Court File Nos. T-1621-19 and T-1559-20

FEDERAL COURT

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, ASSEMBLY OF FIRST NATIONS

May 12, 2021

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PART I - OVERVIEW

1. At the outset of its principal decision on the merits of this discrimination complaint, which was not challenged by any party, the Tribunal summed up the lengthy proceedings up to then:

> This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.

2. In its compensation decision, the Tribunal made the following factual finding:

> Canada's conduct was devoid of caution with little to no regard to the consequences of its behaviour toward First Nations children and their families both in regard to the child welfare program and Jordan's Principle. Canada was aware of the discrimination and some of its serious consequences …. Canada did not take sufficient steps to remedy the discrimination until after the Tribunal's orders …. Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.

3. The Assembly of First Nations ("AFN") responds to two separate applications of the Attorney General of Canada ("AGC") for judicial review. In the first application, Canada seeks to avoid liability for compensation awarded to First Nations children and their primary caregiver(s) who suffered harm as a result of Canada's discriminatory conduct. Canada asserts, improbably, that a finding of systemic discrimination excludes the right to an individual remedy.

4. The second application attempts to deny such compensation to a significant proportion of victims by attacking the definition of a "First Nations child" for the purposes of Jordan's Principle.

5. In both applications, Canada challenges the remedial jurisdiction of the Canadian Human Rights Tribunal ("the Tribunal") to compensate and 'make whole' victims of discrimination. In assessing Canada's claims, this Honourable Court must take account of jurisprudence that establishes the following principles:

    a. The Canadian Human Rights Act ("CHRA") is quasi-constitutional and gives rise to rights of vital importance. These rights must be given full recognition and effect through a broad, liberal interpretation that will best ensure that the objects of the CHRA are achieved.

b. The same is true of the remedial authority of the Tribunal, which must craft remedies to promote the rights being protected by vindicating the rights and freedoms of victims of discrimination.

c. Moreover, this Tribunal like many others, has been afforded a broad, discretionary remedial authority, and the Court should hesitate to substitute its own views for the conclusions of the specialized, expert body to which Parliament has delegated the task. The Court's task is not to determine the "correct" interpretation of statutory language such as "compensation".

d. This approach is indeed mandated by reasonableness review, which Canada ignores in asking this Court to reinterpret the remedial language of the CHRA afresh, to match the position that Canada fully and unsuccessfully urged on the Tribunal.

e. The Court's restrained and deferential role on judicial review is to determine whether the Tribunal acted irrationally or illogically in its chain of analysis, given the specific context of human rights law and practice, and the facts and circumstances of this case in which it was immersed and has first-hand knowledge.

f. The Court should therefore consider the time span and duration of this complaint; the 72 hearing days for the Merits Decision and countless other days in Remedies hearings and compliance motions; the more than 100,000 documents that were put before the Tribunal, the extensive written and oral argument; and the careful, logical, extensive reasons that the Tribunal delivered in some 37 decisions after giving Canada a full opportunity to address every legal issue.

g. The Tribunal's manner of proceeding was fully consistent with administrative law principles that recognize that it is not a Court, and like other human rights tribunals that have heard such factually complex cases, the Tribunal was not limited by court-like processes in focusing on how to effectively vindicate important statutory rights.

h. In assessing reasonableness, the analytical dichotomy between systemic and individual, intentional discrimination that Canada asserted below and in this Court was erased by the Supreme Court over two decades ago. Every year there are hundreds of decisions across Canada in which human rights tribunals award damages to individual employees and other claimants after findings of systemic

discrimination against the victims.

i. The Tribunal's remedial decision should in addition be evaluated and upheld in light of its consistency with Canada's international obligations.

j. The Court should also place these judicial review applications in the context of Canada's relentless, ongoing and longstanding refusal to accept the Tribunal's jurisdiction (even before it had convened) or the obvious connection between Canada's role in First Nations child welfare and the requirements of the CHRA, culminating in the Tribunal's strong, unchallenged finding of wilful, discriminatory behaviour toward one of the most vulnerable groups over which Canada asserts jurisdiction.

6. The Tribunal found that Canada was discriminating against First Nations children, families and communities in its administration of the First Nations Child and Family Services ("FNCFS") Program and in its application of Jordan's Principle. The Tribunal accordingly made a number of interim orders, including those that are challenged by Canada in these applications.

7. The AGC's preference for a narrow construction of the Tribunal's remedial provisions to order compensation is contrary to the principles governing the interpretation of human rights legislation and does not properly account for the history and purpose of equality rights. Properly construed, it is clear that the Tribunal has the discretion to compensate those who experience discrimination for the pain and suffering they endured, as well as to take into account any wilful or reckless conduct of the perpetrator.

8. Surprisingly, and without notice, Canada has purported to shovel in two reports before this Court that were never put before the Tribunal, never tested, and are undoubtedly inadmissible expert evidence when simply attached to the affidavit of an unrelated witness.

9. The two decisions of the Tribunal are reasonable. Canada's applications should be dismissed with costs.

PART I - FACTS

A. Canada's Efforts to Dismiss the Complaint and Non-Compliance with Orders

10. Since the outset of the filing of the human rights complaint, the AGC has used every tool available in its arsenal to have the case dismissed. The AGC's has engaged in various judicial reviews and motions to challenge the jurisdiction of the Tribunal to hear the complaint. Once these administrative tactics were dealt with, Canada then engaged in conduct to derail the process. Several times, the Tribunal was required to deal with Canada's failure to comply with lawful orders.

11. The AFN and Caring Society originally filed the human rights complaint with the CHRC on February 5, 2007.[1] Canada urged the CHRC to decline to deal with the complaint, arguing that it was outside the CHRC's jurisdiction. On September 30, 2008, the CHRC rejected that submission and referred the complaint to the Tribunal.

12. On November 11, 2008 the AGC sought judicial review of the CHRC's referral decision. By Order dated November 24, 2009, Madame Prothonotary Aronovitch stayed Canada's judicial review application pending the Tribunal hearing. Canada appealed this order, and Mr. Justice O'Reilly dismissed Canada's appeal on March 30, 2010.

13. In 2010, the AGC persuaded the Tribunal to prevent the public airing of the Tribunal proceedings by the Aboriginal Peoples Television Network (APTN). The Chief Justice of this Court reversed that decision on June 30, 2011.[2]

14. The AGC challenged the jurisdiction of the Tribunal to hear the Complaint. In 2011, the Tribunal accepted the AGC's submission that funding was not a service and therefore, the Tribunal did not have jurisdiction to hear the complaint. On April 18, 2012, the Federal Court set aside that decision and remitted the matter to a different panel.[3] Canada appealed to the Federal Court of Appeal on May 22, 2012, and its appeal was dismissed the following year.[4]

15. On July 12, 2012, the Acting Tribunal Chairperson ordered a three-person panel to re-hear

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[1] The proceedings up to 2012 were summarized by this Court in *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, at paras 64-107

[2] *Aboriginal Peoples Television Network v. Canada (Human Rights Commission)*, 2011 FC 810

[3] *Canada (Human Rights Commission) v. Canada (Attorney General),* 2012 FC 445

[4] *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75Th

the complaint. The Tribunal formally dismissed the AGC's motion to end the proceeding.[5] Canada objected to the parties amending their complaint to include allegations of retaliation and filed a motion[6] to block expert witnesses of the AFN and Caring Society from testifying.[7] Canada also sought to postpone the hearing of the complaint.

16. On February 25, 2013, the hearing on the merits commenced before the Tribunal. Through access to information requests, the Caring Society was able to obtain relevant government documents that Canada did not provide to the parties in Tribunal disclosure. The parties were forced to file a production motion, and the hearing on the merits was delayed to allow for additional disclosure by the AGC. The Tribunal held that:

> the Respondent's conduct here is far from irreproachable. As demonstrated by the evidence brought by the Caring Society as a result of Dr. Blackstock's *ATIA* request, the Respondent knew of the existence of a number of these documents, prejudicial to its case and highly relevant, in the summer of 2012 and yet failed to disclose them. [8]

17. On January 26, 2016, the Tribunal issued its landmark ruling and affirmed that Canada was discriminating against First Nation children and families.[9] The Parties turned their attention to immediate relief measures for the Tribunal's consideration. While the AGC accepted the Tribunal's ruling on the merits, Canada unilaterally took it upon itself to reform the FNCFS program in a manner of its choice.[10] The Tribunal expressed concern with Canada's proposals that reforms be implemented over five years.

18. Canada's refusal to end its discrimination resulted in a number of non-compliance motions before the Tribunal. Canada was ordered to make further enhancements to the FNCFS

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[5] *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*), 2012 CHRT 17.
[6] *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*), 2012 CHRT 24.
[7] *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).*, 2012 CHRT 28
[8] *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*), 2013 CHRT 16, at para 55.
[9] *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 ["Merits Decision"].
[10] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*), 2016 CHRT 10, at para 7.

program and Jordan's principle.[11] Canada was ordered to fund NAN's choose life program and address remoteness funding inequities.[12] Canada was ordered a third time to comply with its orders regarding Jordan's principle.[13] The AGC filed for judicial review, however, the parties negotiated a settlement, and the Tribunal varied its order on consent.[14]

19. The Tribunal found that Canada was not in compliance with its orders to cease discrimination in Ontario.[15] In 2019, the Tribunal issued another order regarding Canada's failure to fully implement Jordan's principle for First Nations children living off-reserve.[16]

B. Tribunal's Decision on the Merits

20. In 2007, the First Nations Child and Family Caring Society ("Caring Society") and the AFN filed a complaint alleging that the Minister of Indian and Northern Development Canada ("Canada"), represented by the AGC, was engaged in a discriminatory practice contrary to section 5 the *Canadian Human Rights Act*. Specifically, it alleged that Canada was discriminating in the provision of child and family services, on the basis of race and/or national or ethnic origin, by denying equal child and family services and/or differentiating adversely in the provision of child and family services and Jordan's Principle, against First Nations children and families living on reserve and in the Yukon.[17]

21. On January 26, 2016, the Panel substantiated the AFN's complaint in its seminal decision, 2016 CHRT 2[18] ("Merits Decision"). Canada was found to be discriminating against First

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[11] *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 16.
[12] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*), 2017 CHRT 7.
[13] *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*), 2017 CHRT 14.
[14] Federal Court file No. T-918-17; *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*), 2018 CHRT 35.
[15] *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*), 2018 CHRT 4.
[16] *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 7.
[17] Merits Decision at paras 456-467.
[18] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Norther Affairs Canada)*, 2016 CHRT 2. ["2016 CHRT 2" or "Merits Decision"]

Nations children and families living on-reserve and in the Yukon through its First Nations Child and Family Services Program (hereinafter the "FNCFS Program") and other related provincial/territorial agreements, by denying and/or differentiating adversely in the provision of child and family services, in violation of subsections 5(a) and 5(b) of the *Canadian Human Rights Act.*[19]

22. The Panel's main findings of fact addressing the need to reform and redesign the FNCFS Program in both the short and long term were summarized at paragraphs 384 to 389 of the Merits Decision. In essence, the Tribunal found that Directive 20-1 created perverse incentives to remove children from their homes and communities. While operations budgets including funding for prevention services were fixed, funding to remove children and place them into state care were fully reimbursable at cost. The only way to provide the necessary child and family services for First Nations children was to bring them into state care.[20]

23. The Tribunal also found that Canada's failure to update Directive 20-1 since the mid-1990's resulted in the underfunding of FNCFS agencies, which was inconsistent with provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families were denied an equitable opportunity to remain united with their families.[21] The panel noted that while the Enhanced Prevention Focused Approach ("EPFA") did provide some prevention funding in various regions, Canada had incorporated some of the same shortcomings of Directive 20-1 into the EPFA which continued to perpetuate the incentive to remove children from their families.[22]

24. While FNCFS Agencies were required to comply with provincial/territorial child welfare legislation, the FNCFS Program funding authorities were not based on that legislation. As a result, funding provided by Canada failed to consider the actual service needs of First Nations children and families.[23] This created funding deficiencies for items such as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel,

[19] *Canadian Human Rights Act*, RSC, 1985, c. H-6, ss. 5(a) and 5(b) ["*CHRA*"]; Merits Decision, paras 456-467.
[20] Merits Decision at para 384.
[21] Merits Decision at para 385.
[22] Merits Decision at para 386.
[23] Merits Decision at para 388.

remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures.[24]

25. With respect to Jordan's Principle, the panel affirmed how it was to be applied:

> Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.[25]

26. At the hearing, the AGC argued that Jordan's Principle was not a child welfare concept, not a part of the FNCFS Program, and, therefore, was beyond the scope of the AFN's complaint. The Panel disagreed, and based on all the evidence before it, held that while not strictly a child welfare concept, Jordan's Principle was relevant and often interlinked with the provision of child and family services under the FNCFS Program.[26] The Tribunal found that due to a lack of social and health services on reserve, a number of First Nations children were placed in care in order for them to access the services they need.[27] As a result, Canada was paying for health related services under the FNCFS program.[28]

27. In substantiating the complaint, the Tribunal ordered Canada to cease its discriminatory practices and reform the FNCFS Program and the *1965 Agreement* to reflect the findings of the Tribunal. Canada was also ordered to cease applying its narrow definition and to fully implement the full meaning and scope of Jordan's principle.[29]

28. The AFN and Caring Society sought an order for compensation.[30] However, the Tribunal reserved its decision on compensation, opting to address the most pressing discrimination issues first through interim measures, leaving the compensation issue to be dealt with at

[24] Merits Decision at para 389.
[25] Merits Decision at para 351.
[26] Merits Decision at para 362.
[27] Merits Decision at para 364.
[28] Merits Decision at para 373
[29] Merits Decision at para 481.
[30] Merits Decision at paras 486-487.

a future date after determining a process to allow the parties to put forward their evidence and legal submissions.[31]

C. Evidence of Harm Before the Tribunal

29. After the Merits Decision, the Tribunal made further rulings before releasing its 2016 *Compensation Decision*. The panel received thousands of pages of evidence, including transcripts and reports, and made more significant findings. These interim decisions, which represent the foundation for the *Compensation Decision*, were not challenged by Canada, yet the AGC asks the Court to set aside the 2016 decision.[32] In that decision the Tribunal did not attempt to reproduce all the evidence that was before it, but affirmed that compelling evidence existed in the record to permit its findings of pain and suffering experienced by First Nations children and their families.[33]

30. In considering the Tribunal's review of the harms visited upon First Nations' children, parents and grandparents in the *Compensation Decision*, it is important that the Court not re-weigh the evidence before the Tribunal. However, it is critical for this Court to recognize the full extent of the evidence on the merits of the complaint and not only the extracts relied upon in the *Compensation Decision*, however poignant and significant.[34]

31. The merits hearing spanned 72 days, from February 2013 to October 2014.[35] Over 100,000 documents were tendered into evidence by the Parties following the Caring Society's motion for additional disclosure from the AGC. The documents that the AGC initially refused to disclose were relevant to the complaint and highly prejudicial to Canada's case.[36] Testimony before the Tribunal included officials working for FNCFS agencies, experts, and government officials. In addition, various reports from the Auditor General of Canada, parliamentary committees, researchers and joint AFN-Canada studies were introduced.

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[31] Merits Decision at para 490, and *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Norther Affairs Canada)* 2018 CHRT 4 at para 444.
[32] Compensation Decision at para. 237.
[33] Compensation Decision at para. 15.
[34] *Ibid*.
[35] Merits Decision at para 14.
[36] *Supra* note 8, at para 53.

32. The Tribunal heard direct evidence of physical and psychological damages experienced by First Nations children and families, including the emotional harm and the indignity directly attributable to Canada's discriminatory conduct. Furthermore, the Tribunal acknowledged the suffering of First Nations children and families who were denied an equitable opportunity to remain together or to be reunited in a timely manner.[37]

33. The Tribunal received overwhelming evidence that Canada knew its inequitable and inadequate funding of the FNCFS Program was causing large numbers of First Nations children to be placed into state care.[38] Canada also knew the harms to First Nations children arising from being removed from their families and communities, and yet Canada repeatedly chose not to correct the problem.[39] The Tribunal determined that Canada's approach to Jordan's Principle discriminated against First Nations children and families.

34. The Joint National Policy Review ("NPR") released in 2000 found that Canada's FNCFS Program and Directive 20-1 were inequitable. The study concluded that, per capita per child in care, First Nations CFS agencies received 22% less funding than provincial averages. In the *Compensation Decision*, the Tribunal accepted the findings in the NPR as its own findings, including confirmation of the pain and suffering of experienced by First Nations, particularly its finding that "several experiences of massive loss have disrupted First Nations families and have resulted in identity problems and difficulties in functioning."[40]

35. The Wen:de reports addressed the deficiencies of the FNCFS Program and related harms for First Nations' children and families. These studies established that the funding under Directive 20-1, which was based on population levels created a perverse incentive to remove First Nations children from their homes. The more children an agency had in care, the more funding they received. Also, as funding for prevention services and least disruptive measures was almost non-existent, the only option to provide services to a family was to apprehend a child at the outset.[41] The Tribunal accepted the findings in the

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[37] Merits Decision at para 467.
[38] Merits Decision at para 191, 197, 276, 386,
[39] Merits Decision at para 390, 454.461
[40] Compensation Decision at para 170.
[41] Merits Decision at para. 168.

Wen;de reports for the purposes of the *Compensation Decision*, noting their relevance and reliability: Canada has participated in the studies giving rise to the reports.[42]

36. The Tribunal therefore relied on its earlier findings derived from these reports, in relation to the pain and suffering experienced by First Nations children and their families. The evidence showed that Canada's program was causing these victims to suffer and despite the knowledge of these harms, Canada continued to maintain its discriminatory policies. [43]

37. In 2008, the Auditor General tabled a report with Parliament concluding that Canada's funding practices were not equitable and failed to address the needs of First Nations. As a result, First Nations children on reserve were placed into state care at a disproportionate rate. The Tribunal relied on the Auditor General's report in its *Compensation Decision* as evidence of the link between the removal of children and Canada's responsibility.[44]

38. A 2009 report by the Public Account Committee ("PAC") noted that Canada had failed to provide any evidence of a plan to address the concerns and recommendations identified within the Auditor General's 2008 report. Again, the Tribunal relied on this evidence and its earlier findings in the *Compensation Decision* in concluding that Canada had engaged in wilful and reckless conduct. Canada was aware of the impacts of its policies and the need for reform, particularly with respect to prevention services as a tool to limit the removal of children. [45]

39. A number of witnesses during the merits hearing addressed Canada's discriminatory practices, and the resulting harms suffered by First Nations children and families. The evidence, including from FNCFS agency workers, painted a disturbing outlook of the systemic issues and the resulting harmful environment experienced by First Nations children and families.

40. Dr. Nicholas Trocme, a professor at McGill University, discussed his research into the overrepresentation of First Nations children in the child welfare system in instances of maltreatment and neglect. He noted that proportionally, the number of investigations

[42] Compensation Decision at para. 162-163.
[43] Compensation Decision at para 164-165.
[44] Compensation Decision at para 181.
[45] Compensation Decision at para 236-237 and 240.

involving aboriginal and particularly First Nations children and families was much higher than expected[46] and that First Nations children were more than 12 times as likely to be placed in out of home care during the investigation period.[47]

41. Theresa Stevens, the then Executive Director for Anishnaabe Abinoojii Family Services in Kenora, Ontario[48], described the significant differences in needs between First Nations and Non-First Nations families as it pertains to child welfare services. She emphasized the unique First Nations considerations at play, including: the history of residential schools, the Sixties Scoop, and the incidence of family breakdowns, multigenerational trauma, suicides and substance abuse in their communities.[49] In terms of direct experiences of harm, she noted situations where her agency could only provide necessary services for First Nations children in significant need if they were removed from their families and placed off-reserve as a result of FNCFS funding policies.[50]

42. Thomas Wesley Goff, a consultant who has worked extensively with First Nations in the area of child welfare, provided testimony regarding the lack of supports in the area of mental health. He provided examples of how communities attempted to address mental health programming, but were forced to refer children and families to off-reserve non-First Nations agencies with extensive waiting lists. The agencies ultimately provided services that did not "always appreciate the cultural background of the children and families they are serving" and the "fundamental issues First Nations have faced over the years".[51]

43. Elizabeth Ann Kennedy, the then Executive Director of the Ontario Native Women Association, also expressed issues with the services for children with complex needs on-reserve. She noted that these services did not exist at the community level and resulted in children being flown out of their communities in order to have their special needs met. She stressed the communities and First Nations leaderships' concerns with the impact of the removal of children from their family and culture, noting that "the whole cultural

[46] Dr. Nicholas Trocme Transcript at p. 89-90, Affidavit of Deborah Mayo (March 10, 2021) ["Mayo Affidavit"], Exhibit 14.
[47] *Ibid* at p. 95.
[48] Theresa Stevens Transcript at p. 68, Mayo Affidavit, Exhibit 23.
[49] Ibid.
[50] Ibid at p. 66.
[51] Thomas Wesley Goff Transcript at p. 154, Mayo Affidavit, Exhibit 21

piece was missing in terms of providing child welfare services."[52]

44. These systemic issues, including the underfunding of infrastructure, impacted the services available to First Nations communities. For example, Carolyn Bohdanovich, a director of a child and family services agency, stated that her agency was renting office space in a mobile home, which had to close as the floor began caving in.[53]

45. Time after time, witnesses acknowledged that a two-tiered system existed between the provinces and First Nations on-reserve in the support they received for child welfare services. For example, Darin Michael Keewatin, the then Delegated Director of the Kasohkowew Child Wellness, addressed the obstacles faced by Designated First Nations Agencies (DFNA), in attempting to implement culturally appropriate approaches in the provision of community services. He noted that as culturally appropriate services "are not mainstream, they are not recognized" despite the fact that there were examples of DNFAs keeping children out of care by using culture, language and ceremonies.[54] He also described how agencies had been penalized by INAC because they were not bringing children into care, so funding was removed.

46. Another common issue with on-reserve child welfare services was the lack of culturally appropriate services off-reserve and the need for more investment in communities. As articulated by Elizabeth Ann Kennedy, by not providing culturally appropriate services "our children lose their relationship to their communities in many cases, to their language, you know, to the whole culture and, you know, resulting in that whole loss of cultural identity." She further noted that the placement of children into non-First Nations homes by mainstream agencies exacerbated these problems.[55]

47. In 2011, the Auditor General issued a follow-up report. It noted that progress was unsatisfactory on several of its previous recommendations as the FNCFS program failed to address the lack of services for First Nations through meaningful reform. For the purposes of compensation, the Tribunal found, based on this report, that Canada was aware of the need for prevention services and their importance in keeping children safe

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[52] Elizabeth Ann Kennedy Transcript at p. 73, Mayo Affidavit, Exhibit 22.
[53] Vol 22 Carolyn Bohdanovich at p. 35.
[54] Darin Michael Keewatin Transcript at p. 94-95, Mayo Affidavit, Exhibit 34
[55] *Supra* note 52 at p. 21.

and in their homes. Despite this knowledge, Canada continued not to sufficiently fund and reform the child service system.[56]

48. The AFN called three witnesses to establish the impacts of Indian Resident Schools ("IRS") and that Canada's child welfare policies tended to perpetuate historical disadvantages and make First Nations children and families more vulnerable to harm. Dr. Milloy was called as an expert to provide evidence about the creation and operations of IRS and how the flaws of that system were currently being repeated and perpetuated by the FNCFS Program. He noted that a significant number of children died as a result of Canada's underfunding of the IRS system, which manifested itself in a number of ways: overcrowding, poor hygiene, poor diet, amongst others.[57] The increasing number of deaths was directly attributable to removing children from healthy traditional lifestyles and placing them in the confines of poorly constructed schools that continued to deteriorate over time as a result of neglect and inadequate funding.

49. The deplorable conditions of the IRS were a result of the Canada's funding formulas , particularly the per-capita funding system. The per-capita system was based on enrollment; that meant that in order for the churches to increase the per-capita funding they received, they needed to increase the number of students attending their schools. In a striking similarity to the Canada's FNCFS Program, the funding for IRS was not based on meeting the needs of First Nations children.

50. Starting in 1969, the IRS took on a new manifestation when it became a marked component of the child welfare system. Attendance at the schools was typically dependent upon social workers or the Children's Aid Society placing children in the schools because they were not properly cared for in their own homes and/or their own communities.[58] An emphasis was put on orphans and neglected children.

51. Dr. Amy Bombay's research and expert testimony highlight the fact that the IRS system impeded the transmission of traditional, positive child-rearing practices. Dr. Bombay's research focused on historical trauma in the context of the IRS system to enable a better

[56] *Compensation Decision* at para. 239-240.
[57] John S. Milloy, A National Crime: The Canadian Government and the Residential School System, 1879 to 1986 (University of Manitoba Press: 1999) at pg. xv.
[58] Dr. John S. Milloy Transcript at p. 19 Mayo Affidavit, Exhibit 32

understanding of the extent of the true damage inflicted on First Nations people. Dr. Bombay introduced a comparative body of research conducted among groups that have undergone major collective traumas who share a common identity, such as Holocaust survivors, Japanese Americans subjected to internment, and survivors of the Turkish genocide of Armenians.

52. Dr. Bombay's research addressed how the IRS system impeded the transmission of traditional, positive child-rearing practices. Instead, institutionalized negative parental role models for children who attended residential schools resulted in the provision of care of children and healthy families in subsequent generations being less than adequate. In other words, the IRS system broke down First Nation child-centered family models by effectively killing the Indian in the child.

53. Dr. Bombay described how children of IRS survivors are at a greater risk for negative outcomes. This is because residential schools are an important contributor to the health disparities reported in First Nations and other Indigenous peoples in Canada. Dr. Bombay presented evidence on how the intergenerational effects of residential schools have negatively impacted the overall collective health and well-being of First Nations peoples living both on-reserve and off-reserve.

54. Dr. Bombay discussed the relationship between the effects of IRS and children's well-being, emphasizing the prevalence of negative outcomes for the First Nations population with ties to residential schools. Trauma presented at an early age is an important contributor to health disparities and continued high rates of stress and trauma seen in communities today. In particular, the high rates of "childhood adversity" is a harmful consequence of IRS as it is an essential mechanism in the proliferation of stressors and negative outcomes across one's individual lifespan, as well as across generations.

55. Dr. Bombay highlighted the relationship between being affected by IRS and the likelihood of a child spending time in foster care. Data and statistical analyses suggest that those families who were more affected by IRS (for example, where several generations of their family were students in IRS) resulted in negative consequences such as a diminished ability to provide adequate and stable care for their children. That, in turn was associated with an increased likelihood of their children spending time in foster care.

56. In utilizing data from the Regional Health Survey, Dr. Bombay discussed the higher rates

of chronic health conditions for First Nations people relative to the non-aboriginal population in Canada. These conditions included high blood pressure, arthritis, intestinal problems, heart disease and diabetes. Dr. Bombay described how life-long stressors correlate to higher rates of mental health problems for Indigenous people. For example, First Nations women living on-reserve are twice as likely to experience depression compared to non-Aboriginal women. These mental health disparities are perhaps most evident in high rates of suicide amongst Indigenous people.

57. Dr. Bombay also spoke to empirical evidence regarding the effects of First Nations children who live with their biological mother but not their biological father, and the rate of children coming from “broken homes” or “single-parent households”. The high rates of trauma continued into adulthood for these children as they are more likely to encounter severe trauma, such as being victim of a violent crime, compared to the general Canadian population.

58. Finally, Dr. Bombay discussed her research on early life adversity and how this affects the brain and manifests itself in psychological and physical health outcomes.[59] She highlighted the large amount of research which concludes that adverse conditions in early life can impact the developing brain and increase vulnerability to mood and other disorders.[60] Medial scans of an abused or neglected child’s brain is measurable by examining the differences in the functions and structure of the brain.[61] Pre-natal and early life adversities can result in vulnerability to the consequences of future stress through stress-related mechanisms that lead to epigenetic changes. These are changes in the expression of genes, meaning the environment can turn certain genes on and off, resulting in stable and lasting changes in gene expression.[62]

59. Elder Joseph provided evidence on how the IRS system and current child welfare practices are empirically linked to many social disparities in First Nations communities and families today. Elder Joseph testified that his residential school experience was not uncommon and was indeed a negative one. Attending an IRS had injected a deep sense of loneliness into his life. He testified that the experiences suffered by the survivors of

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[59] Dr. Amy Bombay Transcript, p. 97, Mayo Affidavit, Exhibit 36.
[60] *Ibid* at p. 97.
[61] *Ibid* at, p. 98.
[62] *Ibid* at p. 99.

IRS resulted in a sense of shame and brokenness in their lives.

60. Elder Joseph's work on reconciliation was also focused on child welfare. He stated that nearly half of all Aboriginal children under fourteen years of age are in foster care. Aboriginal children are more likely to experience sexual, physical and emotional abuse, and more likely to be victims of violent crime and to be incarcerated.[63] He testified that Aboriginal children also die at a rate three times higher than other, and they are more likely to be born with severe birth defects and debilitating conditions like Fetal Alcohol Spectrum Disorder. Also, suicide rates are six times higher compared to others, amongst a litany of other traumatic injuries.[64] He concluded his testimony by noting that children removed from their home and community suffer a great cultural loss. They are segregated and eventually lose the ability to relate to family and friends.

61. Dr. Mary Ellen Turpel-Lafond spoke of her work as British Columbia's Representative for Children and Youth. Dr. Turpel-Lafond provided evidence on the significant number of reports of injuries that children and youth experienced while in the child welfare system. Her report entitled "Too Many Victims: Sexualized Violence in the Lives of Children and Youth in Care" noted that 23% of female Aboriginal youth who responded to the survey reported they had unwanted sexual contact, versus 13 percent of the total female youth in B.C.[65] An overwhelming number of First Nations children in care faced sexualized violence over the decade she was the child representative.[66] She noted that the troubling aspect of this exposure to sexual violence, child trafficking and sexual exploitation was that a substantially higher percentage of First Nation children were being brought into state care as a result of neglect. Essentially, children were taken from loving and protective parents into a strange and alienating domain with no supports, and the children became even more vulnerable.

62. Dr. Turpel-Lafond also addressed other disturbing trends which were present for First Nations children in state care. Her report entitled "Trauma, Turmoil and Tragedy: Understanding the Needs of Children and Youth at Risk of Suicide and Self-Harm" involved 89 youths who had in some way engaged in self-harm or completed a suicide.

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[63] Elder Joseph Transcript, pgs. 94-94 Mayo Affidavit, Exhibit 38.
[64] *Ibid* at p. 93
[65] Dr. Mary Ellen Turpel-Lafond Affidavit at paras 17 -18, Mayo Affidavit, Exhibit 163.
[66] *Ibid* at para 21.

The level of representation of Aboriginal youth, primarily First Nations, was about 60 percent in that cohort.[67] Dr. Turpel-Lafond also discussed the lack of support for children in care who reach the age of majority. These children "age out" of the CFS program and are routinely forced out of their foster homes. As a result, many of these children plunge into alcohol and drug abuse, some dying due to overdosing.[68] These children are being denied essential services despite the clear need for intervention. Dr. Turpel-Lafond further identified that First Nations children and youth encounter jurisdictional conflicts that have resulted in children being denied the requisite supports. One child who was the focus of one of Dr. Turpel-Lafond's reports suffered sexual abuse and sexual violence, and she had little to no assistance due to understaffing of the local child welfare agency. Her needs were never addressed and tragically, she eventually committed suicide.[69]

63. Dr. Turpel-Lafond stated that addiction response programs are not tailored to meet the needs of First Nations families. Addictions are one of the most frequent factors when children are involved in the child welfare system, yet prevention services are nowhere to be seen on the issue.[70] In addition, the availability of supports to aid the transition of young people out of care and into independence are lacking. Those who leave prematurely or simply age out are likely to experience immediate and longer-term difficulties in their lives.[71] In the *Compensation Decision*, the Tribunal was cognizant of Dr. Turpel-Lafond's evidence, particularly in its consideration of the significant pain and suffering endured by First Nations children and families and the direct correlation between that suffering and Canada's discriminatory practices.[72]

D. Tribunal's Decision on Compensation

64. The Tribunal invited the Parties to respond to questions it put forward in relation to compensation and file additional submissions on the matter.[73] An initial hearing was held on April 25-26, 2019.

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[67] *Ibid* at, at para 26.
[68] *Ibid* at at para 30.
[69] *Ibid* at at paras 33-34.
[70] *Ibid* at at para 35.
[71] *Ibid* at at para 37.
[72] Compensation Decision at para 32.
[73] Compensation Decision at para 12.

65. The AGC argued that complaints of systemic discrimination are distinct from individual complaints and, thus, require different remedies.[74] The AGC argued that the Tribunal had no jurisdiction to award individual compensation as there were no individual complainants who were a party to this proceeding.[75] Further, the AGC submitted that the complainants were organizations and could not experience pain and suffering.[76] Finally, the AGC argued that awarding compensation to victims would amount to a class action type of proceeding.[77]

66. The objections advanced by the AGC were rejected by the Tribunal. The Tribunal held that the proposition that a systemic case can only warrant systemic remedies is not supported by the statute and the jurisprudence. Rather the *CHRA* regime allows for both individual and systemic remedies, where supported by the evidence before the Tribunal.

67. The Tribunal held that under s. 53 of the *CHRA* it may order the person or entity found to be engaging in a discriminatory practice to financially compensate the victim. Specifically, under s. 53 (2)(e) the Tribunal can order a respondent to pay up to $20,000 for pain and suffering that the victim experienced as a result of the discriminatory practice. Under s. 53(3), the Tribunal may order the person to pay an additional $20,000 where the person is found to be engaging in the discriminatory practice willfully or recklessly.[78]

68. In calculating the appropriate amount of compensation under s. 53(2)(e) of the *CHRA*, the Tribunal assessed Canada's discriminatory behaviour to determine if it resulted in harm to First Nations children and the extent of the pain and suffering.[79] None of these findings in the *Merits Decision* had been challenged by Canada.

69. The Tribunal noted that Canada's funding formula often required children to be unnecessarily removed from their homes and communities in order to access required services.[80] These children were not living in abusive or unsafe homes. The only way for a FNCFS agency to provide a service, in a manner that was comparable to those that were available to all other Canadian children, was to place First Nations children into state care.

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[74] Compensation Decision at para 52.
[75] Compensation Decision at para 57 and 66.
[76] Compensation Decision at para 68.
[77] Compensation decision at paras 63-65.
[78] Compensation decision at paras 225-226 and 242.
[79] Compensation Decision at para 125.
[80] Compensation decision at paras 156-161 and184-185.

70. The Tribunal was satisfied on the evidence that the removal of children from their communities and families was traumatic and caused great pain and suffering to both the children and their families.[81] The Tribunal accepted that some children and their families also experienced serious mental and physical pain resulting from delays and denials of health-related services. The panel highlighted the extensive evidence demonstrating that First Nations children were denied essential services and how these denials and delays caused harm to the children and their parents or grandparents. [82] It noted that some children were required to stay in hospital longer than was medically required, while other families waited for funding approvals for medical equipment that they needed.[83] In some cases, such approvals never materialized.

71. As a result of its factual findings, the Tribunal awarded $20,000, the maximum amount allowed for pain and suffering, to each First Nation child who was removed from their home since 2006, and to each of their parents or grandparents where the removal was unnecessary.

72. In determining the appropriate amount of compensation under s. 53(3), the Tribunal assessed whether Canada was aware of its discriminatory practices. Based on the overwhelming evidence before it, the Tribunal found that Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families.[84] The Tribunal determined that Canada knew that its policies were harming children, however, the government chose to put their financial interests above the best interests of children.[85] As a result of this wilful and reckless behaviour, the Tribunal awarded each First Nation child that was removed from their home since 2006 and, where the removal was unnecessary, each of their parents or grandparents an additional $20,000, the maximum allowable amount.

73. The Tribunal acknowledged that no amount of compensation can ever recover what First Nations children and families have lost or address the suffering they have endured because of racism, colonial practices and discrimination. The Tribunal noted that this type of discrimination and the harms the victims suffered amounted to the worst-case scenario. The

[81] Compensation Decision at paras. 168-171.
[82] Compensation Decision at para 222.
[83] Compensation Order at paras 223-224.
[84] Compensation Decision at paras 231-232.
[85] Compensation Decision at paras 231, 235, and 241.

compensation award of $40,000 could never be considered proportional to the pain and suffering the victims endured.[86] The Tribunal stressed that ordering the maximum amount allowed by statute to be paid to each victim recognizes the severity of the discrimination.

74. Importantly, the Tribunal stressed that the combination of systemic and individual remedies was recognition, to the best of its abilities and tools provided under the CHRA, that the matter before it was one of the worst possible cases of discrimination. The panel affirmed that the CHRA regime allows for both types of remedies.[87] Ultimately, the matter before it was about the negative impacts and harms inflicted on First Nations children and families by the federal First Nations child welfare program, despite its purported mandate to serve and protect this vulnerable population.[88]

E. Request to Expand the Compensation Order

75. At the request of the Interested Parties, the Chiefs of Ontario ("COO") and the Nishnawbe Aski Nation ("NAN"), the Tribunal posed three questions to the Parties about the appropriateness of expanding the Compensation Order. First, the Tribunal asked the Parties if compensation should be ordered for the family of Jordan River Anderson. Secondly, COO requested that compensation be extended to include those children who were removed off-reserve. Finally, COO and NAN requested that the aunts, uncles and other family members who had been caring for children at the time of removal be included in the Compensation Order.

76. The Tribunal declined to make an Order for compensation to be paid to Jordan River Anderson on the basis that compensation was granted for a defined period, being December 12, 2007 to November 2, 2017.[89]

77. On the second question, the Tribunal declined to grant the relief sought by COO and NAN noting that COO's Statement of Particulars only focused on on-reserve First Nations children and there was insufficient evidence and arguments regarding off-reserve children and

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[86] Compensation Decision at para 13.
[87] Compensation Decision at para 13.
[88] Compensation Decision at para. 13-15.
[89] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Norther Affairs Canada),* 2020 CHRT 15, at para 11 ["2020 CHRT 15"].

families.[90]

78. Regarding the third question stemming from COO and NAN's request to expand the Compensation Order to include the extended family of a children, the Tribunal noted that the proposal would likely have resulted in a contested proceeding among a child's parents and members of the extended family and include the need for determination as to who be recognized as appropriate caregiver.[91] This could necessitate a complex assessment as to who was financially responsible for the child, who loved the child more, and whether they maintained a parental role or bond.[92] The process could be very harmful to the child.[93]

79. The Tribunal accepted the fact that if compensation was expanded to the extended family, the nature of the award would shift to compensating an adult for the time, expense and love of a child. This would result in a marked departure from compensating a biological parent or grandparent for the loss of their child to a system which targeted them because they were First Nations.[94]

F. The Compensation Framework

80. The Tribunal did not order the immediate payment of compensation, as the Panel recognized the need for the development of a culturally safe process to locate the victims of Canada's discrimination, namely First Nations children and their parents or grand-parents.[95] The process was required to respect their rights and the privacy of the victims and took into account an independent process for distributing the compensation. [96]

81. The Tribunal ordered the AGC, AFN and the Caring Society to develop compensation plan and return to the Tribunal with propositions by December 10, 2019. On February 21, 2020, the Caring Society, the AFN and Canada submitted a draft compensation framework to the Tribunal. The jointly developed compensation framework establishes a distribution mechanism in compliance with the Tribunal's direction and facilitates the culturally safe and

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[90] 2020 CHRT 15, at para 22.
[91] 2020 CHRT 15, at paras 41-45.
[92] 2020 CHRT 15, at para 35.
[93] 2020 CHRT 15, at para 36.
[94] 2020 CHRT 15, at para 44.
[95] Compensation Decision, at para 269.
[96] Compensation decision, at para 369.

expeditious distribution of compensation.[97]

82. The Compensation Framework was finalized by the parties and it reflected the Tribunal further guidance on questions raised by the parties. The Tribunal affirmed its authority to award compensation and noted that the compensation framework was a "remedy in this case" and was a special program, plan or arrangement that is permissible under the CHRA.[98]

G. Tribunal's Decision on Definition of a First Nations Child

83. In two rulings, the Tribunal considered the eligibility of children who should be covered under Jordan's Principle. The first decision, dated July 17, 2020 and cited as 2020 CHRT 20, concerns the criteria for determining individuals who are eligible for consideration under Jordan's Principle. The order was partially modified in the Tribunals subsequent decision dated November 25, 2020 and cited as 2020 CHRT 36. As discussed below, the Tribunal relied on findings that were in fact made in prior decisions that Canada did not challenge. In effect, the AGC is asking this Court to set aside decisions that are binding on it and for which all time limits for judicial review have elapsed.

84. In determining eligibility for Jordan's Principle, the Tribunal considered its finding on the merits, as well as the findings in its previous decisions. In the *Merits Decision*, the Tribunal found that Canada's definition and implementation of Jordan's Principle was excessively narrow, and that resulted in discriminatory service gaps, delays and denials of services for First Nations children.[99] The Tribunal noted that the House of Commons adopted a workable definition[100] that could serve as a basis for immediate action.[101] The ruling emphasized the importance of applying Jordan's Principle to all jurisdictional disputes rather than only those of children with multiple disabilities.[102]

85. In 2016, the Tribunal noted that Canada was inappropriately limiting Jordan's Principle to

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[97] 2021 CHRT 76, at para 19-21 and 36.
[98] 2021 CHRT 76, at paras. 36, 38.
[99] Merits Decision, paras. 381, 391 and 458
[100] *Motion 296* Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019), 2020 CHRT 20 at para. 5.
[101] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20 at para. 5.
[102] 2020 CHRT 20 at para. 5.

First Nations children living on reserve. The Panel confirmed and ordered Canada to apply Jordan's Principle to all First Nations children and not just those living on reserve.[103] In 2017, the Tribunal found that Canada continued to apply a narrow definition of Jordan's Principle whereby it captured only children on-reserve or ordinarily resident on reserve.[104] The Panel again confirmed that Jordan's Principle "applies equally to all First Nations children, whether resident on or off reserve."

86. In 2019, the Tribunal provided direction to the Parties on what constituted an urgent medical need. The Tribunal turned its mind to those First Nations children without status and not receiving necessary services. The Tribunal noted that Jordan's Principle decisions were not adequately considering the best interests of non-status children.[105] Accordingly, the Tribunal ordered Canada to provide First Nations children living off-reserve who have urgent and/or life-threatening needs, but do not have *Indian Act* status, with the services required to meet those urgent and/or life-threatening needs, pursuant to Jordan's Principle.[106]

87. Upon settling the definition of Jordan's Principle, the Tribunal turned its attention to eligibility. The Tribunal noted that Jordan's Principle was not a federal program, but a human rights principle grounded in substantive equality that addresses all inequalities and gaps in federal programs for First Nations children.[107] The Tribunal determined that four categories of individuals are appropriately considered to be First Nations children for the purposes of Jordan's Principle on an interim basis.[108] The Tribunal tasked the Parties with the development of eligibility criteria for Jordan's Principle and with establishing a mechanism to identify citizens and/or members of First Nations that would be timely, effective and which considered the implementation concerns raised by all parties.

88. In November of 2020, the Tribunal made its final ruling on eligibility further to Jordan's Principle. Jordan's Principle would apply where:

    i. The child is registered or eligible to be registered under the *Indian Act*, as amended from

[103] 2016 CHRT 16 at para 118.
[104] 2017 CHRT 14 at paras. 50, 52-54, 67
[105] 2019 CHRT 7 at paras 79, 84 and 85.
[106] 2019 CHRT 7 at para 87.
[107] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36 ["2020 CHRT 36"] at para 12.
[108] 2020 CHRT 20 para. 112

time to time;

ii. The child has one parent/guardian who is registered or eligible to be registered under the *Indian Act*;

iii. The child is recognized by their Nation for the purposes of Jordan's Principle; or

iv. The child is ordinarily resident on reserve.[109]

PART II – ISSUES

89. The issues in this application are:

I. Is Reasonableness the appropriate standard of review for the compensation order and the definition of First Nations' children?

II. Was the Tribunal's decision to grant compensation to victims of Canada's discrimination reasonable?

III. Did the Tribunal apply the appropriate level of procedural fairness in its hearing on compensation and the definition of a First Nations child for the purpose of Jordan's Principal eligibility?

PART III – STATEMENT OF ARGUMENT

A. Standard of Review

90. The Supreme Court of Canada, in *Vavilov*, held that administrative decisions are presumed to be reviewed on a standard of reasonableness. The Court also clarified that true questions of jurisdiction or *vires* are no longer treated as a separate category attracting a correctness standard of review.[110] The reasonableness standard of review applies to both the Tribunal's interpretation of its enabling legislation and to the application of that statue to the facts before it.[111]

91. The reviewing court must accord respectful deference to the factual and legal determinations

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[109] 2020 CHRT 36, at para 56.
[110] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ["*Vavilov*"] at paras. 65-68, 111.
[111] *Keith v. Canada (Human Rights Commission)*, 2019 FCA 251, at para 6.

of a tribunal. This is especially in a case like this one, where the Tribunal has conducted a thorough hearing, issued about 37 reported decisions, and has had an extraordinary opportunity that is simply unavailable to the court to understand the nuances of First Nations children's needs and what is required from Canada to remedy its protracted and seriously discriminatory behaviour.

92. Reasonableness is concerned with "justification, transparency and intelligibility within the decision-making process" and with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[112] .

93. Accordingly, when conducting a reasonableness review, a reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention'. The court must seek to understand the reasoning process followed by the decision maker to arrive at its conclusion.[113] This requires the reviewing court to assess the Tribunal's reasons holistically and contextually, to understand the basis on which the decision to award compensation was made.[114]

94. A reviewing court should consider <u>whether the decision as a whole is reasonable</u>. This requires the reviewing court to consider whether the decision bears the hallmarks of reasonableness, being justification, transparency and intelligibility, and whether it is justified in relation to the relevant factual and legal constraints.[115] The court's role is not to ask itself what the correct factual or legal conclusion should have been.

95. The Supreme Court has held that there are two types of fundamental flaws that render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable considering the relevant factual and legal constraints that bear on it.[116]

96. Rationality internal to the decision-making process means that the decision must be based on reasoning that is both rational and logical. A decision will be reasonable if the reasons reveal

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[112] *Vavilov*, at para 86, citing *Dunsmuir* at paras 47-49.
[113] *Vavilov*, at para. 84, quoting Dunsmuir, at para. 48
[114] *Vavilov*, at para. 97.
[115] *Vavilov*, at para. 99, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District*), 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, at para. 13).
[116] *Vavilov*, at para 101.

that the decision was based on a rational chain of analysis, and the reasons read with the record make it possible to understand the decision maker's reasoning.[117]

97. Reasonableness means that the Court shall only interfere with the Tribunal's decision if it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[118] In particular, the Court cannot re-weigh or effectively re-decide the case before it.[119]

98. As the Federal Court of Appeal recently held in a closely allied area of specialized expertise:

> In fact, the Supreme Court emphasized that where the evidence before an administrative decision-maker permits a number of outcomes, the administrative decision-maker draws upon expertise, such as knowledge, experience and familiarity with the dynamic of labour relations, and there is relatively little in the way of constraining legislative language, the administrative decision-maker will have a large permissible space for acceptable decision-making: see *Vavilov* at paragraphs 31, 111-114, and 125-126. Many decisions by labour adjudicators, including the one here, will fall into this category.[120]

99. In establishing the Canadian Human Rights Tribunal, Parliament chose to delegate authority to interpret and apply provisions of the CHRA to a specialized institutional adjudicative body with expertise in human rights.[121] That expertise allows the Tribunal to address complaints of discrimination and craft remedies in a manner that is sensitive to an evolving, flexible, and purposive understanding of human rights.

100. Deference is especially important in remedial decisions, where there are many possible outcomes, and where the Tribunal has considerable statutory discretion in crafting remedies that respond to the quasi-constitutional rights of vital importance. Principles of judicial review dictate judicial acceptance that the Tribunal understands the complexities inherent in a choice of remedies through its specialized expertise and its longstanding experience with the evidence in this case.

101. Despite acknowledging its burden under the reasonableness standard, the AGC asks this Court to accept its preferred interpretation of the broad remedial provisions of the CHRA.

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[117] *Vavilov*, at para 103.
[118] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47
[119] *Hughes v. Canada (Attorney General)*, 2016 FCA 271 at para 8.
[120] *Zalys v. Canada*, 2020 FCA 65, at para. 79
[121] *Stewart v. Elk Valley Coal Corp.,* 2017 SCC 30 at para 20.

Canada effectively asks for review on a correctness standard.

102. The AFN submits that the Tribunal's findings on the awarding of compensation and determination of eligibility for Jordan's Principle were the result of a rational reasoning process that is justified in light of the relevant factual and legal constraints bearing on the decision, as required by *Vavilov*.[122]

B. No Breach of Procedural Fairness

103. The AGC alleges that the Tribunal denied procedural fairness to Canada, citing the following grounds: it changed the nature of the complaint in the remedial phase; failing to provide notice that it was considering finding that the discrimination is ongoing; failing to provide reasons sufficient to allow this Court to understand the basis for its conclusion that the statutory requirements for individual compensation were met; requiring the parties to create a new process to identify the beneficiaries of its compensation order; and, inviting the parties to request the addition of new categories of beneficiaries in the same judgment.

104. At paragraph 138 of its Factum, the AGC suggests that the Tribunal's finding that discrimination was ongoing was the most "egregious" denial of procedural fairness, given that it "provided the Tribunal with significant evidence of the myriad ways it had responded to the Tribunal's orders…." The AGC further argues that the "Tribunal gave no indication that it was considering making a finding that the discrimination was ongoing…." AFN submits that this argument is totally baseless. The Tribunal was not obligated to give notice or reasons that the systemic discrimination which Canada was found to be guilty of in the 2016 *Merits Decision* had ceased. In fact, the Tribunal had not yet completed the remedies stage, so how could the AGC have reasonably believed that the systemic discrimination had ceased?

105. The AFN submits that there was no breach of procedural fairness. Indeed, despite the Tribunal's 2016 Merits decision, the parties are still adjudicating interim relief at the present time. As recently as March 17, 2021 the Panel issued a consent order regarding Non-Agency First Nations stemming from a motion by the Caring Society that Canada was not in full

[122] *Vavilov*, at para 101.

compliance of the Tribunal's order to cease its discriminatory practices.[123]

106. With respect to the remaining categories of alleged breaches of procedural fairness, which presumably are less egregious, the AFN submits that the AGC's submissions are equally baseless.

107. There can be no dispute that all parties received notice of issues that were under consideration. There were no surprises. With respect to compensation award, the AGC had notice from the outset of the hearing that compensation was an issue. The compensation remedy sought was further elaborated by AFN in its particulars and in written submissions during the hearing on the Merits. In the remedies phase, there was a special hearing on compensation in which the AGC fully participated. Canada made the same arguments it is making before this Court, which were ultimately rejected by the Tribunal

108. Where outstanding issues were before the Tribunal and further questions remained, the Tribunal notified all parties in writing and provided them with an opportunity to provide written and/or oral submission. The AGC was given full and ample opportunity to present evidence and make representations, which it did in each of these matters. In its *Compensation Decision*, the Tribunal summarized the parties' submissions in 77 paragraphs, numbered 16 to 93, and Canada's submissions occupy 31 of these paragraphs. There is no doubt that the Tribunal was well aware of Canada's position on the issues it now complains of before this Court.

109. The evidentiary record considered by the Tribunal in the lengthy hearing is clearly articulated in its reasons. Paragraph 50(3)(e) of the CHRA empowers the Tribunal to decide procedural issues related to the inquiry. The Tribunal is not bound by the strict rules of evidence, and is specifically empowered to receive evidence by oath, affidavit or otherwise.

110. Finally, many elements such as compensation were reserved by the Tribunal back in 2016. Compensation was one of those issues declared at that point to be under reserve.[124] The AGC had every opportunity to seek judicial review of the Merits Decision, but it chose not to do so. Canada now seeks to advance arguments that attack the findings of the Tribunal in its

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[123] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)* 2021 CHRT 12, at para 5 - 7.
[124] Merits decision at paras 485 – 490.

Merits decision through the back door of a procedural fairness attack on a 2020 decision.

111. Administrative tribunals are "masters of their own procedure. In *Prassad,*[125] the Supreme Court observed that in the absence of specific rules laid down by statute or regulation, administrative tribunals control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.[126] Rule 3 of the Tribunal's *Rules of Procedure* permits the parties to bring motions before the Tribunal, and allows the Tribunal to establish a procedure for the resolution of the issues raised by the motion. Nothing in either the CHRA or the Tribunal's *Rules of Procedure* limits the type of motions that can be brought before the Tribunal.

112. The record provides no suggestion that the Tribunal limited the type or amount of evidence that could be adduced by the AGC. Thus, the AFN submits that the AGC was not treated unfairly.

C. Canada has failed to show any unreasonableness in the Tribunal's interpretation of "compensation" under s. 53(2)(e) and 53(3) of its enabling legislation

113. Canada repeats the arguments that it made before the Tribunal. It asserts surprise that compensation was being claimed, and makes the odd submission that individuals who are harmed by a systemic human rights breach are not entitled to be compensated.

114. The evidence shows that the AGC received and indeed responded to particulars in the Tribunal proceeding at least six years earlier in which compensation was claimed.

115. In its decision, the Tribunal considered its home statute, principles of interpretation, court and Tribunal jurisprudence and the evidence, and made a finding of mixed fact and law that compensation was justified on the record before it. There is no basis to overturn its decision as irrational or illogical.

116. With respect to compensation, the statutory scheme provides:

> **Complaint Substantiated**
>
> **53. (2)** If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against

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[125] *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560.
[126] *Prassad*, at para 16.

> 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:
>
> (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.
>
> **Special Compensation**
>
> **(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 of panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

117. The AGC erroneously suggests that the Tribunal's compensation order amounts to a class action which is not allowable under the CHRA.[127] It cites no authority for the submission. The AGC further alleges that the consent of the actual victims is required to request compensation for harm.

118. The AFN submits that the AGC mischaracterizes the compensation award by the Tribunal and conflates this premise by comparing it to the type of damages that one may obtain in court proceeding. To be clear, the Tribunal did not order compensation for tort-like damages and personal harm. Rather, human rights awards for pain and suffering under the *CHRA* are compensation for the loss of ones right to be free from discrimination, for the experience of victimization,[128] and harm to their dignity.[129]

119. The quantum of compensation awards for harm to an individual's dignity is tied to the seriousness of the psychological impacts that the discriminatory practices have had upon the victim.[130] Medical evidence is not needed in order to claim compensation for pain and suffering.[131]

120. In its line of reasoning, the Tribunal first considered the application of its home statute.[132]

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[127] Applicant's Memorandum of Fact and Law (Attorney General of Canada), March 12, 2021, ["AGC Factum"] at paras 69-71.
[128] *Shelter Corp. v. Ontario (Human Rights Comm.)*, 2001 CanLII 28414 (ON SCDC) at para 43.
[129] *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 at paras 13 and 28.
[130] *Jane Doe* at para 12.
[131] *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20 at paras. 92-96 and 98
[132] Compensation Decision at paras 94, 98.

From there the Tribunal reviewed the complaint and the Statement of Particulars in accordance with the Tribunal's Rules of Procedure[133] and noted that both the Caring Society and the AFN requested compensation for pain and suffering and special compensation remedies.[134] The Tribunal also noted that AGC responded to both these compensation allegations and requests in its updated Statement of Particulars of February 15, 2013 demonstrating its awareness that the complainants were seeking remedies for pain and suffering and for special compensation for individual children.[135]

121. The Tribunal then conducted a thorough assessment of the Parties' positions. The Tribunal considered the AGC position on the inability to award compensation to victims who were not named complainants. In this regard the Tribunal stated:

> Nothing in the *Act* suggests that the Tribunal lacks jurisdiction and cannot order remedies benefitting victims who are not Complainants. The Panel disagrees with the AGC's argument and interpretation including of section 40 paras. (1) and (2) summarized above. Section 40 (1) and (2) is reproduced here:
>
> > 40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.
> >
> > Consent of victim
> >
> > (2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.
>
> This wording suggests that complaints on behalf of victims made by representatives can occur and the Commission has the discretion to refuse to deal with the complaint if the victim does not consent. [136]

122. In determining that there was no bar to considering an award of compensation, the Tribunal turned its mind to the pain and suffering analysis. In this regard, the Tribunal assessed its home statute, as well as the case law. The Tribunal once again gave careful consideration to the Parties' submissions. It addressed the AGC's argument that systemic discrimination

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[133] Compensation Decision at para 99.
[134] Compensation Decision at para 106 and 108.
[135] Compensation Decision at paras 109 – 111.
[136] Compensation Decision at paras 112 – 113.

requires systemic remedies (which is true) but that this should preclude individual compensation awards. The Tribunal disagreed with the AGC's position.[137] In this regard, the Tribunal stated:

> [142] In claiming there is no evidence in the record to support compensation to individual victims who are not a complainant in this case, the Panel finds that the AGC does not consider section 50(3)(c) of the *CHRA*: "(c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law". The only limitation in relation to evidence is found at section 50 (4) of the *CHRA*, the member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.
>
> . . . .
>
> [144] The Panel finds it is unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it. The AGC in making its submissions does not consider the Tribunal's findings in 2016 accepting numerous findings in reliable reports as its own. The AGC omits to consider the Tribunal's findings of the children's suffering in past and unchallenged decisions in this case.[138]

123. The Tribunal then assessed the evidence of harm to First Nations children and families, and noted that it was overwhelming:

> [147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case.[139]

124. The Tribunal also reflected on its *Merits Decision*, highlighting the evidence of Canada's FNCFS Program and the discriminatory effects of the funding models on First Nations children and their families, which can continue throughout their lives. The Tribunal also

[137] Compensation Decision at paras 132 – 133.
[138] Compensation decision are paras 142 and 144.
[139] Compensation Decision at para 147.

considered the gravity of breaking up children from their families and communities[140] and reflected on the evidence the Tribunal had received in reports and the testimony of agency witnesses.

125. Federal officials also provided some insight into the harms First Nations children suffered. The Tribunal provided the following excerpt as an example:

> [224] Other evidence in the record further exemplifies that delays, gaps and denials cause real harm and suffering to the Frist Nations children and their families:
>
>> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline at 30 degrees in order to alleviate the respiratory distress that resulted from her condition. AANDC, Jordan's Principle Chart Documenting Cases, October 6, 2013 (see HR, Vol 15, tab 422, p 2).
>>
>> MR. WUTTKE: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that correct?
>>
>> MS BAGGLEY: Well, it said the summer of 2008.
>>
>> MR. WUTTKE: Okay.
>>
>> MS BAGGLEY: "Tomatoe/tomato".
>>
>> MR. WUTTKE: Between half a year and three quarters of a year?
>>
>> MS BAGGLEY: Yes, yes.
>>
>> MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?
>>
>> MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons. (see Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).

126. The Tribunal applied the findings of the Supreme Court of Canada, taking judicial notice that the removal of a child from a parent's custody affects the individual dignity of that parent.[141]

127. In regard to compensation under s. 53 of the CHRA, the Tribunal is able to award additional

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[140] Merits Decision at paras 151 and 153, 156 - 161.
[141] Compensation decision, at para 166 – 167.

compensation of up to $20,000 where the perpetrator of discrimination is found to be engaging in the discriminatory practice wilfully or recklessly. In determining the appropriate amount of compensation under s. 53(3), the Tribunal had to assess whether Canada was aware of its discriminatory practices.

128. The Tribunal found that "Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families both in regard to the child welfare program and Jordan's Principle.[142] The Tribunal reflected upon the various internal, external and parliamentary reports over the course of 20 plus years that highlighted that the FNCFS program was harming children.[143] However, the government chose to put its financial interests above the best interests of children. As a result of this wilful and reckless behaviour, the Tribunal awarded each First Nations child who was removed from their home since 2006 and, where the removal was unnecessary, each of their parents or grandparents, an additional $20,000, the maximum allowable amount.

129. The process and outcome of the Tribunal's decision amply reflects an internally coherent and rational chain of analysis.[144] In addition, the Tribunal's decision follows from the facts and the law it reviewed, and the Tribunal meaningfully explained why its decision best reflects Parliament's intention.

D. Canada's Approach to Systemic Remedies Produces Absurd results

130. The AGC asserts the Tribunal did not have jurisdiction to award compensation because no child complainant was a party to the action and no child provided evidence for the assessment of damages.[145] Furthermore, the AGC relies on *Moore*[146] to support the proposition that complaints for systemic discrimination may only yield systemic remedies. In particular, that the Tribunal may not award individual remedies such as compensation in systemic claims, according to the AGC.

131. The AFN submits that the AGC's understanding of remedies in systemic cases is illogical at best. On its face, its position would deny any compensation for a failure to accommodate a

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[142] Merits Decision at para 231.
[143] Compensation Decision at paras 239 – 241.
[144] *Vavilov* at paras. 102-104.
[145] 2019 CHR 39 at para 57.
[146] *Moore v. British Columbia (Education),* 2012 SCC 61 ["Moore"].

claimant's special needs (which arise from a systemic barrier) due to membership in any protected group under human rights legislation. Every year, thousands of systemic human rights complaints across Canada allege, for example, that an employee lost pay because the employer failed to accommodate the employee's need to adjust work hours to accommodate her child care needs or doctor's appointment. Hours of work comprise part of the employment system. If discrimination is found, pay is awarded, and the system is ordered to be changed.

132. Canada's reliance on *Moore* is also flawed, because the case did not preclude individual remedies for systemic discrimination. Rather, the court held that the remedy must flow from the claim.[147]

133. In the present case, Canada's FNCFS program discriminated against First Nations children in almost every community across Canada. These children were unnecessarily removed from their parents, families and communities. Each one of these children suffered both collective harms and individual harms as a result of Canada's conduct.

134. The AGC's position would leave no form of compensation to victims of discrimination where systemic problems persist. This would enable abusers of human rights and state actors who possess extraordinary power over others to escape any financial liability for their actions, harms and misdeeds. This proposition is contrary to both domestic and international human rights standards.

135. In systemic human rights actions, representatives of victims constitute the public face of all victims. Representatives can focus on the disturbing stories of individual victims, or they can highlight the systemic nature of the wrongs. Regardless of the case put forward by representative claimants, human rights law requires that victims of discrimination are valued as human beings.

136. Compensation for the violation of human rights is essential to return injured individuals to the position they would have been in if not for the infringement. It is also essential to ensure that human rights laws do not devolve into empty words. A human right whose violation has no consequence lacks any real substance and could not have been intended by Parliament. Justice LaForest referred to such an approach of rights without remedies as a "thin and

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[147] Moore at para 64.

impoverished vision" of equality rights.[148] Any violation of human rights must yield effective consequences.

137. The principle that unlawful infringement of human rights requires compensation is also well established in international law. As the Tribunal noted, the right to relief and compensation for victims of human rights violations is enshrined in the International Convention for Civil and Political Rights and in the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

E. Tribunal properly exercised its jurisdiction

138. The AGC alleges that the Tribunal's framing of the AFN and Caring Society's complaint was erroneous as it was not entitled to transform a complaint of discriminatory underfunding into a complaint seeking individual compensation.[149] Effectively, it claims that neither the complaint nor the evidence led provided a basis for the Tribunal to consider individual compensation on the matter.[150]

139. For the AGC, the matter before the Tribunal was a complaint of systemic discrimination, and that as a result, there can be no overlap with a claim for individual compensation as a systemic complaint is solely about challenging structural and social harms. According to the AGC, as a distinct complaint, systemic discrimination requires different evidence, potentially different parties and different remedies.[151] The AGC is plainly wrong.

140. The AFN submits that AGC has in fact mischaracterized the Supreme Court's reasoning in *Moore*, and is effectively attempting to establish that the approach to the allegations of discrimination undertaken by the Tribunal should have been accomplished in a binary way: being either individual or systemic. However, as noted by the Supreme Court in *Moore*, it is:

> neither necessary nor conceptually helpful to divide discrimination into these two discrete categories. A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several….The only difference is quantitative, that is, the number of people disadvantaged by the practice.[152]

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[148] *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327
[149] AGC Factum at para 55.
[150] AGC Factum at para 57.
[151] AGC Factum at para 60.
[152] Moore at para 58.

141. Importantly in *Moore*, the Supreme Court did not preclude systemic evidence as being a sufficient basis for grounding a finding of discrimination, which could elicit both systemic reform and individual compensation, such as in the case of Canada's discriminatory provision of child services at the heart of the *Merits Decision* and the *Compensation Decision*.

142. For the Supreme Court in *Moore*, the crux of the matter was simply that "the remedy must flow from the claim."[153] As addressed, the systemic evidence presented therein was merely presented as additional evidence that the child at issue was discriminated against. Again, this does not mean that a finding of discrimination predicated on systemic evidence precludes individual remedies, in addition to systemic reform. Nor does it limit the scope of the claim giving rise to a remedy to the initial claim form filed by complainants.

143. As the remedy must simply flow from the claim, it is clear the AGC has erred in its supposition that *Moore* demands that a "victim must be identified with particularity" and that said individual "must provide evidence of the harms they suffered because of the discriminatory practice". Further, the AGC has provided no basis for these erroneous requirements applying with more particularity where "heightened damages are sought based on a party's conduct".[154]

144. The AGC also relies on the Federal Court of Appeal decision in *CNR 1985* wherein Hugessen J.A. noted that the Tribunal's remedial authority limits compensation to "victims" which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, "by the nature of things individual victims are not always readily identifiable".[155]

145. What the AGC failed to address is that Hugessen J.A.'s decision was reversed by the Supreme Court of Canada, which restored the Tribunal order to CNR to adopt a special program that imposed a quota on female hiring until women represented 13% of the workforce. By its very nature, this order would benefit unnamed and unparticularized non-party female job applicants in the future. The Supreme Court made clear in *CNR*, and the

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[153] Moore at 64.
[154] AGC Factum at para 57.
[155] AGC Factum at para 61 citing *Re CNR and Canadian Human Rights Commission*, 1985 CanLII 3179 (FCA) at para. 10 [CNR 1985].

Tribunal in the present case recognized, that human rights codes must be interpreted in a "fair, large and liberal manner to ensure that their important objects are attained:

> 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. [156] [emphasis added]

146. The "exercise of the human rights tribunal's remedial discretion must be grounded in the overriding principle of effective remedy; and the unique character of human rights legislation, its broad purposes, distinct provisions and administrative machinery."[157] The Supreme Court has therefore rejected an interpretation of the CHRA that would limit the Human Rights Tribunal's authority to the remedial jurisdiction and framework that is afforded by the common law. This follows from the "almost constitutional" nature of the rights protected, and the need to adopt remedies to effect the principles and policies set forth in the CHRA.[158] Thus, in the current case, the powers of the Tribunal must encompass both individual compensation and systemic remedies, to counter the full extent of the proven discrimination that was visited on First Nations children and families by Canada, and to penetrate known institutional barriers to change.[159]

147. The Tribunal dealt fully and reasonably with the AGC's claim of surprise with respect to a claim of compensation.

148. The Complaint in this case notably established that the inequitable levels of funding contributed directly to the over representation of First Nations children in child welfare care.[160] By way of their Statement of Particulars dated June 5, 2009, the AFN and the Caring

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[156] *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at p. 1138 [CNR 1987] at page 1134.
[157] Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Hum Rts 1 at pp 3-4.
[158] *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84, at paras 8 and 11
[159] *Supra* note 157 at p.4.
[160] Complaint Filed at Tribunal, p 1, Mayo Affidavit, Exhibit 1.

Society clearly demonstrated their intention from the date of their initial filing to pursue individual compensation for each First Nation person who was removed from their home as a result of Canada's discriminatory conduct:

> (3) Pursuant to sections 53(2)(d), (e) and (f), requiring compensation and special compensation in the form of payment of one hundred and twelve million dollars into a trust fund to be administered by FNCFCS and to be used to:
>
> > (a) As compensation, subject to the limits provided for in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989 and thereby experienced pain and suffering;
> >
> > (b) As compensation for the expenses required to enable those persons who experienced pain and suffering to receive therapeutic, repatriation, cultural and linguistic services and for the expenses to enable First Nations Child and Family Services Agencies to provide such services.[161]

149. As noted by the Tribunal, the Statement of Particulars constitutes an inextricable component of the claim. It is designed to flesh out the scope of the claim, since the claim form is short and cannot truly reflect all the elements of a claim, especially a complex one.[162] Notably, the claims for compensation were clearly intended to form part of the claim from the commencement of the complaint, well prior to commencement of the hearing on the merits[163]. The AGC responded to the requested relief over eight years ago, as noted by the Tribunal.[164] Five years later, as the Tribunal found, Canada "admitted that compensation was an issue to be determined by the Tribunal" in a Consultation Protocol signed in these proceedings.[165]

150. The Tribunal also squarely addressed the AGC's assertion that individual compensation must be predicated on individual victims being a party to the complaint before the Tribunal, leading substantial evidence of their personal experiences. The Tribunal acknowledged that s. 40(1) allows a group to advance a complaint if it has reasonable grounds to believe a person is engaging in a discriminatory practice.

151. The Tribunal also determined that in light of resolution 85/2018, in which the Chiefs in

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[161] Complainants' Particulars, para 21(3), Mayo Affidavit, Exhibit 3.
[162] Compensation Decision at para. 108
[163] Compensation Decision at para. 108.
[164] Respondents' Particulars, para 64-65, Mayo Affidavit, Exhibit 6; Compensation Decision at paras. 109-10
[165] Compensation Decision at para. 111.

Assembly mandated the AFN to seek compensation on behalf of their members, the AFN was empowered to speak on behalf of the First Nations children who were victims of Canada's discrimination, including voicing their needs and seeking redress for their harms suffered by way of compensation. [166] The accordance of said representative status to the AFN also did not diminish the rights of individuals as the Tribunal was clear that any beneficiaries of its decision would have the right to opt-out of its award of compensation. [167]

152. The evidence that the Tribunal relied upon made clear that the initial complaint and early Statements of Particulars reflected the fact that systemic reforms and individual compensation were at the heart of the Complainants' claim. Canada had every opportunity to adduce evidence in response during the many periodic hearings, and the Tribunal had ample authority to exercise its systemic and compensatory remedial powers. As noted by the Tribunal "the case at hand…is one of systemic racial discrimination as admitted by Canada in its oral and written submissions on compensation and, also a case where the Tribunal found that the system caused adverse impacts on First Nations children and their families".[168]

153. Despite the AGC's assertion that there was a "dearth of evidence" of the experiences of victims, it is clear upon a review of the decision that the Tribunal gave abundant consideration to the evidence before awarding relief.

154. The Tribunal was entitled to receive and accept any evidence or other information as it saw fit, pursuant to s. 50(3)(c) of the *CHRA.* The Tribunal in fact reviewed such evidence in depth in the Compensation Decision.[169] This evidence included the acceptance by child welfare experts that the removal of any child from their parents is inherently damaging, but that the effects of apprehension of individual First Nations children will be more traumatic than on non-First Nations counterparts[170]; the despair and suffering experienced by First Nations parents in having their families torn apart[171]; as well as statements reflecting comments from hundreds of parents with children taken into care who emphasized the worst part of removal

[166] Affidavit of Jonathan Thompson, Exhibit "G", Resolution 85/2018. Compensation Decision at paras. 34 and 201-202.
[167] Compensation Decision at para. 201.
[168] Compensation Decision at para 140.
[169] Compensation Decision at para. 155-172.
[170] Compensation Decision at para. 168.
[171] Compensation Decision at para. 169.

was the rupture from one's family and home.[172]

155. Importantly, despite the AGC's mischaracterization of the law and its suggestion that individual victims and their direct evidence were necessary for a finding of individual compensation, it was clear that the Tribunal endorsed the AFN's representative status on the matter and was relying on "highly credible" witnesses. These included the Truth and Reconciliation Commissioner and other adults, who spoke on behalf of children in an effort to voice the harm and suffering endured by First Nations children. As noted by the Tribunal, these children were and remain "vulnerable and need not testify before this Tribunal for the Panel to make a determination of their suffering of being unnecessarily removed from their homes and the harms caused as a result of the systemic and racial discrimination".[173]

156. The Tribunal relied on numerous findings of fact in relation to the harms visited upon First Nations children that it had made in the *Merits Decision* and its ten subsequent rulings prior to *Compensation Decision.* These were in turn based on thousands of pages of evidence, including testimony transcripts and reports. The Tribunal also made clear that it was not purporting to reproduce all of the evidence that was before it, but affirmed that compelling evidence existed in the record. The Tribunal's factual findings were clearly reasonable and beyond reproach.[174]

157. Ultimately, the claim before the Tribunal was and remained throughout the proceedings about discrimination against First Nations children and families. It was never, despite the AGC's assertion, a moving target of a complaint which expanded over time.[175] While Canada attempted to show its funding model was not discriminatory, it was always aware of the compensation claim.

158. The AGC has also asserted that the sixteen decisions in this matter following the *Merits Decision* in 2016 amount to an "open-ended series of proceedings". To the contrary, they reflect the Tribunal's responsible management of the proceedings, as in other complex

[172] Compensation Decision at para. 171.
[173] Compensation Decision at para. 175.
[174] Compensation Decision at para. 15.
[175] AGC's factum at para 64.

human rights cases[176], to enable the parties to negotiate practical solutions to the challenges presented in implementing its Order, and to enable the Tribunal to give the human rights of First Nations children and families their full recognition and effect in light of the egregious discrimination that was demonstrated.

159. Canada's characterization of the Tribunal's case management as an "abdication of its responsibility to issue clear, practical and reviewable orders", and its allegation that the Tribunal has "transformed" and "expanded" the complaint, are an example of a party inappropriately searching for ways and means to minimize those rights and to enfeeble their proper impact.[177] Indeed, the refusal of the Tribunal to expand the scope of the compensation order, as requested by NAN and the COO, indicates that the Tribunal was very careful about the scope of the complaint.

160. The complexity of reforming the provision of child and family services to First Nations, coupled with addressing compensation for over 100,000 victims in just the removed class, dictates that Tribunal continue to retain jurisdiction to facilitate the due administration of its Orders by the parties.

161. It is also difficult to reconcile the AGC's concerns with ongoing negotiation being part of the administration of the Tribunal's orders, particularly as the AGC seems to be inferring that these efforts are coercive, "endless" and unnecessary.[178] This attitude certainly flies in the face of the principle of reconciliation. Fundamentally, in all dealings with First Nations, from the assertion of Crown sovereignty to the provision of child welfare legislation, the Crown must act honourably and nothing less is required if the reconciliation of the pre-existence of First Nations societies with the sovereignty of the Crown is to be achieved.[179] Because of its connection with s. 35, the honour of the Crown is in essence a constitutional principle.[180] As noted by the Supreme Court of Canada, the honour of the Crown "requires the Crown… to participate in processes of negotiation". [181] While generally addressed in the

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[176] *McKinnon v. Ontario (Ministry of Correctional Services), [1998], OHRBID, No 10,* 1998 CanLII 29849 (ON HRT), *32 CHHR D/1* and *[2002] OHRBID, No 22* , *Ontario v. McKinnon*, 2004 CanLII, 47147

[177] CNR 1987 at page 1134

[178] AGC Factum at para. 158.

[179] *Haida Nation v British Columbia (Minster of Forests),* 2004 SCC 73 at para. 17

[180] Manitoba Métis v. Canada, [2013] 1 SCR 623 at para. 69 ["*Manitoba Métis*"].

[181] Haida Nation at para 25.

context of Aboriginal rights, it has been established that negotiation can foster reconciliation, and that efforts at negotiation are important as true reconciliation is rarely, if ever, achieved in courtrooms.[182]

162. Finally, when considering the AGC's allegations, this Court must remember that a significant portion of the proceedings following the *Merits Decision* were caused by Canada's failure to adhere to the Tribunal's direction pursuant to the *Merits Decision* and other uncooperative actions. This occurred despite the stated acknowledgment by the AGC that Canada accepted the finding of systemic discrimination as provided therein.[183] For example, Canada repeatedly sought to narrow the application of Jordan's Principle, contrary to the terms, spirit and intent of the *Merits Decision*.[184]

163. The AFN would therefore submit that the complexity of the complaint, the nature of human rights cases, reconciliation and Canada's continued efforts at undermining the terms of the *Merits Decision,* all support the Tribunal's continued jurisdiction over the matter, and implementation of ongoing processes aimed at giving effect to both the *Merits Decision* and the *Compensation Decision*.

F. Compensation in favour of parents/caregiving grandparents was reasonable

164. The AGC has also alleged that the Tribunal was unreasonable in awarding compensation for Canada's discrimination provision of child services to parents and caregiving grandparents, as in its view, there was no evidence of the impact of Canada's funding policies on parents and grandparents capable of grounding compensation.[185] This is related to the previously addressed assertion by the AGC that there was a "dearth of evidence" of the experiences of victims.[186] The AFN repeats its submissions, that as previously noted, it is clear upon a review of the decision that the Tribunal gave abundant consideration to the evidence before awarding relief to these victims.

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[182] *R. v. Desautel* SCC 2021 17at para 87-88.
[183] AGC Factum at para 25; see 2019 CHRT 1, Order for Canada to pay complainants compensation for knowingly failing to disclose a significant number of highly-relevant documents.
[184] 2017 CHRT 14, 2016 CHRT 16, 2016 CHRT 10, Canada's narrow interpretation of of Jordan Principles contrary to the Merits Decision.
[185] AGC Factum at para 133.
[186] AGC Factum at para. 64.

165. As part of its position, the AGC relies on the Federal Court's decision in *Menghani*[187], alleging that this decision stands for the proposition that awarding compensation to victims when they are not complainants would be contrary to a "general objection" to awarding compensation to non-complainants. The Court's main reasoning in *Menghani* however was that relief for the non-complainant at issue was statutorily barred as the discrimination took place extraterritorially. Additionally, the focus of the claim was not relief for the non-complainant, but redress for the complainant who was discriminated against in the provision of public services, hence the Court denying specific relief for the non-complainant because as noted in *Moore*, "the remedy must flow from the claim."[188] Additionally, there are no other examples of this alleged "general objection" at play beyond its consideration in *Menghani*, effectively as an afterthought and *obiter*.

166. The Tribunal properly considered the effect of *Menghani* and reasonably determined that the analysis, factual matrix and the findings of the Federal Court therein were different from the case before it, and did not support the AGC's position to bar the Tribunal from awarding compensation to non-complainants victims.[189]

167. As the remedy must simply flow from the claim, it is again clear the AGC has erred in its supposition that family members must advance claims themselves and provide evidence of the harms that they suffered. The June 2009 Statement of Particulars of the Complainants clearly provided that compensation was being sought for the pain and suffering endured by First Nations related to the removal of children from their homes.[190] The Tribunal reasonably recognized that AFN was empowered via the mandate of the Chiefs-in-Assembly to speak on behalf of First Nations parents/caregiving grandparents who were victims of Canada's discrimination, including seeking redress for their harms suffered by way of compensation.[191] In interpreting the CHRA, the Tribunal also has reasonably established that complaints on behalf of victims made by representatives can occur and the Commission has the discretion to refuse to deal with the complaint if the victim does not consent. [192]

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[187] *Canada (Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 ["*Menghani*"].
[188] Moore at 64.
[189] Compensation Decision at para 122.
[190] Complainants' Particulars, para 21(3), Mayo Affidavit, Exhibit 3.
[191] Compensation Decision at para 201-202.
[192] Compensation Decision at paras 112 – 113.

168. The Tribunal received and accepted such evidence as it saw fit, pursuant to s. 50(3)(c) of the *CHRA* in relation to the harms suffered by these victims, and conducted a thorough review of the relevant evidence in the Compensation Decision.[193] This evidence addressed the despair and suffering experienced by First Nations parents/grandparents in having their families torn apart[194], as well as statements reflecting comments from hundreds of parents with children taken into care who emphasized the worst part of removal was the rupture from one's family and home.[195]

169. The Tribunal also relied on its numerous findings of fact in relation to the harms visited upon First Nations parents and caregiving grandparents that it had made in the *Merits Decision* and its ten subsequent rulings prior to *Compensation Decision,* which were based on vast amounts of evidence. As noted by the Tribunal, the evidence was "ample and sufficient" to make its finding that "each parent or grandparent" who had a child unnecessarily removed from their home and family, <u>has suffered.</u>[196] The Tribunal's careful deliberation on this point is illustrated in its comments that in light of the record before it, it was forced to limit its compensation to First Nations parents caring for their child, or alternatively, caregiving grandparents.[197]

170. The evidence before the Tribunal is also clearly distinguishable from that in the *Ward* decision as referenced by the AGC. The evidence concerning the administration of the FNCFS program and the associated effects on already historically oppressed First Nations families, including unnecessarily broken homes, which were so callously disregarded by Canada despite repeated calls for action, clearly amounted to discrimination to a level far beyond the effects of one's child being insulted. The matter before the Tribunal was not simply a case of "negative impacts", but one concerning the fundamental pain and suffering experienced by First Nations children <u>and their families</u> derived from Canada's provision of child welfare services.[198] For these reasons, the Tribunal's finding with respect to compensating parents and caregiving grandparents is clearly reasonable and beyond

[193] Compensation Decision at para. 155-172.
[194] Compensation Decision at para. 169.
[195] Compensation Decision at para. 171.
[196] Compensation Decision at para 185.
[197] Compensation Decision at para 185.
[198] Merit Decision at para. 1.

reproach.[199]

G. Tribunal's Decision is supported by International Human Rights Standards

171. The AFN further submits that the Tribunal's award of compensation in the *Compensation Decision* (2019 CHRT 39) is also supported by international law. The Government of Canada has committed to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*[200] "without qualification". [201] Further to this laudable goal, Canada has recently tabled Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples ("*Bill C-15*")*, which would formally cement these international standards into Canada's domestic sphere.[202]

172. The preamble of Bill C-15 details how *UNDRIP* has been identified as the framework for reconciliation at all levels and across all sectors of Canadian society, which has also been described by the Supreme Court of Canada as the "fundamental objective of the modern law of aboriginal and treaty rights."[203] Notably, the preamble of Bill C-15 also provides that UNDRIP is affirmed as a "source for the interpretation of Canadian law".

173. Under the preamble of the *UNDRIP*, First Nations are entitled without discrimination to all human rights recognized in international law. It also acknowledges that the recognition of the international norms described therein will ultimately enhance harmonious and cooperative relations between states and First Nations, based on principles which include justice, respect for human rights, non-discrimination and good faith.

174. With respect to international norms regarding First Nations children, Article 7 of *UNDRIP* establishes that First Nations have the collective right to not be subjected to the forced removal of their children, while Article 8 affirms that Fist Nations also have the right not to be subjected to forced assimilation or destruction of their culture. The *United Nations*

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[199] Compensation Decision at para. 15.
[200] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 ["*UNDRIP*"].
[201] Minister of Indigenous and Northern Affairs Carolyn Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, May 10, 2016.
[202] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Session, 43rd Parliament, 2020 (first reading)
[203] *UNDRIP,* Articles 3 and 4.

Covenant on the Rights of the Child[204] further elaborates on fundamental human rights considerations in relation to children, establishing an onus on states to ensure that all the rights provided for therein shall apply equally to each child within their respective jurisdiction, without discrimination of any kind, irrespective of their race, and that the best interest of the child should be the prevailing consideration in all actions concerning children. It also provides that in states with persons of indigenous origins, an indigenous child "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture".[205]

175. Importantly, Article 8(2) of *UNDRIP* affirms an obligation on states to provide effective mechanisms for the prevention of, and redress for violations of these international norms, particularly for "any action which has the aim or effect of depriving [First Nations] of their integrity as a distinct peoples, or of their cultural values or ethnic identities", as well as "any form of forced population transfer which has the aim or effect of violating or undermining any of their rights".[206]

176. The requirement to establish a domestic avenue of redress for violations of international norms is further addressed within Article 2 of the *American Convention on Human Rights*[207] which provides that States must undertake to adopt, in accordance with their constitutional processes and the provisions of said Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

177. What these international human rights standards reveal is that a critical aspect of affirming human rights is the development of an effective framework for the redress of violations. The essential nature of an effective framework for redress was well summarized in the *Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights:

> Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary

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[204] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 ["UN Convention"].
[205] UN Convention, Articles 2,3 and 30.
[206] *UNDRIP*, Article 8(2)(a) and 8(2)(c).
[207] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

> and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.[208]

178. The AFN would submit that the Tribunal's Compensation Decision reflects adherence to these international norms by acknowledging violations of the international human rights of First Nations children and providing a domestic avenue for the redress of said violations. This ultimately aligns with the legal presumption that Canadian legislation, including the *Canadian Human Rights Act,* should conform to international law principles. The presumption of conformity to international principles was addressed in *R. v. Hape* where the Supreme Court affirmed that "it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law principle"[209] and that courts should seek to ensure compliance with Canada's binding obligations under international law.[210] The Supreme Court additionally relied on the presumption of conformity in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia* as a partial basis for overturning previous decisions excluding collective bargaining as a right constitutionality protected by the *Charter of Rights and Freedoms*.[211]

179. The Tribunal was clearly cognizant of its obligations to uphold the values associated with international human rights law, particularly where it noted at paragraph 196, in relation to the principle of conforming to international laws, that:

> The AGC should not be allowed to avoid this principle in Canada, a country who professes to uphold the best interest of the child and who signed and ratified the *Convention on the Rights of the Child* (see 2016 CHRT 2 at, para. 448). Also, the *CHRA* is a result of the implementation of international human rights principles in domestic law (see the *Decision* at paras. 437-439).[212]

180. The AFN submits that the legal presumption that Canadian legislation will conform to international law principles ultimately informed the Compensation Decision. Based on this presumption, it was well within the Tribunal's purview to compensate the victims of

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[208] Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993. See UN doc. A/CONF.157/53.
[209] *R. v. Hape*, [2007] 2 SCR 292 at para. 53 ["*Hape*"].
[210] *Hape,* at para. 56.
[211] *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia,* 2007 SCC 27 at para. 20.
[212] 2019 CHRT 39 at para. 196.

Canada's systemically discriminatory provision of child welfare services to First Nations children, in conjunction with its Orders with respect to systemic reforms in relation to Canada's provision of child and family services to First Nations. The Tribunal, as the federal embodiment of international human rights principles into domestic Canadian law, must be respected as the appropriate forum for redressing the violation of internationally recognized human rights, including the provision of compensation for such violations as reflected in the Compensation Decision. Such respect for its processes is essential to the full and non-discriminatory realization of human rights in Canada.

H. Not a Class Action

181. The AFN submits that Canada is erroneously attempting to mischaracterize the Tribunal's compensation order as a class action. Canada provides a comparison of the types of damages that one could obtain in a court proceeding with that of the Tribunal and that consent of the victim is required to pursue a claim for compensation. It is clear that the Tribunal did not order compensation for tort-like damages or personal harm – nor should it, as the Federal Court of Appeal made clear 30 years ago[213]- but rather it ordered compensation for the loss of the right to be free from discrimination. The Tribunal provided compensation within its powers under s. 53 of the *CHRA*.[214]

182. In an attempt to reframe the Tribunal compensation order, the AGC argues that the *CHRA* does not grant the Tribunal the ability to consider complaints of classes.[215] Its submissions then proceed to discuss how class actions provide tort-like compensatory damages. The AGC states that if Parliament intended that class actions be managed by the Tribunal, then it would have provided them the tools to handle these actions.[216] The AGC also contends that class action rules would have achieved better outcomes and eliminated the need for the further orders and negotiations that occurred in the process before the Tribunal.[217]

183. The argument side-steps the actual purpose of the CHRT and its authority under the *CHRA*.

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[213] 1991 CanLII 8221, at para 16(a): "human rights legislation…has been said to be so basic as to be near-constitutional and in no way an extension of the law of tort…", citing *R. v. Robichaud,* above
[214] Compensation Decision at para 225-226, 242.
[215] AGC Factum para 67.
[216] AGC Factum at para 74.
[217] AGC Factum at para 78.

The *CHRA* was not designed to address different levels of damages or engage in these processes to assess fault-based personal harm. It addresses a distinctive form of compensation, with distinctive origins and goals. Moreover, the CHRT addressed Canada's class action argument in its decision and its efforts to both establish a class action as the appropriate fora, whilst conversely relying on class action criteria in support of its positions within the Tribunal proceedings:

> [209] On one hand, the AGC contends the Tribunal is not the right forum to deal with class actions and on another hand it uses some of the class action criteria to support its position that there is no representative of the group of victims before the Tribunal. With respect, the AGC cannot have it both ways. Accepting the proposition that the Tribunal is not the right forum for class actions in light of its statute requires one to look at what can be done under the statute and not impose the class action criteria to the Tribunal process. While it can be useful to look at class action requirements, the rules of statutory interpretation require the Tribunal to first look at the *CHRA* given that its jurisdiction is derived from it. In addition, the *CHRA* is quasi-constitutional in nature which would supersede any law conflicting with the *CHRA*. If the *CHRA* is silent on an issue, the Tribunal can then use a number of useful tools at its disposition. [Emphasis Added][218]

184. The CHRT carefully addressed Canada's argument that the compensation order does not amount to a class action. The *CHRA* is silent on "classes", as correctly pointed out by Canada in its factum, although this does not preclude the CHRT from handling classes in its decisions. As emphasized in the jurisprudence discussed above, the *CHRA* is quasi-constitutional and has a process to deal with issues that may be silent within it.

185. Once again, the Tribunal fully answered Canada's attempt to divert attention into the class action realm:

> … The CHRA regime is different than that of a Court where a class action may be filed. The CHRA model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not (see section 50 (3) (c) of the CHRA). We are talking about the mass removal of children from their respective Nations. (see 2018 CHRT 4 at, paras. 47, 62, 66, 121, and 133). The Tribunal's mandate is within a quasi-constitutional statute with a special legislative regime to remedy discrimination. This is the first process to employ when deciding issues before it. If the CHRA and the human rights case law are silent, it may be useful to look to other regimes when appropriate. In the present case, the CHRA and human rights case law voice a possible way forward. The novelty and unchartered territory found

[218] Compensation Decision at para 208.

> in a case should not intimidate human rights decision-makers to pioneer a right and just path forward for victims/survivors if supported by the evidence and the Statute. As argued by the Commission, sufficiency of evidence is a material consideration.[219] [Emphasis Added]

186. The Tribunal made human rights awards for pain and suffering for loss of the right to be free from discrimination, the experience of victimization,[220] and harm to dignity.[221] In the CHRA regime, unlike the tort context, the quantum of compensation awards for harm to an individual's dignity is limited, but it is tied to the seriousness of the psychological impacts that the discriminatory practices have had upon the victim.[222]

187. In awarding compensation, the Tribunal agreed with the proposals advocated by the AFN, where the Indian Residential Schools Settlement Agreement (IRSSA) Common Experience Payment (CEP) process provided a viable model to pay compensation to victims. The IRSSA provided two streams of compensation for students who attended an Indian Residential School. The first was the CEP, which was available to all eligible former students who resided at an Indian Residential School. Eligible recipients received $10,000.00 for at least part of a school year, and $3,000.00 for each subsequent year or part thereof.[223] The second was the Independent Assessment Process (IAP) designed to provide compensation through an adjudicative process to individuals who suffered sexual abuse, physical abuse and/or other wrongful acts as children while attending an Indian Residential School covered under the IRSSA[224].

188. The CEP recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The CEP compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language culture, etc. The Tribunal adopted this framework to shield First Nations children from the additional trauma of having to provide evidence of their individual harms and to account for the need to adopt a culturally safe and appropriate process.[225] The Compensation is intended to address the trauma of losing a family member who was apprehended as a result

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[219] Compensation Decision at para 188.
[220] *Shelter Corp. v. Ontario (Human Rights Comm.),* 2001 CanLII 28414 (ON SCDC) at para 43.
[221] *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 at paras 13 and 28 ["Jane Doe"].
[222] Jane Doe at para 12.
[223] Affidavit of Jeremy Kolodziej April 4, 2019 at para 8.
[224] *Ibid* at para 12.
[225] 2020 CHRT 15, at para 32.

of Canada's discrimination.[226] The very purpose of the compensation awarded by the Tribunal is to compensate a biological parent or grandparent for the loss of their child to a system that targeted them because they were First Nations.[227]

189. The Tribunal's characterization of compensation reflects human rights principles of attacking one's dignity and degrading their humanity. This is significantly different than the AGC's characterization of harms. As the focus of compensation is based on human rights principles, the Tribunal took the appropriate approach for the awarding of compensation:

> The trigger that would entitle an individual to compensation is the apprehension of a child or the denial or delay of a service under Jordan's Principle. There would be no reason for a person to justify any individual harm, nor would it require an individual to provide evidence to justify why they are entitled to compensation. This Panel opted to adopt a similar approach to the Common Experience Payment in determining eligibility for compensation to victims to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped. A simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. [228]

190. There are numerous pragmatic reasons why the development of the Compensation Framework needed to be negotiated, apart from the principle of reconciliation. The sheer scale of the discrimination is national and there needs to be a well-organized process for those who have suffered discrimination to obtain compensation. The compensation ordered by the CHRT is clearly within its authority, but given the social, political and legal complexity of the situation, the process to distribute this compensation is best worked out through consultation and negotiation between the parties who represent those that have an interest in the matter. The AGC appears to be wilfully blind to this reality in stating that class actions would have achieved a better outcome[229].

191. Lastly, the Compensation Framework in this matter is designed in this way to allow those affected by discrimination to pursue other court processes, if they in fact endured personal harms. The *CHRA* does not impede class actions or actions of individuals, as the current complain deals with discrimination and not tort-like harms.

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[226] 2020 CHRT 15, at para 43.
[227] 2020 CHRT 15, at para 44
[228] 2020 CHRT 15, at para 35.
[229] Ibid at para 78

I. Definition of First Nations child for purposes of Jordan's Principle was not unreasonable

192. The *Indian Act* was first enacted in 1876 and is one of the oldest and most colonial pieces of legislation still in force today. Its central purpose was and continues to be fundamentally racist. Throughout history it has been highly invasive and paternalistic, as it authorizes the federal government to regulate and administer the affairs and day-to-day lives of registered Indians and reserve communities. This authority has ranged from overarching political control, such as imposing governing structures on First Nations communities in the form of band councils, to control over the rights of Indians to practice their culture and traditions. The *Indian Act* has also enabled the government to determine the land base of First Nations in the form of reserves, and even to define who qualifies as Indian in the form of Indian status.

193. The *Indian Act* is a part of a long history of assimilation policies that intended to terminate the cultural, social, economic, and political distinctiveness of First Nations by absorbing them into mainstream Canadian life and values. The Canadian government developed criteria for who would be legally considered an Indian. These criteria continue to be outlined in Section 6 of the Indian Act, thus defining who qualifies for Indian status. Given the government's historical unilateral authority to determine who is legally Indian, the AFN as well as other leaders and academics have described the *Indian Act* as a form of apartheid law.

194. The *Indian Act* has discriminated against First Nation women who married a non-First Nation man by stripping her of Indian Status. However, Indian status has not been solely dependent on ancestry. As the Royal Commission of Aboriginal Peoples stated, "Recognition as 'Indian' in Canadian law often had nothing to do with whether a person was actually of Indian ancestry." The discriminatory provisions of the *Indian Act* have been challenged over the last 30 years and has resulted in various amendments to the Indian Acts status provisions.

195. Furthermore, *the Indian Act* does not conform to treaties between the Crown and First Nations. At no time did the First Nations signatories to the Treaties ever agree that treaty benefits and remunerations would cease when a descendant lost their "status". It was quite the opposite where the First Nations signatories always sought to ensure that the Treaty rights provided therein would include their descendants in perpetuity. For example, one of the earliest recognized treaties, the *Peace and Friendship Treaty*, renewed in 1752, established

that the First Nations parties thereto were entering into the terms "for themselves and their said Tribe their Heirs, and the Heirs of their Heirs forever". Other Treaties, such as the Douglas Treaties, provided that the First Nations parties' understanding was that certain real property would be kept for the First Nations "own use, for the use of our children, and for those who may follow after us".

196. It is against this backdrop that the Tribunal was required to assess eligibility of a First Nations child for the purposes of Jordan's Principle. The Tribunal determined that it was inappropriate to rely on the *Indian Act* to determine who is considered a First Nations child for the purpose of Jordan's Principle.[230] The Tribunal assessed the history of who is an Indian pursuant to the *Indian Act* and determined the classification under statute did not meet human rights standards.[231] The Tribunal reviewed evidence that the *Indian Act* was designed to assimilate First Nations so that they would lose *Indian Act* status over a few generations. The *Indian Act* accordingly cannot be the only means of determining First Nations identity.[232]

197. The Tribunal also gave consideration to First Nations inherent rights over their collectives and who its citizens are. This consideration is respectful of international human rights norms and standards. Despite not making orders on this issue, the Tribunal issued guidance based on the evidence it received and the case law to which it was referred. The Tribunal recognized the "jurisdictional wasteland" considered in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 and the Supreme Court's conclusion that Canada had a responsibility to First Nations without *Indian Act* status. In this case, the Tribunal identified the particular obligation Canada had to First Nations who lost their *Indian Act* status and connection to their community as a result of the Indian Residential Schools System, the Sixties Scoop or the FNCFS Program.[233]

198. The Tribunal recognized there is a significant difference between determining who is a First Nations child as a citizen of a First Nation and determining who is a First Nations child entitled to receive services under Jordan's Principle.[234] The Tribunal was not seeking to attack provisions of the Indian Act but recognized that certain members of a First Nation

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[230] 2020 CHRT 20, paras 171, 178, 186, 198.
[231] 2020 CHRT 20, paras 172, 196, 244.
[232] 2020 CHRT 20, paras. 165-172
[233] 2020 CHRT 20 at para. 294.
[234] 2020 CHRT 20 at paras 84 and 129.

community continued to face discrimination in the provision of services or lacked access to such services.

199. The Tribunal repeatedly held in its decisions that Jordan's Principle applies to "all First Nations children" and ordered Canada to implement Jordan's Principle's full meaning and scope.[235] These First Nations children who are unable to access essential services experience adverse impacts on their health, safety and wellbeing.[236] The Tribunal also stated that some First Nations children and families have experienced serious mental and physical pain as a result of delays in medical or mental health services"[237]

200. Faced with entrenched systemic discrimination, it was open to the Tribunal to take a purposive approach in interpreting its home legislation to award extend eligibility of Jordan's Principle to individuals without Indian Status who are recognized by their Frist Nations as citizens and members. Furthermore, the Tribunal decision to extend compensation to the victims of Canada's discrimination relating to Jordan's Principle was reasonable. The Tribunal noted that delays or denials in receiving services were "unreasonable"[238] These delays or denials constituted a compensable "worst-case scenario" of discrimination.[239]

J. Canada Introduced Evidence not before the Tribunal

201. Without notice, the AGC has purported to introduce new evidence on judicial review that formed no part of the record before the Tribunal. Canada has appended two reports of the Parliamentary Budget Officer to the affidavit of Debirah Mayo.[240] The AC seeks to rely on these reports to attack the reasonableness of the Tribunal in awarding compensation. However, neither of these documents was introduced or tested before the Tribunal.

202. The AFN submits that this new and fresh evidence should be struck from the record and not considered by this Court. The law is clear that judicial review applications are to be

[235] Merits Decision at paras 382 and 481; 2016 CHRT 10 at para 33; 2016 CHRT 16 at para 160(A)(7); 2017 CHRT 14 at para 135(1)(B)(i) (as amended by 2017 CHRT 35 at para 10).
[236] 2020 CHRT 15, at para 147
[237] 2019 CHRT 39, at para 226.
[238] Compensation Decision.
[239] Compensation Decision at para 234.
[240] Mayo Affidavit, Exhibit 217: April 2, 2020 Report of the PBO on First Nations Child Welfare: Compensation for Removals; and Mayo Affidavit, Exhibit 218: February 21, 2021, Report of the PBO on Compensation for the Delay and Denial of Services to First Nations Children.

conducted strictly on the evidence that was before the decision-maker. In *Chopra*, this Court held:

> There is considerable jurisprudence to the effect that only the evidence that was before the initial decision-maker should be considered by the Court on judicial review. These decisions are premised on the notion that the purpose of judicial review is not to determine whether or not the decision of the Tribunal in question was correct in absolute terms but rather to determine whether or not the Tribunal was correct based on the record before it.[241]

203. As the Federal Court of Appeal stated, an application for judicial review is not a rehearing of the underlying dispute. It is a review of the decision below based on the record that was before the Tribunal.[242] Affidavit evidence to supplement the record below is admissible only in three exceptional circumstances, none of which is applicable here: (a) to provide general background information that might assist the Court in understanding the issues relevant to the judicial review; (b) to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record; and (c) to highlight a complete absence of evidence.[243]The AFN submits that the AGC has not met any of these exceptions in introducing the two reports of the PBO. Rather, this fresh evidence is being tendered to support its argument that the decision of the Tribunal creates uncertainty and ambiguity. Clearly, this is inappropriate and the AFN requests that these reports and the corresponding submissions not be considered.

PART IV - ORDER REQUESTED

204. The AFN respectfully requests that both the AGC's applications for judicial review be dismissed with costs.

205. In the alternative, should this Honourable Court determine that there is any deficiency in the processes or reasons of the Tribunal, , the AFN submits that *Compensation Decision* should not be set aside but rather affirmed; and the deficiencies identified, and the matter be returned back to the Panel, with appropriate directions. The AFN submits that it would be highly inappropriate to remit the matter back to a differently constituted panel as requested

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241 *Chopra v. Canada (Treasury Board)*, 1999 CanLII 8044 (FC), at para 5.

242 *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright),* 2012 FCA 22, at para 19.

243 *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 20.

by the AGC, because the current panel continues to hold jurisdiction over this matter, particularly in relation to the issue of compensation. Moreover, the panel in the course of the last nine or so years in which it has presided over this complaint has accumulated knowledge and insights into the management of this complaint that would be lost if the matter was remitted to a different panel. That would be a waste of Tribunal resources and potentially harmful to the interests of First Nations children and families who would undoubtedly experience delay in seeking and obtaining justice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: May 12, 2021

For: NAHWEGAHBOW, CORBIERE
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PART V – AUTHORITIES

<u>Case law</u>

Aboriginal Peoples Television Network v. Canada (Human Rights Commission), 2011 FC 810

Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22

Canada (Human Rights Commission) v. Canada (Attorney General), 2012 FC 445

Canada (Attorney General) v. Canadian Human Rights Commission, 2013 FCA 75

Canada (Secretary of State for External Affairs) v. Menghani, [1994] 2 FC 102

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) [1987] 1 SCR 1114

Chopra v. Canada (Treasury Board), 1999 CanLII 8044 (FC),

Dunsmuir v New Brunswick, 2008 SCC 9

Eldridge v. British Columbia (Attorney General), 1997 CanLII 327

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), 2012 CHRT 17.

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), 2012 CHRT 24.

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)., 2012 CHRT 28

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), 2013 CHRT 16

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

First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 10

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 16.

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), 2017 CHRT 7.

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), 2017 CHRT 14

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), 2018 CHRT 35

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