create a predictable, clear and universal approach for all beneficiaries across Canada who lack legal capacity that is capable of clear oversight and protections.

[18] The Caring Society relies on the findings of the Youth in Care Canada report previously accepted by the Panel, that it is vital that persons who cannot manage their own financial affairs, receive culturally appropriate and trauma informed services to avoid further harm.

[19] The Caring Society outlines the burdens that would fall on families in the absence of the Appointed Trustee. The Caring Society agrees that compensation cannot be paid directly to those who lack legal capacity. The provincial, territorial and *Indian Act* regimes contemplate the appointment of a guardian of property as a default regime of last resort. The proposed Appointed Trustee provides an alternative to the default "last resort" statutory regimes in a manner that will more effectively implement the Tribunal's orders.

[20] The Appointed Trustee avoids four obstacles for beneficiaries who lack legal capacity. First, it avoids the challenge of determining the legislative provisions that apply to the individual under the provincial, territorial, or *Indian Act* legislative regimes, depending on which legislative framework applies to the individual. The complexity of engaging with the legislation may require beneficiaries to hire legal counsel that would in effect reduce their compensation. Second, the legislative regime within a jurisdiction is often different for adults and children who lack legal capacity. Third, the administrative steps imposed on families under the provincial, territorial and *Indian Act* regimes may result in some families not completing the necessary steps and beneficiaries therefore not receiving compensation.

Fourth, the default regimes do not contain provisions to ensure beneficiaries receive culturally appropriate and trauma informed services.

[21] The Caring Society further elaborates on some barriers potentially facing guardians of property for minors under the default regimes. These barriers undermine the principles of safeguarding the best interests of the child beneficiaries and making the payment process as simple as possible for beneficiaries. First, the application process is often burdensome. In most cases, the parent or guardian will be required to make an application to be appointed the guardian of property. This process may involve a court application, with associated court fees and the possible need to hire counsel. The process will vary between provinces and even in some cases within a province based on the amount of compensation a beneficiary will receive. Quebec in particular has different processes depending on whether the value of the property is above or below $25,000. Second, accounting processes are a significant administrative burden on a guardian of property. The specific accounting requirements vary between provinces and territories and, at least in Quebec, within the province based on the amount of compensation received. Third, guardians of property for a minor are often required to post a bond. The requirements again vary across Canada. The requirement to post a bond adds another burden to seeking compensation.

[22] The Caring Society identifies that there are also burdens for individuals seeking to be appointed a guardian of property for an adult who lacks legal capacity. First, there is an application process. While it involves many of the same challenges as processes involving minors, there is the further requirement of proving a lack of capacity. The requirement to demonstrate an absence of capacity increases the potential for contested litigation. There are similar provisions for financial security to be required by the guardian. In some cases, there is a requirement to present a plan for managing the property. The Caring Society notes that some legislation, such as the *Adult Capacity and Decision-making Act*, SNS 2017, c. 4, s. 7(1)(c), requires the court to be satisfied that appointing a guardian of property is the least restrictive measure. Secondly, the standards to which guardians of property are held are high. It requires appropriate judgement and record keeping. Guardians of property take on a legal risk that they would be held responsible if funds are mismanaged.

[23] Overall, the Caring Society submits that the proposed trust provisions are consistent with a broad interpretation of the *CHRA* that is aimed at effectively remedying the discrimination at issue. The proposed provisions best protect the specific interests of the particularly vulnerable group of beneficiaries who lack legal capacity to manage their own finances.

(iv) Assembly of First Nations

[24] The AFN supports the trust provisions in the *Draft Compensation Framework*. The provisions provide a national approach with clear rules and norms on how funds are to be distributed to beneficiaries.

[25] The AFN is aware of the risk that parents or guardians deplete the funds they hold in trust for a child. The proposed provisions protect vulnerable beneficiaries from this risk. The trust provisions contemplate that all of the funds will be preserved until a child beneficiary reaches the age of majority. These provisions contrast with provincial, territorial and the *Indian Act* regimes that contemplate that trust funds can be encroached upon so long as it is in the best interest of the beneficiary. In particular, there is a possibility under at least some provincial regimes to encroach on the trust funds to pay for some maintenance and support expenses. Similar encroachments are possible for activities that directly benefit the child such as healthcare, education and sports. These encroachments are particularly problematic when the guardian is the state. The AFN is concerned about a process that would likely see some beneficiaries not having any funds left when they reach the age of majority.

[26] The trust provisions provide a consistent national regime. This permits uniform direction on how the trust funds will be managed. It also alleviates the burden on individual guardians of property to navigate the process for managing funds themselves. The AFN notes, much as the Caring Society does, the different regimes that apply across Canada and even in some instances within a jurisdiction based on the amount of compensation at issue. The AFN raises concerns that the reporting requirements under existing legislation are inadequate to safeguard the compensation funds because, if there is an abuse of funds, it is difficult to seek to have it remedied until a minor beneficiary reaches the age of majority.

At that point, any remedy is likely to require expensive litigation. In relation to the *Indian Act* in particular, the funds are not invested in a manner that permits reasonable returns.

[27] The AFN submits that the Tribunal has jurisdiction to approve the trust provisions in the *Draft Compensation Framework*. The Tribunal's remedial jurisdiction stems from the quasi-constitutional nature of the *CHRA* and the broad remedial discretion provided under section 53 of the *CHRA*. The AFN relies on *Merrill Petroleums Ltd.* v. *Seaboard Oil Co.*, 1957 CanLII 631 (AB QB), 22 W.W.R. 529 at p 557 for the proposition that a trust instrument can supersede provincial law. The various provincial and territorial *Trustee Acts* reinforce the supremacy of trust deeds over general legislative provisions. For example, Manitoba's *The Trustee Act*, C.C.S.M. c. T160 provides at section 4 that

> Nothing in this Act authorizes a trustee to do anything that he is in express terms forbidden to do, or to omit to do anything that he is in express terms directed to do, by the instrument creating the trust.

Similarly, the Ontario *Trustee Act*, R.S.O. 1990, c T.23 provides, at section 68, that

> Nothing in this Act authorizes a trustee to do anything that the trustee is in express terms forbidden to do, or to omit to do anything that the trustee is in express terms directed to do by the instrument creating the trust.

[28] The AFN believes that the trust provisions in the *Draft Compensation Framework* are within the scope of the remedies available to the Tribunal. Furthermore, these provisions will give effect to the Tribunal's direction that the parties establish a process that will ensure that minors have their compensation "secured in a fund that would be accessible upon reaching majority" (*Compensation Decision*, para. 261).

(v) Other Parties

[29] The NAN indicated it supports the Caring Society and the AFN's position on the trust provisions. The Commission and the Chiefs of Ontario (COO) take no position.

B. Analysis

[30] The Tribunal has the jurisdiction under section 53 of the *CHRA* to approve the trust provisions in the *Draft Compensation Framework*. This will be explained below.

(i) Scope of Trust Law and Guardianship Law

(a) General Principles

[31] The AFN correctly articulates the general principle that legislative regimes regarding trusts contemplate specific provisions in a trust deed that can take precedence over most aspects of the legislation. In particular, *Merrill Petroleums Limited v. Seaboard Oil Company,* 1957 CanLII 631 (AB QB), at page 557, aff'd 1958 CanLII 499 (AB CA) supports the proposition that while the common law and statutes might impose some duties on trustees, the specific provisions of the trust are governed by the trust agreement:

> While it is also true that there are certain general obligations imposed by law on any trustee (e.g., the duty not to profit from the trust at the expense of the beneficiaries) the more specific obligations and duties of a trustee are set forth in the instrument creating the trust—in other words, except for those general duties imposed by law on all trustees, the terms of a trust are to be found within the four corners of the trust instrument.

[32] Provincial and territorial legislation relating to trusts contemplates the existence of a separate trust instrument managed by another trustee that is different from the regimes contemplated in provincial or territorial guardianship legislation. Similarly, there is no provision in the *Indian Act* that ousts the ability of an individual lacking legal capacity from benefiting from a trust deed and having their property managed by a trustee in accordance with the trust deed.

[33] The Caring Society provided the Tribunal with *Whaley Estate Litigation on Guardianship* in which with Lionel J. Tupman states at page 85 that establishing a trust is an alternative to relying on the default provisions in Ontario legislation that contemplates the appointment of a guardian of property:

> *Trust Terms*
>
> Further alternatives may exist having some bearing on the appointment of a guardian under [Ontario's *Children's Law Reform Act*], including various trust arrangements which may provide authority for the property to be held in trust by a parent or other individual/trustee, a will that contains trust terms, the designation of a trustee or a trust or trust settlement (*inter vivos* trust).

> (Lionel J. Tupman, "Guardianship of Property" in *Whaley Estate Litigation on Guardianship*, Kimberley A. Whaley and WEL, edited by Laura Cardiff (2015), Available online at https://welpartners.com/resources/WEL-on-guardianship.pdf)

[34] The proposition that a specific trust agreement is an alternative to relying on the guardianship provisions of legislation is a general proposition not limited to the specifics of the Ontario legislation. It applies across provincial, territorial and *Indian Act* legislation and provisions on guardianship.

[35] A review of provincial legislation supports the proposition that trust law generally contemplates that a trust agreement can take precedence over provisions in trust legislation. For example, the Ontario *Trustee Act,* RSO 1990, c T.23 at s. 67 and 68 provides that the powers in the Act are in addition to those established in the trust agreement and that nothing in the Act authorizes a trustee to do anything they are prohibited from doing by the trust agreement. The Alberta *Trustee Act*, RSA 2000, c T-8 does not have a general provision explaining the relationship of the Act to trust agreements but has provisions such as s. 35(6) that confirm that specific provisions of the Act are limited by the terms of the trust agreement. Similarly, the British Columbia *Trustee Act*, RSBC 1996, c 464 has various provisions such as s. 27(5) that stipulates that the section only applies if a contrary intention is not expressed in the trust agreement. It is clear that, in general, provincial legislation contemplates operating harmoniously with a trust agreement. In fact, it appears that much of the legislation is written to provide a default set of rules in the event that a trust agreement does not address an issue. A reading of this legislation does not support Canada's assertion that provincial legislation ousts the Tribunal's ability to structure a remedy in the form of a trust. Rather, it provides a framework that would give full effect to any trust created.

(b) Indian Act Regime

[36] Canada raises concerns that the *Indian Act* provides a complete scheme to address the property of individuals within the scope of the Act who lack the legal capacity to manage their own property. Canada identifies sections 51, 52 and 52.1-52.5 as setting out the applicable *Indian Act* regime. Canada's submissions on this matter provide little analysis beyond identifying these statutory provisions.

[37] On an initial reading, the provisions of the *Indian Act* appear to support the proposition that only the Minister may manage the property of an individual with *Indian Act* status who lacks legal capacity. For example, section 51(1) provides that "[s]ubject to this section, all jurisdiction and authority in relation to the property of mentally incompetent Indians is vested exclusively in the Minister." Similarly, for children, section 52 provides that "[t]he Minister may administer or provide for the administration of any property to which infant children of Indians are entitled, and may appoint guardians for that purpose." While there are provisions for appointing another individual to manage the property, the appointed guardian of property's powers flow from the Minister's approval (s. 51(2)(a) and s. 52.2).

[38] The *Indian Act* provisions are far sparser than the trust provisions in provincial and territorial legislation. They do not provide any explicit guidance on how the provisions interact with a trust agreement. However, some of the case law and general trust principles provide relevant insight and support a conclusion that the *Indian Act* does not preclude the Tribunal ordering the proposed trust provisions.

[39] First, a number of cases show how the Minister has broadly applied the provisions to enable others to manage property covered by the applicable *Indian Act* sections. In *Desmoulin (Committee of) v. Blair*, 1991 CanLII 8345 (ON SC) the Minister made an order under section 51(3) of the *Indian Act* that the individual's property would be managed in accordance with the laws of Ontario, and consequentially, by a guardian of property. In *Dickson (Estate of)*, 2012 YKSC 71, the facts highlight the Minister's efforts to find another appropriate individual to manage the property. In *Polchies v. Canada*, 2007 FC 493 monies payable to children were paid to parents. Some parents set up trust funds for their children. Furthermore, paragraph 62 confirms that the Minister does not have exclusive responsibility for the property of all children with *Indian Act* status living on reserve:

> since the discretion conferred on the Minister by section 52 can be triggered by the simple existence of two conditions (the existence of property to which infant children of Indians are entitled and the fact that they reside on a reserve), it would create an absurd result to say that the Minister must administer or provide for the administration of all property of all Indian children residing on reserves.

Similarly, *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 involves litigation about a trust that has child beneficiaries with *Indian Act* status. Collectively, these cases support an inference that the *Indian Act* regime is applied as a last resort, in a manner analogous to the default regimes under provincial legislation. The *Indian Act* does not preclude a trust agreement with a trustee acting on the authority of the trust agreement rather than the *Indian Act*.

[40] Second, the nature of a common law trust is to split title, or ownership, of property. The trustee has legal control of the property but not the right to benefit from the property. The beneficiary does not have legal control of the property but has the right to the benefits that flow from the property. There is a general principle in property law that one cannot give what one does not have. Under the proposed trust provisions, Canada would pay the compensation funds to the trustee. The trustee would receive legal control of the funds while the beneficiary would receive the right to benefit from the compensation funds. The property interest the trustee assumes over the property - the legal control of the compensation funds – has not yet passed to the beneficiary. Accordingly, the property does not come under the scope of the *Indian Act* because the legal control of the property has not yet passed to the beneficiary. The beneficiary who lacks legal capacity cannot give control of their compensation funds to the Minister under the *Indian Act* because they do not have the right to legally control their compensation funds until the funds are paid out in accordance with the terms of the trust agreement.

[41] Similarly, patrimony in a civil law trust would not come under the scope of the *Indian Act* because legal control of the property has not yet passed to the beneficiary. As explained by the SCC, “the trust in Quebec civil law does not result from the division of ownership but rather from the transfer of property in a patrimony created for a particular purpose and not held by anyone” (*Yared v Karam*, 2019 SCC 62 at para. 17).

[42] In conclusion, past practice and the nature of trust law both support that the *Indian Act* does not preclude the creation of the proposed trust provisions in the *Draft Compensation Framework*.

(c) Provincial Legislative Regimes

[43] Canada also argues that the provincial law provides a complete legislative regime that precludes the Tribunal imposing the proposed trust provisions. Canada specifically cites Saskatchewan's *Children's Law Act 2020*, S.S. 2020, c.2; Ontario's *Children's Law Reform Act*, RSO 1990, c. C-12; and British Columbia's *Family Law Act*, SBC 2011, c. 25. While the following analysis does not comprehensively review every provincial and territorial regime, it considers all the statutes referred to by Canada in its argument that the Tribunal lacks jurisdiction. Further, the generally similar structure of these common law statutes supports analogous reasoning that the role of trusts is largely similar in the provinces and territories not canvassed.

[44] The current legislation in force in Saskatchewan is *The Children's Law Act, 1997,* SS 1997, c C-8.2. *The Children's Law Act, 2020*, SS 2020, c 2 received royal assent on March 16, 2020 but, per s. 93, comes into force by order of the Lieutenant Governor in Council. That has not occurred as of the date of this ruling. Regardless, the relevant provisions of the legislation are the same as in the 1997 Act, subject only to being renumbered. References to the 2020 legislation are provided in brackets after the reference to the 1997 legislation that is currently in force.

[45] The key provision in Saskatchewan's 1997 legislation is section 32 [section 47]. The provision provides that "any moneys due and payable to the child" would be payable to the guardian of property under the Act. However, the establishment of the trust agreement would have the effect of not making money due and payable to the child until it is paid out from the trust fund in accordance with the provisions of the trust agreement. Accordingly, the provisions of the statute are not engaged. The analysis with respect to the *Indian Act* that the nature of the trust makes it so that the child cannot grant a property right they do not have applies equally under this legislation. While Canada is correct that section 30 [section 45] provides that the default provision is that the parents are the default guardians of property for a child, that does not displace the child's ability to benefit from a trust administered by a trustee other than the child's parents or other court appointed guardian.

[46] In Ontario, the pertinent legislation is the *Children's Law Reform Act*, RSO 1990, c C.12 and the *Trustee Act*, RSO 1990, c T.23. The *Children's Law Reform Act* does not specifically contemplate the child being the beneficiary of a separate trust agreement. The only provisions that specifically relate to the payment of compensation of over $10,000 to children are found in the *Trustee Act* which provides, at section 36(6), that compensation may be paid into the court. However, the Public Guardian and Trustee, whose office includes the Accountant of the Superior Court of Justice that is responsible for administering funds paid into court, indicates that a trust agreement is capable of directing that the appointed trustee manages the child's funds instead of having the money paid into court or paid to a court appointed guardian:

> 1. Why is children's money held in court?
>
> Ontario law requires children's assets to be held in court, unless:
>
> - a law or court order provides otherwise
> - a document such as a Will or trust instrument provides otherwise
> - a court has appointed a guardian of the child's property
>
> (Office of the Public Guardian and Trustee, "Accountant of the Superior Court of Justice", Question 1, p. 3 (p. 5 of the pdf), https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf).

[47] While Canada is again correct that sections 47-51 of the Ontario *Children's Law Reform Act* give priority to parents as the guardians of a child's property, it does not displace the possibility that the child is the beneficiary of a trust fund. Further, in the recent case of *Santella v. Bruneau (Litigation Guardian of)*, 2020 ONSC 2937 the court refused to appoint a parent as the guardian of property not because of any evidence the parent would abuse the trust but because payment of the inheritance into the court would better protect the funds in the unlikely event the parent lost capacity or became bankrupt. It is not clear that the current case law supports a preference for parents to manage large sums of money in trust for their children.

[48] In British Columbia, the governing legislation is the *Family Law Act*, SBC 2011, c. 25. Section 177 stipulates that "[a] person having a duty to deliver property to a child may discharge the duty by delivering the relevant property to a trustee who is authorized to

receive that property". The definitions in section 175 define a trustee to include a person authorized under a trust agreement. Accordingly, the legislation contemplates that Canada's compensation obligations arising from the Tribunal's orders can be discharged by making a payment to an authorized trustee. Furthermore, this analysis indicates that Canada is incorrect in its assertion that these provisions require that a trustee be appointed by a court order.

[49] The specific statutes referred to by Canada do not support the proposition that there is a preference, let alone a requirement, that compensation to minor beneficiaries must be in accordance with the provisions in the various common law Acts instead of through the proposed trust provisions in the *Draft Compensation Framework*.

(d) Conclusion

[50] The trusts and guardianship laws referred to by Canada do not preclude the Tribunal approving the trust provisions contained in the *Draft Compensation Framework*. First, the general structure of trust law contemplates that the statutory framework can exist harmoniously with a trust agreement. The statutory framework is not intended to preclude or limit the creation of trusts. Second, the *Indian Act* regime is capable of supporting separate trusts that exist with a structure outside the *Indian Act*. The *Indian Act* is best understood as providing provisions in the event that other structures are not in place to manage the property of an individual who lacks legal capacity. And finally, the provincial regimes contemplate, often explicitly, payments into trusts instead of the last resort appointment of guardians of property.

(ii) Scope of *CHRA* Remedial Provisions

[51] Section 53 of the *CHRA* reads as follows:

> 53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.
>
> (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), or
> >
> > (ii) making an application for approval and implementing a plan under section 17;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

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

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

[52] At section 54, the legislator imposes limitations to the application of section 53 of the *CHRA*:

> 54 No order that is made under subsection 53(2) may contain a term
>
> > (a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or
> >
> > (b) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained those premises or accommodation in good faith.

[53] No other limitation to remedies is expressed in the *CHRA.*

[54] Therefore, the Panel uses the Driedger approach and a broad and purposive interpretation of the *Act*, as espoused by the Supreme Court of Canada, is warranted in any human rights analysis:

> According to the modern principle of statutory interpretation, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the *Act*, and the intention of Parliament: Elmer A. Driedger, *The Construction of Statutes*, (Toronto: Butterworths, 1974) at p. 67.
>
> (*Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21, at para. 58)

[55] The Tribunal elaborated on this approach in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14, at paras.12-13:

> [12] The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para. 21).
>
> [13] The special nature of human rights legislation is also taken into account in its interpretation:
>
> > 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.
>
> (*CN v. Canada (Canadian Human Rights Commission*), [1987] 1 SCR 1114, at p. 1134)

Similarly, in *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, at para. 44, the Supreme Court reiterated:

> More generally, this Court has repeatedly reiterated the view that human rights legislation has a unique quasi-constitutional nature and ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it: see, for example, *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at para. 120; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 370; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at pp. 157-58.
>
> (*B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, at para. 44)

(emphasis added)

[56] Section 2 of the *CHRA* enunciates the purpose of the *Act*:

> 2 The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

[57] Section 3 of the *CHRA* prohibits discrimination and sections 5 to 14.1 enunciate prohibited discriminatory practices.

[58] The Supreme Court of Canada described human rights legislation as “the final refuge of the disadvantaged and the disenfranchised” (see *Zurich Insurance v. O.H.R.C.*, 1992 CanLII 67 (SCC), [1992] 2 S.C.R. 321; see also 2018 CHRT 4 at para. 44).

[59] The wording of section 53(2) of the *CHRA* mentions that the Panel or member may “make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate” (emphasis added). This suggests that Parliament awarded considerable discretion to presiding members in order to remedy discrimination and prevent its reoccurrence. This is consistent with a case-by-case approach and special programs found at section 16 of the *CHRA* and discussed by the Supreme Court in *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 (*Action Travail des femmes*), where the Appellant, *Action Travail des femmes*, alleged that CN was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the *CHRA* by denying employment opportunities to women in certain unskilled blue-collar positions. A Human Rights Tribunal constituted under the *Act* adjudicated 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. The SCC was asked to determine whether the Tribunal has the power under s. 41(2)(a) (now 53(2)(a)) *CHRA* 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.

[60] The SCC first ruled out the strict application of the grammatical method of interpretation in the case under examination:

> 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). (…) 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"
>
> (*Action Travail des femmes*, at p 1133).

[61] To the contrary, in the interpretation of the *CHRA*, it is important to take into account the purpose of the *CHRA*, that is to extend the present laws in Canada as set forth in section 2 in order to give effect to the principle that every human being should be given equal opportunity to live his or her life without discrimination (*Action Travail des femmes*, at p 1133). It should be recalled that human rights legislations are intended to give effect to rights of vital importance, ultimately enforceable by a court of law (*Action Travail des femmes*, at p 1134). As a result, while the meaning of the words of the *CHRA* is important, rights must be given full recognition and effect (*Action Travail des femmes*, at p 1134). This is also in line with the federal *Interpretation Act,* RSC 1985, c I-21, according to which statutes are deemed remedial and thus, must receive a fair, large and liberal interpretation with a view to give effect to their objects and purpose (*Action Travail des femmes*, at p 1134).

[62] This comprehensive method of interpretation of human rights legislation was first stated in *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, where Justice Lamer acknowledged the fundamental nature of human rights legislation: they are "not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law" (*Action Travail des femmes*, at pp 1135-36, citing *Heerspink*, at p. 158). This principle of interpretation was later confirmed and further articulated in *Winnipeg School Division No. I v. Craton*, 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156, where Justice McIntyre, writing for a unanimous Court, stated that:

> 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
>
> (cited in *Action Travail des femmes*, at 1136).

[63] The same year, in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.,* 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 [*O'Malley*], Justice McIntyre, again writing for a

unanimous Court, established the governing principles for the interpretation of human rights legislations:

> 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
>
> (*O'Malley*, at pp 546-57, cited in *Action Travail des femmes*, at p 1136).

[64] The *CHRA*'s emphasis is placed on discriminatory practices and its effects (*Action Travail des femmes*, at p 1138, referring to *Bhinder v. Canadian National Railway Co.*, 1985 CanLII 19 (SCC), [1985] 2 S.C.R. 561and *O'Malley*).

[65] These principles must equally be applied when interpreting the remedial powers granted to the Tribunal under the *CHRA*. In *Action Travail des femmes*, the SCC was presented with evidence of systemic discrimination, the definition of which was established as follows:

> 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.
>
> (*Action Travail des femmes*, at p 1139 referring to Abella, Rosalie S. Report of the Commission on Equality in Employment. Ottawa: Minister of Supply and Services Canada, 1984).

[66] For the SCC, paragraph 2 of the Special Temporary Measures Order, ordering the CN to implement a special employment program, was specifically designed to address and remedy the type of systemic discrimination against women in the case under examination. Therefore, the SCC addressed the specific issue of the scope of the remedial powers established under section 41(2)(a) (now 53(2)(a)) of the *CHRA*, taking into account the power granted to the Tribunal to order measures regarding the "adoption of a special

program, plan or arrangement referred to in subsection 15(1) (now 16(1)), to prevent the same or a similar practice occurring in the future" (*Action Travail des femmes*, at p. 1139).

[67] Concurring with the dissenting opinion of Justice MacGuigan of the Federal Court of Appeal in the case under appeal, the SCC held that section 41(2)(a) (now 53(2)(a)) is "designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups" (*Action Travail des femmes*, at p 1141). In cases of systemic discrimination, the prevention of reoccurrence of discriminatory practices often requires referring to historical patterns of discrimination in order to design appropriate strategies for the future (*Action Travail des femmes*, at p. 1141). Furthermore, the SCC held that the type of measure ordered by the Tribunal in the case under examination may be the only means to achieve the purpose of the *CHRA*, that is to combat and prevent future discrimination (*Action Travail des femmes*, at p. 1141, 1145).

[68] In these cases, remedy and prevention cannot be dissociated, since "there is no prevention without some form of remedy" (*Action Travail des femmes*, at p. 1142). Thus, the remedies available under section 53(2)(a) *CHRA* are directed toward a specific protected group and are not only compensatory in nature, but also prospective. As a result, with a view to achieve the prevention objective of the *CHRA*, a "special program, plan or arrangement" as referred to in subsection 16 (1) *CHRA* serves three main purposes: (1) countering the effect of systemic discrimination; (2) addressing the attitudinal problem of stereotyping, and; (3) Creating a critical mass, which may have an impact on the "continuing self-correction of the system" (*Action Travail des femmes*, at pp 1143-44).

[69] In sum, while ruling that the Tribunal had the power to order such a special measure, the SCC summarized its findings as follows:

> 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. Lawrence Region by preventing "the same or a similar practice occurring in the future".
>
> (*Action Travail des femmes*, at pp 1145-46).

[70] The Panel has relied on several occasions on the principles established by the Supreme Court of Canada in *Action Travail des femmes*, see for example: 2016 CHRT 2 at para. 468; 2016 CHRT 10, at para. 12-18; 2018 CHRT 4, at para. 21-39; 2019 CHRT 39, at para. 97.

[71] In *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 [*Robichaud*], the SCC was asked to determine whether an employer was responsible for the unauthorized discriminatory acts of its employees in the course of their employment under the *CHRA*. For the SCC, in order to determine the legal regime of liability applicable under the *CHRA*, it was necessary to start by examining the *Act* itself, “the words of which, like those of other statutes, must be read in light of its nature and purpose” (*Robichaud*, at para. 7).

[72] As per *Robichaud*, at para. 8, the purpose of the *CHRA*, provided for under section 2, is to extend to the laws in Canada with a view to give effect to the principle that every human being should be given equal opportunity to live his or her life without discrimination. As a result, the *CHRA* must be interpreted so as to advance the broad policy it underlies (*Robichaud*, at para. 8, referring to *O’Malley*). As the *CHRA* incorporates certain basic goals of the society, its interpretation must therefore follow a fair, large and liberal method with the aim of achieving its purpose (*Robichaud*, at para. 8 referring to *Action Travail des femmes*).

[73] The Tribunal also discussed section 16 of the *CHRA* relating to the adoption of a special program, plan or arrangement and prevention of future discrimination by relying on

National Capital Alliance on Race Relations v. Canada (Department of Health & Welfare, 1997 CanLII 1422 (CHRT) in 2018 CHRT 4 at para. 34:

> 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 (see National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [Action Travail des Femmes]). 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).
> >
> > (emphasis added).

[74] Following these interpretative principles, remedies available under the *CHRA* must be effective and “consistent with the "almost constitutional" nature of the rights protected” (*Robichaud*, at para. 13). As a consequence, in the case under examination, the SCC concluded that the broad remedial powers under the *CHRA* must be available against the employer. A narrower interpretation of the *Act* would have the effect of nullifying its remedial powers:

> Who but the employer could order reinstatement? This is true as well of para. (c) which provides for compensation for lost wages and expenses. Indeed, if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act's carefully crafted remedies effective. It indicates that the intention of the employer is irrelevant, at least for purposes of s. 41(2). Indeed, it is significant that s. 41(3) provides for additional remedies in circumstances where the discrimination was reckless or wilful (i.e., intentional). <u>In short, I have no doubt that if the Act is to achieve</u>

> its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.
>
> (*Robichaud*, at para. 15, emphasis added).

[75] The Panel has relied on several occasions on the principles established by the Supreme Court of Canada in *Robichaud*, see for example: 2016 CHRT 2 at para. 43, 468; 2016 CHRT 10, at para. 11-18; 2018 CHRT 4, at para. 26, 28; 2019 CHRT 39, at para. 94.

[76] Additionally, the wording in section 53(2)(e) and 53(3) of the *CHRA* is broad enough to include the compensation order to be paid in a trust fund. The idea here is that the *Act* allows a maximum of $20,000 under each heading 53 (2)(e) and 53(3) and the Panel has determined that the discrimination found in this case is of the worst kind justifying the maximum amount permissible in the *Act* (see 2019 CHRT 39 at paras. 242, 247, 249, 250 and 258).

[77] Ordering compensation to be paid into trust is not unprecedented and is within the scope of the broad remedial powers of the *CHRA*.

[78] There is precedent for a court ordering that a remedy be paid into trust instead of directly to a beneficiary where that arrangement is more advantageous to the beneficiary:

> I would also accede to S.A.'s request that MVHC pay the costs award into a trust on the same terms, for the same beneficiaries and with the same trustees as the Trust.
>
> (*S.A. v. Metro Vancouver Housing Corp*., 2019 SCC 4, para. 73)

[79] It is not a distinguishing feature that in that case the order was made by the Supreme Court of Canada on appeal from a Superior Court. The reasons do not indicate that the Court is relying on the inherent jurisdiction of Superior Courts to order that the costs be paid into the trust. Similar orders appear to have been made by Tribunals in *Otis Canada Inc. v International Union of Elevator Constructors*, 1991 CanLII 12578 (NS LA) and earlier in the proceeding prior to *Vermilion Resources Ltd. (Re)*, 2011 CanLII 95455 (AB SRB). More generally, compensation or damages are often paid to the successful party's lawyer in trust rather than directly to the successful party. This occurs even when the order does not expressly permit a payment into trust. Further, the Tribunal has jurisdiction to implement the

broad remedial power of the quasi-constitutional *CHRA* (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 SCR 789 at para. 26 and *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50). Section 53 also speaks more broadly of ordering that a person “compensate the victim” of a discriminatory practice. It does not limit compensation to a direct monetary payment to the victim. Benefiting from funds paid into trust and administered by a trustee is indisputably a form of compensation. Accordingly, a proper interpretation of the broad remedial powers under section 53 of the *CHRA* supports the Tribunal exercising similar remedial power and ordering that compensation be paid into a trust where that is in the beneficiary’s interests.

(iii) Application

[80] The Panel views the trust fund as a hybrid remedy. On one hand, compensation is paid. On the other hand, the preferred process to pay this compensation considers other relevant factors such as creating a culturally safe process in light of the specific circumstances of this case, the vulnerability of victims/survivors who are minors or adults who lack legal capacity, access to justice, a clear and equitable process across Canada, protection of funds from administrative fees, etc. Therefore, this part of the remedy can be viewed as a “special program, plan or arrangement” provided for in the *CHRA* and explained by the Supreme Court and Tribunal in the decisions discussed above. In sum, the trust fund is also a remedy that accounts for the specific needs of the victims/survivors in a case where the legacy of colonialism, residential schools, the sixties' scoop and historical prejudices form part of the Tribunal's findings. For those reasons, the *CHRA* analysis and reasoning found in paras. 51-75 in the scope of *CHRA* remedial provisions section applies to the trust fund aspect of the compensation.

[81] The Panel agrees it is vital that persons who cannot manage their own financial affairs receive culturally appropriate and trauma informed services to avoid further harm. This is consistent with what the Supreme Court described, mentioned above, as referring to historical patterns of discrimination in order to design appropriate strategies for the future (*Action Travail des femmes* at p.1141). This is also consistent with the approach taken in the Panel’s rulings.

[82] The Panel agrees with the Caring Society that burdens would fall on families in the absence of the Appointed Trustee. The Panel also agrees that the provincial and *Indian Act* regimes referred to by the parties contemplate the appointment of a guardian of property as a default regime of last resort. The proposed Appointed Trustee provides an alternative to the default "last resort" statutory regimes in a manner that will more effectively implement the Tribunal's orders. Accordingly, there is no conflict between the proposed Appointed Trustee and trust provisions in the *Draft Compensation Framework* approved under the *CHRA* and the trustee and guardianship law referred to by Canada.

[83] Finally, the Panel agrees with the Caring Society that the Appointed Trustee avoids the four obstacles for beneficiaries who lack legal capacity listed above. First, it avoids the challenge of determining the legislative provisions that apply to the individual under the provincial, territorial, or legislative regimes, depending on which legislative framework applies to the individual. The complexity of engaging with the legislation may require beneficiaries to hire legal counsel that would in effect reduce their compensation. Second, the legislative regime within a jurisdiction is often different for adults and children who lack legal capacity. Third, the administrative steps imposed on families under the provincial, territorial and *Indian Act* regimes may result in some families not completing the necessary steps and beneficiaries therefore not receiving compensation. Fourth, the default regimes do not contain provisions to ensure beneficiaries receive culturally appropriate and trauma informed services.

[84] The Panel's approach to resolving the alleged conflict between the quasi-constitutional *CHRA* and provincial legislation is informed in part by the analysis in *Thibodeau v. Air Canada*, 2014 SCC 67. The decision emphasizes that legislation is presumed to act as a coherent whole where legislators do not intend to enact conflicting statutory provisions:

> First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap, on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results. This presumption may be rebutted if one of

> the provisions was intended to cover the subject matter exhaustively. Third, only where a conflict is unavoidable should the court resort to statutory provisions and principles of interpretation concerned with which law takes precedence over the other.
>
> (*Thibodeau* at para. 92).

[85] The court goes on to highlight that a conflict only occurs if the concurrent application of both pieces of legislation would create an absurd result or if there is a direct contradiction such as one enactment only permitting an extension of time before the time limit expired while another allowed extensions after it expired (*Thibodeau* at paras. 94-96).

[86] As indicated earlier, it is possible to read the provincial trustee and guardianship law harmoniously with the *CHRA*. The same is true for the *Indian Act* by drawing on the analogies to provincial common law statutes that highlight that the guardianship provisions in the legislation are intended to be a default regime capable of being supplemented through trusts. Following the analysis in *Thibodeau*, this is the correct approach.

[87] It is true that *Thibodeau* contemplates alleged conflicts between legislative provisions enacted by the same government. In this case, Canada alleges that some of the conflicts are between the federal *CHRA* and provincial laws relating to trusts and guardianship. The result is still the same.

[88] First, the analogous principle when considering whether laws enacted by provincial governments and the federal government conflict is cooperative federalism. The doctrine aims “to facilitate interlocking federal and provincial legislative schemes” (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 at para. 17). There is amble support for concluding that the provincial and federal legislation are capable of acting harmoniously.

[89] Second, even if there were merit to Canada’s claim that provincial legislation limited the remedial scope of the *CHRA*, the Tribunal would be constrained by section 57(1) of the *Federal Court Act*, RSC 1985, c F-7:

> **Constitutional questions**
>
> **57 (1)** If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal

> Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

[90] As Canada has not served a Notice of Constitutional Question, the Tribunal would be unable to find that the *CHRA* is inapplicable or inoperable in the face of the provincial legislation relied on by Canada. The Panel's analysis has clearly demonstrated that, on a proper interpretation of the *CHRA*, the proposed trust terms are within the scope of the *CHRA*'s remedial provisions.

[91] Agreeing with Canada to use provincial legislation to pay compensation to minors and adults who lack legal capacity is actually allowing other statutes to limit an order made by this Panel who has determined this amount owed to victims of the discriminatory practice is justified. As explained above, many provincial statutes allow for administrative and other expenses to be deducted from the beneficiary's funds. This could deplete the amount owed to the victims and would reduce the compensation determined to be appropriate by this Panel for the victims' pain and suffering as a result of racial discrimination. Such a result cannot be Parliament's intent. In fact, allowing provincial statutes to authorize a reduction of the amount ordered by this Panel to be paid to the victims/survivors would in fact allow the Provinces to exercise their jurisdiction in a manner that would hinder the Tribunal's orders. This is not permissible. The Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2018 SCC 31, [2018] 2 SCR 230 [*Matson and Andrews*] did not remove the primacy of the *CHRA* over other general statutes in the presence of a finding of discrimination (see 2020 CHRT 20 at paras. 253-265).

[92] While Canada only directed the Panel to three provincial legislative schemes, it is appropriate to conclude that these legislative schemes are representative of trust law and guardianship law across Canada. In particular, no other provincial or territorial regimes are more favourable to Canada's position. If they were, Canada would have advanced them in its submissions. For the Panel to seek to comprehensively review the other provincial and territorial trustee and guardianship statutory regimes would deny the parties an opportunity to present their case in relation to those regimes and deny the Panel the benefit of any

assistance the parties' submissions would provide in considering any nuances that might arise under these regimes. Furthermore, the common law generally operates similarly across provinces and territories. If there were any material differences in other common law provincial and territorial legislation, it was incumbent on Canada to draw that to the Tribunal and other parties' attention. The trust provisions under the *Civil Code of Quebec,* CQLR c CCQ 1991 may not be directly analogous to the common law because Quebec uses civil law. However, if those provisions supported Canada's position that provincial law precluded the creation of a trust under the *CHRA*, Canada ought to have put forward an argument based on Quebec law. Again, absent that argument, the Panel can conclude that the outcome under Quebec law would be the same as in the common law provinces although the reasoning may differ under civil law.

[93] The Panel's jurisdiction to award remedies in the presence of a proven discriminatory practice is exercised under a quasi-constitutional statute that, in the event of a conflict, has primacy over other federal statutes. However, as demonstrated, a proper approach to statutory interpretation demonstrates that there is no conflict either between the *CHRA* and the guardianship provisions in the *Indian Act* or between the *CHRA* and provincial guardianship and trustee legislation referred to by Canada.

(iv) Perverse effect in using the *Indian Act* to award compensation

[94] In addition, the Panel believes there is a perverse effect in using the *Indian Act* in order to distribute compensation. The *Indian Act* for many First Nations peoples is an instrument of oppression and of racism that is aimed at eliminating First Nations over time (see 2020 CHRT 20 at paras. 167-169, 171). This is not the best course of action to foster reconciliation and to eliminate discrimination when there is a safer road that can be followed. The Panel is compensating children and families for pain and suffering of significant adverse effects such as being removed from their homes, communities and Nations as a result of Canada's systemic and racial discrimination. The Panel also found in the *Merit Decision* that this was a continuation of the residential schools' system, for which in 2008 the Prime Minister issued an apology. The Panel believes it is important to avoid additional pain and suffering to victims in forcing them to use the *Indian Act* to receive compensation. As

mentioned above, the regime under the *Indian Act* confers powers to the Minister to manage the property of an individual with *Indian Act* status who lacks legal capacity. In the Panel's view, it would be inappropriate to force victims/survivors that have suffered racial and systemic discrimination at the hands of Canada to require them to have their compensation funds managed by Canada and to seek Canada's approval in order to access funds. This is not culturally safe in light of this specific case.

[95] Nothing in the *CHRA* suggests that ordering compensation to be paid into a trust fund exceeds the Tribunal's jurisdiction under the *CHRA*. In fact, given the specific facts in this case, it may be the most permissible way to uphold a culturally appropriate and safe process for First Nations victim-survivors.

[96] Canada's proposed approach does not consider the importance of culturally appropriate processes in dealing with victims of discrimination, the complexity of communicating non-conflicting information to access compensation and the fact that most provincial legislations allow for the administrator to charge administration fees payable from the compensation funds. In the process elaborated by the First Nations parties, Canada would pay for those fees and this would ensure the funds would not be depleted by administration fees. This would be in line with the Tribunal's intentions when it ruled Canada's actions were of the worst form of racial and systemic discrimination and that this warranted for the maximum compensation under the *CHRA*. Allowing administration fees to be payable to administrators of the funds under provincial legislation would in fact lower the Tribunal's compensation awards. Moreover, it would also create inequalities amongst the minor and incapacitated adult beneficiaries as administration fees vary from one province to the other.

III. NAN's Role in the Compensation Process

A. Context

[97] NAN was granted interested party status in 2016 CHRT 11 that allowed NAN to participate in the proceedings as an intervenor. NAN's participation was limited to "the specific considerations of delivering child and family services to remote and Northern

Ontario communities and the factors required to successfully provide those services in those communities" (2016 CHRT 11, para. 5).

[98] In the *Compensation Decision*, the Tribunal directed the Caring Society, the AFN and Canada to consult with the interested parties:

> The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to.
>
> (*Compensation Decision*, para. 269).

[99] The *Draft Compensation Framework* contains a provision contemplating further development of tools to guide the implementation of the compensation framework. Section 13.2 contemplates consulting with NAN as part of that process:

> 13.2. The parties will discuss the development of these tools with the Commission and with the Interested Parties, as appropriate, in keeping with the scope of their status as Interested Parties in this proceeding.

[100] NAN proposes to remove section 13.2 and instead amend section 1.4 to add the underlined section 1.4.1:

> 1.4 Throughout this document, the word "**Parties**" is used to refer collectively to the complainants, the AFN and the Caring Society, and the respondent Canada.
>
> > 1.4.1 When reference is made to the "Parties" further developing or changing any process, tools, or document relating to the Compensation Process, including but not limited to amending this Framework, the term refers collectively to the AFN, the Caring Society, and Canada, in consultation with the CHRC, COO, and NAN; however, the CHRC, COO, and NAN do not have to participate in such further development/change should they decide not to.

And the following footnote:

> In keeping with the Tribunal's order regarding development of the compensation process, at para 269 of 2019 CHRT 39.

B. Position of the Parties

[101] NAN is concerned that the current provisions in section 13.2 of the *Draft Compensation Framework* do not adequately protect its participatory rights as indicated in the *Compensation Decision*. NAN expresses the need to repeatedly and forcefully articulate its desire to be involved in developing the *Draft Compensation Framework*. NAN believes its advocacy has strengthened the provisions relating to remote First Nations. Furthermore, remoteness issues cannot be compartmentalized so NAN's involvement is important throughout all aspects of developing the compensation process.

[102] The AFN, the Caring Society and Canada provided joint submissions in response. While acknowledging the important contributions of NAN, the COO and the Commission, they oppose the amendment. They argue section 1.2 ensures NAN's participatory rights are fully respected because it stipulates that the *Draft Compensation Framework* is consistent with the Tribunal's orders and is unable to derogate from them. The parties note that section 13.2 provides that NAN will be consulted as appropriate "in keeping with the scope of their status ... in this proceeding" whereas NAN's amendment would grant it participatory rights that exceed what it was granted by the Tribunal.

C. Analysis

[103] The Panel agrees with the NAN that remoteness issues cannot be compartmentalized and acknowledges that NAN's contribution to these proceedings has been meaningful. The Panel is also convinced that the NAN's participation in this compensation process has strengthened the provisions relating to remote First Nations. Remoteness issues have always been present in this case and have a considerable impact on service delivery. The Panel understands this and appreciates the NAN's expertise on these issues. However, the Panel does not view section 13.2 of the *Draft Compensation Framework* as infringing on the NAN's participatory rights or at odds with the compensation ruling. The provision provides for the NAN to be consulted "as appropriate" which is a reasonable approach in order to move forward efficiently. The Panel understands the NAN's concern as section 13.2 provides a discretion to the AFN, the Caring Society and Canada to decide what is appropriate in order to reach out for consultation as opposed to reiterating

that the NAN ”should” be consulted, as provided for in the ruling. The Panel reiterates that the AFN, the Caring Society and Canada should consult with the NAN, the COO and the Commission on all important issues that concern them. Moreover, the Framework is intended to be consistent with the Tribunal’s Compensation Entitlement Order. Where there are discrepancies between this Framework and the Compensation Entitlement Order, or such further orders from the Tribunal as may be applicable, those orders will prevail and remain binding (see section 1.2 of the *Draft Compensation Framework*). The Panel believes this section is clear and protects the NAN’s participatory rights in this process.

[104] Furthermore, as mentioned in the December 14, 2020 decision letter, nothing in any of the Tribunal’s orders is intended to infringe on the inherent rights of self-determination and self-governance of First Nations in Canada. Canada has obligations to meaningfully consult with First Nations on all matters concerning them regardless of whether or not they are part of these proceedings.

IV. Jordan’s Principle Discrimination Eligibility Timeframe

A. Context

[105] The Tribunal addressed the period of discriminatory application of Jordan’s Principle for which compensation would be ordered in the *Compensation Decision*. Subsequently, in 2020 CHRT 7, the Tribunal realized that there were additional issues relating to the timeframe for which compensation was ordered. While the Tribunal addressed the issue of First Nations in care as of January 1, 2006 who were apprehended earlier, the Tribunal realized there were similar issues with respect to First Nations children awaiting Jordan’s Principle services as of December 12, 2007 or who were otherwise affected by discriminatory treatment as of that date. The Tribunal accordingly requested additional submissions on this issue (2020 CHRT 7, paras. 152-155). After receiving the parties’ submissions, the Tribunal confirmed the order from the *Compensation Decision* in 2020 CHRT 15 at paras. 7-11.

[106] Paragraphs 250 to 257 of the *Compensation Decision* set out entitlement to compensation for discrimination related to Jordan’s Principle:

Compensation for First Nations children and their parents or grandparents in cases of unnecessary removal of a child to obtain essential services and/or experienced gaps, delays and denials of services that would have been available under Jordan's Principle

[250] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's [*Merit*] *Decision* 2016 CHRT 2 and subsequent rulings (2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4) resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out-of-home care were denied services and therefore did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35 (for example, mental health and suicide preventions services, special education, dental etc.). Finally, children who received services upon reconsideration ordered by this Tribunal and children who received services with unreasonable delays have also suffered during the time of the delays and denials. All those children above mentioned experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations child removed from their home and placed in care in order to access services and for each First Nations child who was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[251] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's [*Merit*] *Decision* 2016 CHRT 2 and subsequent rulings (2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4) resulted in harming First Nations parents or grandparents living on reserve or off reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services for their child and had their child placed in care outside of their homes, families and communities in order to receive those services and therefore, did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35. Those parents or grandparents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations parent or grandparent who had their child removed and placed in out-of-home care in order to access services and for each First Nations parent or grandparent who's child was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal,

between **December 12, 2007** (date of the adoption in the House of Commons of Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[252] It should be understood that the pain and suffering compensation for a First Nations child, parent or grandparent covered under the Jordan's Principle orders cannot be combined with the other orders for compensation for removal of a child from a home, a family and a community rather, the removal of a child from a home is included in the Jordan's Principle orders.

[253] The Panel finds as explained above there is sufficient evidence and other information in this case to establish on a balance of probabilities that Canada was aware of the discriminatory practices of its child welfare program offered to First Nations children and families and also of the lack of access to services under Jordan's Principle for First Nations children and families. Canada's conduct was devoid of caution and without regard for the consequences experienced by First Nations children and their families warranting the maximum award for remedy under section 53(3) of the *CHRA* for each First Nations child and parent or grandparent identified in the orders above.

[254] Canada is ordered to pay $20,000 to each First Nations child and parent or grandparent identified in the orders above for the period between **January 1, 2006** and until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased and effective and meaningful long-term relief is implemented; the parties agreed on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order for all orders above except Jordan's Principle orders given that the Jordan's Principle orders are for the period between **December 12, 2007** and **November 2, 2017** as explained above and, following the process discussed below.

[255] The term parent or grandparent recognizes that some children may not have parents and were in the care of their grandparents when they were removed from the home or experienced delays, gaps and denials in services. The Panel orders compensation for each parent or grandparent caring for the child in the home. If the child is cared for by two parents, each parent is entitled to compensation as described above. If two grandparents are caring for the child, both grandparents are entitled to compensation as described above.

[256] For clarity, parents or grandparents who sexually, physically or psychologically abused their children are entitled to no compensation under this process. The reasons were provided earlier in this ruling.

> [257] A parent or grandparent entitled to compensation under section 53 (2) (e) of the *CHRA* above and, who had more than one child unnecessarily apprehended is to be compensated $20,000 under section 53 (3) of the *CHRA* per child who was unnecessarily apprehended or denied essential services.

[107] The Tribunal directed that the parties consult to determine how to identify First Nations children for the purpose of the compensation process (*Compensation Decision* Order, para. 257). The parties were unable to agree and requested further guidance from the Tribunal. The Tribunal provided the requested guidance on how to construct eligibility criteria in 2020 CHRT 20 and finally in 2020 CHRT 36, a consent order to which all parties participated and agreed to including the NAN. As noted earlier, this decision only addresses Jordan's Principle eligibility and does not define First Nations identity.

[108] Canada, the Caring Society and the AFN added Section 4.5.2 and its subsections to the *Draft Compensation Framework* in response to the Tribunal's guidance in 2020 CHRT 20. Those provisions are the following:

> 4.2.5. **"First Nations child"** means a child who:
>
> a) was registered or eligible to be registered under the *Indian Act;*
> b) had one parent/guardian who is registered or eligible to be registered under the *Indian Act*;
> c) was recognized by their Nation for the purposes of Jordan's Principle; or
> d) was ordinarily resident on reserve, or in a community with a self-government agreement.
>
> 4.2.5.1 Children referred to in section 4.2.5(d) (ordinarily resident on reserve or in a community with a self-government agreement ("First Nations community")) who do not meet any of the eligibility criteria in section 4.2.5(a) to (c) will only qualify for compensation if they had a **meaningful connection** to the First Nations community. The factors to be considered and carefully balanced include (without any single factor being determinative):
>
> a) Whether the child was born in a First Nations community or whose parents were residing in a First Nations community at the time of birth;
> b) How long the child has lived in a First Nations community;
> c) Whether the child's residence in a First Nations community was continuous;
> d) Whether the child was eligible to receive services and supports from the First Nation community while residing there

> (e.g. school, health services, social housing, bearing in mind that there may have been inadequate or non-existent services in the First Nations community at the time); and
> e) The extent of the connection of the child's parents and/or other caregivers to the First Nation community, excluding those non-status individuals working on a reserve (i.e., RCMP, teachers, medical professionals, and social workers)
>
> 4.2.5.2 The timeframe for children referred to in section 4.2.5(b) to (d) above are eligible for compensation in relation to denials, gaps and unreasonable delays with respect to essential services is January 26, 2016 to November 2, 2017.
>
> 4.2.5.3 Children referred to in section 4.2.5(b) to (d) as well as their parents (or caregiving grandparents) are eligible for compensation in the amount of $20,000 for pain and suffering pursuant to s. 53(2)(e) of the *Canadian Human Rights Act* for pain and suffering in relation to denials, gaps and unreasonable delays with respect to essential services, but are not eligible for compensation under s. 53(3) of the *Canadian Human Rights Act* for wilful and reckless discrimination.

B. Position of the Parties

[109] Canada, the AFN and the Caring Society provided joint initial submissions in support of the proposed provisions. They explain that section 4.2.5.1 ensures that any child without *Indian Act* status living in a First Nations community who is not recognized by their community for the purposes of Jordan's Principle but has a meaningful connection to the community is eligible for compensation. Section 4.2.5.2 defines the timeframe for compensation. The process follows the same end-date of November 2, 2017 established in the *Compensation Decision* while January 26, 2016 was selected as the start date based on the Tribunal's finding that "Jordan's Principle is meant to apply to all First Nations children" (*Merit Decision* at para. 382) and order that Canada "cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle" (*Merit Decision* at para. 481). The submission contends that the date of the *Merit Decision* constitutes a clear break from the past in accordance with *Canada (Attorney General) v Hislop*, 2007 SCC 10 at paras. 81-108 for the purpose of the children identified in sections 4.2.5(b) to (d). Section 4.2.5.3 reflects the Tribunal's finding in 2020 CHRT 20 at paragraph 115 that

> it would be unfair to make a finding of non-compliance of the Tribunal's orders against Canada given that while the Tribunal did not use the *Indian Act* registration provisions as an eligibility criteria and did not limit Jordan's Principle to children on reserve, it did not provide a definition of who is a First Nations child eligible under its Jordan's Principle orders.

[110] NAN opposes section 4.2.5.2 of the *Draft Compensation Framework's* restriction of the timeframe of discrimination for which First Nations children who are not eligible for *Indian Act* status are entitled to compensation and section 4.2.5.3's restriction of these children's eligibility for compensation for wilful and reckless discrimination under section 53(3) of the *CHRA*. NAN opposes relying on the colonial *Indian Act* to differentiate categories of beneficiaries. NAN relies on its earlier submissions from March 20, 2019 on identifying First Nations children for the purpose of Jordan's Principle. NAN argues that it was always of the view that Jordan's Principle applied to all First Nations children and that Canada should have been of this view as well. NAN relies on evidence cited in *Daniels v. Canada*, 2013 FC 6 to demonstrate Canada's knowledge. Further, the treaty relationships, which Canada recognizes, do not allow Canada to unilaterally determine First Nations identity. Further, NAN does not find it persuasive for Canada to argue that Canada believed a provision designed to prevent jurisdictional gaps in services for First Nations children only applied to First Nations children eligible for *Indian Act* status. Accordingly, the *Merit Decision* cannot represent a clear break from the past as contemplated in *Hislop*. NAN argues that Canada's exclusion of First Nations children without *Indian Act* status was unreasonable according to the criteria established in *Hislop*, para. 107. In addition, NAN argues the different timeframes for which beneficiaries are entitled to compensation will complicate the process.

[111] Canada, the AFN and the Caring Society submitted a joint response opposing NAN's request to remove sections 4.2.5.2 and 4.2.5.3 from the *Draft Compensation Framework*. They note that the provisions were not drafted with the intent to deny compensation to any eligible beneficiaries and that, to the extent of any inconsistency with the Tribunal's orders, section 1.2 ensures the Tribunal's orders take precedence. They argue that while NAN would prefer an earlier start date for compensation than that provided in section 4.2.5.2, the issue has already been litigated and should not be reconsidered. Canada, the AFN and the Caring Society considered it unreasonable to award damages for wilful and reckless conduct while the eligibility criteria for Jordan's Principle were unclear. They submit that while

sections 4.2.5.2 and 4.2.5.3 do not precisely mirror specific language in the Tribunal's orders, any potential beneficiary who disagrees with the provisions will have an opportunity to contest them.

C. Analysis

[112] The Panel generally agrees with the merit of the NAN's additional submissions. Moreover, the Panel notes the NAN opposes relying on the colonial *Indian Act* to differentiate categories of beneficiaries.

[113] However, as mentioned above, the eligibility for compensation under Jordan's Principle orders have already been argued and answered by this Tribunal. Furthermore, the Panel finds the joint response from the AFN, the Caring Society and Canada referred to in para. 111 above to be acceptable especially in light of sections 1.2 and 9.6 of the *Draft Compensation Framework*.

V. Retention of Jurisdiction and Tribunal's Role

A. Context

[114] Since the Tribunal issued the *Merit Decision*, the Tribunal has consistently retained jurisdiction to address the various remedial issues in this case. As noted by the Tribunal in its 2016 CHRT 10, the remedial process is complex with far-reaching consequences. The Tribunal structured the remedial process to implement a practical, meaningful and effective remedial process in accordance with the *CHRA*. In doing so, the Tribunal committed to first address immediate reforms to the FNCFS Program and the *1965 Agreement* while longer term program reform would be addressed subsequently. The Tribunal also retained jurisdiction to address requests for financial compensation for victims of the discriminatory practice. This ruling is part of the financial compensation process for which the Tribunal has continuously retained jurisdiction throughout its various rulings

[115] In its submissions that led to the *Compensation Decision*, the AFN requested that the distribution of compensation to victims be managed by an independent body. The AFN argued that this process would provide for the efficient and expeditious compensation of

victims (*Compensation Decision*, paras. 39-44). The Tribunal agreed that this approach was appropriate and the parties adopted it into the *Draft Compensation Framework* at section 9.

[116] Within the independent compensation process proposed in the *Draft Compensation Framework*, section 9.6 contemplates review of an individual compensation decision by the Tribunal:

> 9.6. Potential beneficiaries denied compensation can request the second-level review committee to reconsider the decision if new information that is relevant to the decision is provided, or appeal to an appeals body composed of individuals agreed to by the Parties and hosted by the Central Administrator. The appeals body will be non-political and independent of the federal public service. **The Parties agree that decisions of the appeals body may be subject to further review by the Tribunal.** The reconsideration and appeals process will be fully articulated in the Guide.
>
> (emphasis added)

[117] The *Draft Compensation Framework* does not provide any additional guidance in terms of what is contemplated by "further review by the Tribunal".

[118] The Panel, by letter dated October 20, 2020, requested submissions from the Commission on the Tribunal's authority to retain jurisdiction in accordance with the provisions of section 9.6 of the *Draft Compensation Framework*. The Panel welcomed any comments from other parties on this matter.

B. Commission's Submissions

[119] The Commission responded to the Panel's letter of October 20, 2020 requesting submissions on this issue. The other parties either agreed with the Commission's submissions or did not address this issue.

[120] The Commission argues that the *Draft Compensation Framework*, including the detailed appeals process and the involvement of third party adjudicators, is consistent with the purpose of the *CHRA* and similar to the approach taken in previous cases.

[121] The Commission frames the Tribunal's appellate role as part of the Tribunal's retained jurisdiction. The retained jurisdiction itself is part of the broad discretion section 53

of the *CHRA* provides to fashion remedies. It allows the Tribunal to direct the parties to attempt to implement a remedy while retaining the ability to step in if the parties fail to do so.

[122] The proposed structure of the Tribunal's supervision is analogous to prior cases such as *Grant v. Manitoba Telecom Services Inc*, 2012 CHRT 20; *Public Service Alliance of Canada v. Canada (Treasury Board)*, 1998 CanLII 3995 (CHRT) and *Walden et al. v. Attorney General of Canada*, Consent Order dated July 31, 2012. In all those cases, the Tribunal retained jurisdiction to decide the matter in the event that the parties were unable to agree. That is no different from the current case where the *Draft Compensation Framework* provides for procedures through which the parties will attempt to reach an agreement and, if they are unable to do so, the Tribunal has jurisdiction to determine any outstanding disputes. In particular, the Tribunal in *Walden* had and used its jurisdiction to determine requests brought by non-complainant individuals (*Walden et al. v. Attorney General of Canada*, 2016 CHRT 19 and 2018 CHRT 20). The Commission does not see any legal distinction between *Walden* where the initial attempt at an agreement was between the government and the non-complainant and the *Draft Compensation Framework* that provides that an independent Claims Administrator will attempt to facilitate agreement, including through an appeals process.

[123] The Commission acknowledges that the Tribunal's retained jurisdiction may be called upon for approximately three and a half years after the compensation process is initiated. The Commission indicates that there is no statutory or case law limit to the length of the Tribunal's retained jurisdiction.

C. Analysis

[124] The Panel agrees with the Commission's characterization of the Tribunal's supervisory role as part of the Tribunal's retained jurisdiction. The retained jurisdiction itself is part of the broad discretion s. 53 of the *CHRA* provides to fashion effective remedies. It allows the Tribunal to direct the parties to attempt to implement a remedy while retaining the ability to step in if the parties fail to do so. The Panel in this case has exercised this authority on a number of occasions and has provided extensive reasons that were never challenged

in this case. The Panel relies on its previous rulings and will not echo them all here. As an example, in 2016, the Panel wrote:

> Remedial orders designed to address systemic discrimination can be difficult to implement and, therefore, may require ongoing supervision. Retaining jurisdiction in these circumstances ensures the Panel's remedial orders are effectively implemented (see *Grover* at paras. 32-33),
>
> (see 2016 CHRT 10, at para. 36 and further analysis at paras. 12-18).

[125] Later in 2017, the Panel provided additional guidance:

> (…) Rather, in line with the remedial principles outlined above, the Panel's purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation is to ensure that as many of the adverse impacts and denials of services identified in the [*Merit*] *Decision* are temporarily addressed while INAC's First Nations child welfare programing is being reformed. That said, in crafting any further orders to immediately redress or prevent the discrimination identified in the [*Merit*] *Decision*, it is necessary for the Panel to examine the actions Canada has taken to date in implementing the Panel's orders and it may make findings as to whether those actions are or are not in compliance with those orders.
>
> As the Federal Court of Canada stated in *Grover v. Canada (National Research Council)*, (1994), 24 CHRR D/390 (FC) at para. 32, "[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal." This statement is in line with the Panel's approach to remedies to date in this matter. In order to facilitate the immediate implementation of the general remedies ordered in the [*Merit*] *Decision*, the Panel has requested additional information from the parties, monitored Canada's implementation of its orders and, through its subsequent rulings, provided additional guidance to the parties and issued a number of additional orders based on the detailed findings and reasoning already included in the [*Merit*] *Decision.*
>
> (2017 CHRT 14, at paras. 31-32).

[126] In 2018, the Panel rendered an important decision that led to a Consultation Protocol signed by Canadian Ministers and the parties including the National Chief of the AFN. In this protocol, Canada fully accepted to implement the Tribunal's 2018 CHRT 4 ruling and previous rulings. Of note, the Panel relying on its previous rulings and consistent with its approach to remedies since the *Merit Decision* stated as follows:

> Indeed, the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 (CanLII) has also directed human rights tribunals to ensure that their remedies are effective, creative when necessary, and respond to the fundamental nature of the rights in question:
>
> Despite occasional disagreements over the appropriate means of redress, the case law of this Court, (…), stresses the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights (…) Thus, in the context of seeking appropriate recourse before an administrative body or a court of competent jurisdiction, the enforcement of this law can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the *Quebec Charter*. (see at para. 26).
>
> (see 2018 CHRT 4, at. paras. 51-52).
>
> **As stated above, the *CHRA*'s objectives under sections 2 and 53 are not only to eradicate discrimination but also to prevent the practice from re-occurring. If the Panel finds that some of the same behaviours and patterns that led to systemic discrimination are still occurring, it has to intervene. This is the case here.**
>
> (2018 CHRT 4, at para. 165).

[127] Section 9.6 of the *Draft Compensation Framework* reflects, but does not create, the Tribunal's authority to review decisions of the appeals body. Rather, the Tribunal's authority appropriately flows from its retained jurisdiction. This arrangement appropriately reflects the value in providing the parties an opportunity to resolve aspects of the dispute themselves while confirming the Tribunal's ultimate responsibility to ensure that the inquiry before the Tribunal is resolved in accordance with the provisions of the *CHRA*.

[128] Determining whether an individual complainant is entitled to compensation under the *CHRA* and, if so, how much compensation is a core aspect of determining a complaint before the Tribunal. That remains true in the unique circumstances of this case where the complaint was brought by the Caring Society and the AFN on behalf of a group of victims who were not identified by name (*CHRA*, s. 40(2)).

[129] The Tribunal has provided a number of decisions and rulings directly addressing the victims' entitlement to compensation for discriminatory conduct. Most notably, the *Merit Decision* found that Canada's programs and funding discriminated against First Nations

children and amounted to discriminatory conduct. In the *Compensation Decision*, the Tribunal found that the victims on whose behalf the complaint was brought were entitled to compensation. The Tribunal addressed the quantum of compensation and considered some general eligibility parameters such as which classes of family members were entitled to compensation. The Tribunal also recognized the value in directing the parties to negotiate further aspects of the compensation process. The Tribunal provided further guidance in subsequent rulings. In particular, the Tribunal addressed in 2020 CHRT 7 issues of the age at which First Nations child victims would be eligible to receive compensation funds, eligibility for compensation of children apprehended into care prior to January 1, 2006 but who remained in care as of that date, and compensation to the estates of deceased victims. In 2020 CHRT 15, the Tribunal addressed disputes between the parties relating to compensation for First Nation children living off-reserve, challenges specific to victims living in remote communities, the scope of family caregivers entitled to compensation, and definitions for terms relating to Jordan's Principle. In 2020 CHRT 20, the Tribunal assisted the parties in developing mechanisms to identify eligibility criteria for Jordan's Principle as it related to First Nations identity. Consistent with the principles of reconciliation and First Nations right to self-determination, the Tribunal preferred to provide the parties guidance in their discussions and avoid defining who is a First Nations child for eligibility purposes under Jordan's Principle.

[130] Consistently throughout its prior decisions and rulings, the Tribunal has resolved contested issues and encouraged the parties to negotiate issues on which they are able to make progress. Section 9.6 of the *Draft Compensation Framework* further reflects the Tribunal encouraging the parties to reach a negotiated settlement while retaining jurisdiction in the event negotiation is unsuccessful. The overall structure of the *CHRA* strongly encourages parties to resolve disputes through negotiation and the importance of negotiation is heightened in this case. However, there is always a possibility that negotiation is unsuccessful. The Tribunal is obliged to retain jurisdiction in order to resolve a dispute that negotiation fails to resolve. This is consistent with the Tribunal's approach in the *Grant, Public Service of Canada,* and *Walden* cases submitted by the Commission in which the Tribunal provided directions and a framework for negotiations but retained jurisdiction in the event that negotiations failed. It is also consistent with cases from other tribunals such as

the case of *Alberta (Labour Relations Board) v. International Woodworkers of America, Local 1-207*, 1989 ABCA 7 where, at paragraph 16, the court explained that it was appropriate for the Board to direct the parties to negotiate while the Board retained jurisdiction to impose a remedy if the parties could not agree and it was even acceptable for the Board to suggest that the parties engage third-party arbitration as part of their attempt to reach a settlement despite the fact that the Board did not have jurisdiction to order binding arbitration. The provision in section 9.6 that the Tribunal may review decisions of the appeals body simply reflects that, as a consequence of the Tribunal's retained jurisdiction, it is able to provide further direction or impose a remedy in the event that the parties, through the Central Administrator and the appeals body, are unable to agree with a potential beneficiary on that individual's entitlement to compensation. Section 9.6, and the parties' agreement, is not the source of the Tribunal's authority in this section.

[131] The remaining provisions in section 9, including aspects of section 9.6 not related to the Tribunal's jurisdiction, are a manifestation of the parties negotiating compensation with individual beneficiaries in accordance with the direction provided in the Tribunal's orders.

[132] In this particular case, the large volume of anticipated individual claims for compensation in this case would make it difficult, if not impossible, for the Tribunal to expeditiously adjudicate each claim. The parties would no doubt face similar challenges if they sought to review and negotiate each of the individual requests for compensation themselves. However, section 9 reflects the parties delegating their ability to negotiate individual beneficiary's entitlement to compensation to the Central Administrator who is capable of implementing a more expeditious process. While the merits of the independent process are obvious, the key observation is that the Central Administrator's authority comes from the parties' assignment of their ability to negotiate in order to resolve disputes in a human rights complaint.

[133] While providing agency for the parties to negotiate is important, the Tribunal is ultimately responsible for ensuring the *CHRA* is upheld. Accordingly the Tribunal may, in rare cases, decline to adopt a position negotiated by the parties (e.g. *Taylor (on behalf of Kevin Taylor) v. Aboriginal Affairs and Northern Development Canada and Health Canada*,

2020 CHRT 10). Section 9.6 reflects that the Tribunal may review a decision of the appeals body regardless of whether the parties and the potential beneficiary agree with the outcome.

[134] In conclusion, section 9.6 reflects two different sources of authority. The provision relating to the Tribunal's ability to review decisions of the appeals body does not create the Tribunal's authority. Rather, it appropriately reflects the Tribunal's retained jurisdiction. In contrast, the Central Administrator's authority is created in section 9. This authority comes from the parties' ability to negotiate aspects of a human rights complaint.

D. Conclusion

[135] The Tribunal retains jurisdiction on all its compensation orders including the approval and implementation of the Compensation Process. The Tribunal's retention of jurisdiction in relation to the compensation issue does not affect the Tribunal's retained jurisdiction on any other aspects of the case for which the Panel continues to retain jurisdiction.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
February 11, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: February 11, 2021

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, Julie McGregor and Adam Williamson, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton, Patricia MacPhee, Max Binnie, Kelly Peck and Meg Jones , counsel for the Respondent

Maggie Wente and Sinéad Dearman, counsel for the Chiefs of Ontario, Interested Party

Julian Falconer, Akosua Matthews and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party