Court Nos: T-1621-19
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

- and -

CONGRESS OF ABORIGINAL PEOPLES

Intervener
(in T-1559-20)

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

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This country needs [...] **reconciliation** and the starting point is the **children and respecting their rights**. If this is not understood in a meaningful way, in the sense that it leads to **real** and **measurable change**, then, the TRC and this Panel's work is trivialized and unfortunately the suffering is born by vulnerable children.[1]

PART I - STATEMENT OF FACTS

A. Overview

1. "*This decision concerns children.*"[2] The Canadian Human Rights Tribunal ("**Tribunal**") began its landmark 2016 Merits Decision by putting First Nations children at the forefront of its analysis. The Tribunal ruled that Canada's conduct resulted in harm, trauma and victimization of First Nations children and their families stemming from Canada's systemic violations of the *Canadian Human Rights Act* ("***CHRA***"). Canada embraced the Merits Decision and vowed to correct its "unacceptable" practices, including the "inexcusable number of children in care".[3] Despite these promises, the Tribunal has issued multiple non-compliance orders against Canada since 2016, and in doing so made further findings regarding the nature and scope of the harm and trauma suffered by its victims. These decisions too have never been challenged. But now that the Tribunal has ordered monetary remedies directly to the victims of its discrimination, Canada seeks to escape responsibility for the harms it caused.

2. The discrimination in this case flows from Canada's flawed and inequitable provision of child and family services and the denial, delay and disruption of services for First Nations children caused by its improper implementation of Jordan's Principle. Canada does not deny its discriminatory conduct, or that it caused harm and trauma.[4] Therefore, the starting point for these judicial reviews is acknowledging the existence of that discrimination and its adverse impacts for First Nations children and families: the infringement of dignity. For some, this meant unnecessary separation from their families. For others, a lack of access to the essential education, health or social services supports they deserved. For still others,

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[1] 2018 CHRT 4 at para 451[emphasis in original].
[2] 2016 CHRT 2 ["**Merits Decision**"] at para 1 [emphasis added].
[3] January 26, 2016 statement of the Ministers of Justice and Indigenous Affairs re 2016 CHRT 2, Joint Electronic Record ["**JER**"], **Tab 350**.
[4] Indeed, before the Tribunal, counsel for Canada repeatedly acknowledged that the discrimination in this case had caused harm, see: Transcript of the Apr 26, 2019 hearing before the Tribunal re compensation at pp 177 (lines 8-11), 179 (lines 7-16), 190 (lines 14-22); 197 (line 23) to 198 (line 20), **JER, Tab 105.4**.

loss of life. These harms, the Tribunal found, perpetuate the historical disadvantages resulting from the residential school system and the Sixties Scoop.[5]

3. The experiences of Canada's victims are found throughout the record. They include stories from residential school survivors, child welfare professionals who were forced to remove children in order to provide them and their families the services they needed,[6] and families who required services for their children, including S.J., a toddler diagnosed with a life-threatening disorder, who was denied access to treatment because she lived off-reserve and did not have *Indian Act* status.[7] The Tribunal also heard the stunning and horrific testimony of Canada's witness on Jordan's Principle, who admitted Canada classified Jordan's Principle cases as "resolved" when the child died or aged out of care.[8]

4. The compensatory and other remedies crafted by the Tribunal flow directly from the discrimination and harm caused by Canada. Indeed, the Tribunal grounded its decisions regarding compensation and Jordan's Principle eligibility in the robust and largely uncontroverted evidence – most of it adduced or generated by Canada. The Tribunal, with its specialized expertise, and this particular Panel, with its unique experience of managing this Complaint since 2012, grounded its legal analysis squarely within the evidence before it its prior unchallenged decisions, its jurisdiction under the *CHRA* and in the human rights framework enacted by Parliament.

5. The Tribunal reasonably concluded from the evidence as a whole that Canada was "devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families".[9] It also found that Canada had continuously focused on "financial considerations rather than on the best interest of First Nations children and respecting their human rights."[10] As a result, it ordered Canada to compensate certain specific victims harmed by the discrimination. This decision was reasonable, and indeed necessary to deter future human rights abuses. The Tribunal also reasonably rejected Canada's latest attempt to curtail the scope

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[5] Merits Decision paras 218, 226-228, 404, 413-427, 459. 2018 CHRT 4 at paras 115, 119, 124, 143, 150.
[6] 2019 CHRT 39, at para 158 and Apr 4, 2013 examination-in-chief of D. Dubois at p 60 lines 9-25, **JER, Tab 45**.
[7] 2019 CHRT 7 at paras 58-75.
[8] May 1, 2014 cross-examination of C. Baggley at p 68 lines 11-25, **JER, Tab 83**.
[9] 2019 CHRT 39, at para 230.
[10] 2019 CHRT 39 at para 231.

of Jordan's Principle and required Canada to consider, on a case-by-case basis, requests from children not eligible for *Indian Act* status living off-reserve where they either: (i) are recognized by their Nation; or (ii) have one parent with *Indian Act* status.

6. Before this Court, Canada makes a series of formalistic arguments to deny individual victims the compensation to which the Tribunal found – and the record shows – they are entitled. In essence, Canada claims it should not have to compensate its victims because: (a) there are so many victims; and/or (b) class actions may provide for compensation; and/or (c) any discrimination is an artifact of the *Indian Act*; and/or (d) the impact of the residential school experience is merely of historical interest; and/or (e) it had insufficient notice that the discrimination was ongoing (which is highly suspect given the clear statements in the Merits Decision and further findings in the non-compliance orders). None of these arguments provide a legal basis to deny the victims their right to compensation under the *CHRA.*

7. Canada also seeks to limit Jordan's Principle to children that it unilaterally deems as having "status" under its colonial *Indian Act*, instead of recognizing that First Nations know their children. Further perpetuating its colonial approach, Canada says that it wants to quash the Jordan's Principle Eligibility Order so that it can have further discussions with First Nations, despite there being no evidence of any opposition by First Nations to this order. What Canada is really resisting is the obligation to consider the needs of First Nations children without *Indian Act* status living off-reserve who are recognized by their First Nation or have one parent with s. 6(2) *Indian Act* status.

8. These judicial reviews should be dismissed. The Tribunal's orders are anchored in its clear and unequivocal jurisdiction and well-established human rights jurisprudence to redress discrimination and compensate victims – regardless of its widespread nature. It is not the fault of the victims in this case that Canada's wilful and reckless conduct adversely impacted so many First Nations children and families across the country. The lived experiences of the victims cannot be denied, and Canada's attempt to now erase and silence those voices cannot be allowed. Canada acknowledges the harm it has caused and therefore, in keeping with our human rights principles, framework, and legislation, Canada must be held accountable.

B. The Facts

1. The Context for the Complaint: Child Welfare and Jordan's Principle

9. The overarching purpose of any child welfare program is to protect children from harm and to support families so that, whenever possible, children can grow up safely at home.[11] These services aim to remove children from their homes as a last resort (and to return them as soon as possible thereafter if removal is required), based on the universal understanding that any unnecessary removal and separation of a child from their family causes harm and negatively impacts a child's life trajectory.[12] On-reserve and in the Yukon, these services are provided by Canada via the First Nations Child and Family Services Program ("**FNCFS Program**").

10. Jordan's Principle means that First Nations children must receive the public services they need, when they need them, free of adverse differentiation or denials related to their First Nations identity. It functions to ensure substantive equality for First Nations children.[13] It is named for Jordan River Anderson, of Norway House Cree Nation. Born in 1999 with complex medical needs, after spending the first two years of his life in hospital, Jordan was told by his medical team he could leave the hospital. However, Canada and Manitoba argued for two years over who should pay for his at home care. He passed away when he was five years old, never having lived outside of the hospital.

2. Procedural history

11. On February 27, 2007, the Caring Society and the AFN[14] filed a human rights complaint pursuant to s. 5 of the *CHRA*,[15] alleging that Canada was discriminating against First Nations children and families because of race and national and/or ethnic origin. The Complaint alleged that Canada's FNCFS Program adversely impacted First Nations children and families, and that its implementation of

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[11] See generally: Merits Decision at paras 115-120.

[12] See for example, Feb 25, 2013 examination-in-chief of C. Blackstock at p 143, lines 15-22, **JER, Tab 37**: "I don't know how many removals I've done in my life as a child protection worker. Too many to remember. And I can tell you that no matter how sensitive and caring you try to be during that process, it is a life changing and often very traumatic experience for children and young people."

[13] Merits Decision at para 353.

[14] The First Nations Child and Family Caring Society of Canada is a non-profit organization committed to advocacy on behalf of First Nations agencies serving the well-being of children, youth and families. The Assembly of First Nations is a national advocacy organization working on behalf of over 600 First Nations across Canada. See also: Merits Decision at para 12.

[15] Oct 24, 2019 Affidavit of C. Blackstock at para 7, **JER, Tab 285**.

Jordan's Principle caused First Nations children to be denied services and to experience service delays resulting in inequitable outcomes.[16] The discrimination was described as "systemic and ongoing".[17]

12. The Complaint was filed as a last resort. For a decade, both organizations advocated for reform by conducting research – funded and supported by Canada – showing First Nations children receive less child welfare and social services than all other Canadian children and by outlining solutions to the discrimination.[18] Canada refused to implement the recommendations leaving the Caring Society and the AFN with no other choice but to bring the Complaint. After years of delay occasioned by Canada's procedural litigation and technical arguments, detailed in the Commission's submissions, on July 10, 2012, the Tribunal Panel, composed of Members Marchildon, Lustig and Bélanger, was appointed to hear this case.[19]

13. On October 16, 2012, the Tribunal amended the Complaint to include an allegation of retaliation against Dr. Blackstock, the Caring Society's Executive Director. That complaint was determined in Dr. Blackstock's favour. The Tribunal found that Canada retaliated against her when she was denied entry to a meeting with the Chiefs of Ontario at the Minister of Aboriginal Affairs and Northern Development Canada's office (**"Retaliation Decision"**).[20] Dr. Blackstock was awarded $20,000: $10,000 for pain and suffering and $10,000 for Canada's wilful and reckless conduct. The Retaliation Decision, which Canada did not judicially review, held that: "when evidence establishes pain and suffering, an attempt to compensate for it must be made."[21]

14. The hearing on the merits began in February 2013. However, it was delayed for several months after the Caring Society received an Access to Information request revealing that Canada had failed to disclose tens of thousands of relevant documents. Many of these documents were central to demonstrating the discrimination perpetrated by Canada. Canada's obstruction of process resulted in

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[16] Complaint Form, **JER, Tab 4**.
[17] Complaint Form at p 3, **JER, Tab 4**.
[18] Joint National Policy Review ("**NPR**"), CHRC Book of Documents ["**CBD**"] Vol 1 at Tab 3; Bridging Econometrics: Phase One Report, CBD Vol 1 at Tab 4; Wen:De: We are Coming to the Light of Day, CBD Vol 1 at Tab 5; Wen:De: The Journey Continues, CBD Vol 1 at Tab 6, **JER, Tab 106**.
[19] 2012 CHRT 16.
[20] 2015 CHRT 14 at paras 58-61.
[21] 2015 CHRT 14, at para 124 [emphasis added].

a 5-month delay to the hearing. The Tribunal later awarded the Caring Society $90,000, on consent.[22]

15. The Complaint was heard over 72 days in 2013 and 2014. The Tribunal heard from 25 witnesses, including four expert witnesses. Of particular note, Dr. Amy Bombay, an expert on the psychological effects and transmission of trauma on wellbeing, gave evidence on the collective traumas experienced by Indigenous people, including in Indian Residential Schools, and the cumulative emotional and psychological wounding over time on individual and community health.[23] Her evidence informed the Tribunal's understanding of the inter-generational trauma experienced by First Nations children and their families as a result of removals.

16. Repeatedly, the Tribunal heard compelling and largely uncontradicted evidence of Canada's discriminatory conduct, the perpetuation of harm and trauma through its FNCFS Program and its failure to implement Jordan's Principle. Some examples that stand out include the following:

a) Chief Robert Joseph, a respected Elder and residential school survivor, testified about being asked by then Prime Minister Harper what Canada should apologize for. In response, he linked Canada's conduct during the Indian Residential School era with its current discrimination. He testified:

> And so, we have the state saying 'Yeah, we made a mistake.' We can't make the same mistake twice. These are the same children and their parents and grandparents and we can't afford to continue losing children into despair and oblivion, detachment, or loneliness, brokenness, or whatever it is.[24]

b) Derald Dubois, a child welfare professional, residential school survivor, son of a residential school survivor, a parent, foster parent, and adoptive parent, testified about the multi-generational impact of past and present removals which he described as "wreaking havoc on our families".[25]

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[22] 2013 CHRT 16, 2014 CHRT 2, 2015 CHRT 1 and 2019 CHRT 1. In 2019 CHRT 1, the Tribunal noted that a number of the documents "were prejudicial to Canada's case and highly relevant" (at para 13).
[23] Expert Report of Dr. A. Bombay, CBD Vol 13 at Tab 314, **JER, Tab 118**; Jan 9 and 10, 2014 evidence of Dr. A. Bombay, **JER, Tabs 65 and 66**.
[24] Jan 13, 2014 examination-in-chief of Chief R. Joseph at p 97 lines 10-16, **JER, Tab 67**.
[25] 2019 CHRT 39 at para 158.

c) Dr. Blackstock testified about the long-term negative impact of removals and provided examples, based on her decades of experience as a social worker, of how a child's life changes when they are removed from their families.[26]

d) Raymond Shingoose, Executive Director of a First Nations Child and Family Services Agency ("**FNCFS Agency**") spoke of having to fundraise for wheelchairs for children in care due to Canada's lack of funding and of how the lack of prevention programs drove children into care. He testified that "parents lose hope and eventually stop trying to make changes in their lives as no supports are provided to them" and that some children received less than adequate care or no access to services they needed.[27]

e) Ms. Murphy, Canada's own witness, acknowledged in her testimony that taking children away from their family and communities had harmful impacts on children and their families.[28]

f) The Tribunal also heard about various individual cases that illustrated the harm Canada's discrimination was having on First Nations children. For example, it heard about a 4-year-old girl who suffered brain anoxia during routine dental surgery and needed a hospital bed to breathe. The request went through over a dozen bureaucrats before someone wrote – "Absolutely not". Her mother was 8 months pregnant and it was Christmas. A doctor paid for the bed.[29] The Tribunal also heard about a First Nations child in care waited nine months for INAC to confirm it would cover the cost of a piece of medically necessary equipment.[30] The Tribunal further heard about a child with a terminal illness, Batten Disease, who required a hospital bed to alleviate respiratory distress. It took sixteen months for her to obtain the bed.[31]

g) The Tribunal cited the further example of *Pictou Landing Band Council v*

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[26] Feb 25, 2013 examination-in-chief of C. Blackstock at p 146 lines 11-24; p 144 line 12 to p 146 line 2, **JER, Tab 37**.
[27] 2018 CHRT 4 at para 179.
[28] Apr 2, 2014 examination-in-chief of S. Murphy at p 50 lines 3-5, **JER, Tab 79**.
[29] Merits Decision at paras 366-367.
[30] Merits Decision at para 365.
[31] May 1, 2014 cross-examination of C. Baggley at p 117 line 16 to p 118 line 12, **JER, Tab 83**; Oct 6, 2013 AANDC Jordan's Principle Chart Documenting Cases at p 2, CHRC BOD Vol 15 at Tab 422, **JER, Tab 120**.

> *Canada*, a case involving the late Maurina Beadle, a mom and Elder, who lovingly cared for her son Jeremy who had severe cerebral palsy and autism requiring care for his personal needs. She suffered a stroke and needed in home care for Jeremy while she recovered. Canada was only prepared to fund services that fell far short of what professionals said Jeremy needed. Maurina and Pictou Landing sought judicial review. This Court granted the application in 2013.[32]

17. The evidence of harm and trauma was also outlined in the NPR and the Wen:De Reports, which Canada funded and partnered in, showing Canada was well aware its child welfare services disparities were hurting First Nations children and their families. The NPR identified harms such as loss of community, culture, language, worldview and traditional family, as well as dysfunction, high suicide rates and violence.[33] The Wen:De Reports detailed the funding disparity for FNCFS Agencies, noted detrimental impacts for First Nations children resulting from jurisdictional disputes and recommended fully implementing Jordan's Principle.[34]

18. The Tribunal also heard compelling evidence showing how the FNCFS Program, and the narrow implementation of Jordan's Principle, harmed First Nations children, including: two reports of the Auditor General of Canada, two reports from the House of Commons Standing Committee on Public Accounts, and several internal federal government reviews.[35] Canada's documents also showed that First Nations children were often denied services available to non-First Nations children. For example, if a child needed three medical mobility devices, Canada would only pay for one device every five years while all devices would generally be covered as the normative standard of care.[36]

19. Canada's own witnesses admitted to criticisms by First Nations groups,

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[32] *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342. Canada appealed (Federal Court of Appeal File No A-158-13), seeking costs from Maurina. It later withdrew the appeal.
[33] Merits Decision at para 151.
[34] Merits Decision at paras 162 and 183; Wen:De: The Journey Continues at p 16, CHRC BOD Vol 1 at Tab 6, **JER, Tab 106**.
[35] Merits Decision at para 149. See for e.g. Mar 28, 2012 Internal Audit Report re Mi'kmaw Children and Family Services Agency, CBD Vol 5 at Tab 52, **JER, Tab 110**; Mar 5, 2010 Implementation Evaluation of Enhanced Prevention Focus in Alberta, CBD Vol 13 at Tab 271, **JER, Tab 118**; March 2007 Evaluation of the [FNCFS Program], CBD Vol 4 at Tab 32, **JER, Tab 109**;
[36] 2017 CHRT 14 at para 70.

provincial governments, and professional bodies about its narrow definition of Jordan's Principle, and to its failure to act. Under cross-examination by the Caring Society, Ms. Corinne Baggley, Canada's witness on Jordan's Principle, was asked "So in the briefing notes that you may have contributed to, do you recollect if you ever recommended modifying the federal definition of Jordan's Principle?" In reply, she admitted "No, I don't remember writing a recommendation to modify."[37] She also admitted that public servants did not have a mandate to publicize Jordan's Principle and there was no means for families to make an application for services under Jordan's Principle.[38] Some of Canada's witnesses also displayed a shocking indifference towards the lives of First Nations children. For example, Ms. Baggley blithely described how a Jordan's Principle case was considered "resolved" where a child died or waited so long for the service that they aged out of care.[39]

20. The evidence underscored Canada's abject failure to take action to redress the discrimination of which it was fully aware. To illustrate, in 2012, senior officials identified a need for significant amounts of new funding in the FNCFS Program, but no action was taken.[40] More disturbing still, Canada even gave an award to those responsible for its failed approach to Jordan's Principle,[41] under which officials worked to ensure no case ever met its narrow definition.[42]

21. In the Merits Decision, the Tribunal upheld the key allegations of discrimination made in the Complaint.[43] It determined that Canada's FNCFS Program and approach to Jordan's Principle discriminated against First Nations children and families on the prohibited grounds of race and national or ethnic origin contrary to s. 5 of the *CHRA*.[44] The Tribunal ordered Canada to cease its discriminatory practices, reform the FNCFS Program, and to take measures to

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[37] May 1, 2014 cross-examination of C. Baggley at p 126, lines 4-17, **JER, Tab 83**.
[38] Apr 30, 2014 examination-in-chief of C. Baggley at p 128 lines 13-23, **JER, Tab 82**, and May 1, 2014 at p 32, lines 8-14, **JER, Tab 83**. See also 2020 CHRT 15 at paras 84-86.
[39] May 1 cross-examination of C. Baggley at p 68 lines 11-25, **JER, Tab 83**.
[40] Merits Decision at paras 292-304. See also: 2019 CHRT 39 at paras 237-240.
[41] 2011 Deputy Ministers' Recognition Award Nomination Form, CBD Vol 13 at Tab 327, **JER, Tab 118.**
[42] Merits Decision at para 381; Apr 30, 2014 examination-in-chief of C. Baggley at p 117, lines 1-12, **JER, Tab 82**.
[43]While all three panel members presided over the hearings, sadly Member Bélanger passed away weeks before the Merits Decision was released.
[44] Merits Decision at paras 456-467.

immediately implement the full meaning and scope of Jordan's Principle.[45]

22. The Tribunal expressly acknowledged the "suffering" of First Nations children impacted by Canada's discriminatory conduct, compounded by the legacy of residential schools and the Sixties Scoop.[46] Based primarily on Canada's own documents and witnesses, the Tribunal found entrenched and wide-spread discrimination experienced by First Nations children in relation to the FNCFS Program.[47] With respect to Jordan's Principle, the Tribunal found that Canada's narrow interpretation "defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children".[48]

23. The Tribunal also found Canada knew about: (i) its discriminatory conduct; (ii) the inequality in the FNCFS Program; (iii) the harm caused to First Nations children; (iv) the disparity facing First Nation children in accessing essential services; and (v) the harmful impacts of misconstruing Jordan's Principle.[49] It further ruled that Canada had evidence-based solutions to remediate these adverse impacts, as reflected in reports it funded and participated in.[50] Despite having opportunities to act, the Tribunal found Canada failed to make any substantive change to alleviate the discrimination, further exacerbating the harm to First Nations children across the country.[51] This wilful disregard by Canada was later held by the Tribunal to be the "worst-case scenario under our *Act*."[52]

24. In addition to making orders directing Canada to cease its discriminatory conduct, the Tribunal stated that the discrimination was ongoing and that further orders and remedies would follow. The Tribunal reminded the parties that it had jurisdiction under the *CHRA* to award compensation to the victims of discrimination under ss. 53(2)(e) and 53(3) of the *CHRA* and that questions from the Tribunal would follow to guide this stage of the remedies.[53] Far from seeking judicial review of the Merits Decision, Canada's Minister of Justice and the Minister of Indigenous

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[45] Merits Decision at para 481.
[46] Merits Decision at paras 218, 404, 412, 458 and 467.
[47] See for instance: Merits Decision at paras 344, 384, 388-389.
[48] Merits Decision at paras 381-382.
[49] Merits Decision at paras 168, 362-372, 385-386, 389 and 458.
[50] Merits Decision at paras 150-185, 270-275, 362-372, 389 and 481.
[51] Merits Decision at para 461.
[52] 2019 CHRT 39 at para 234.
[53] Merits Decision at paras 485-490.

and Northern Affairs welcomed it.[54]

25. From the Merits Decision in January 2016 to the present, the respondents to these judicial reviews have taken various steps to support, and later compel, Canada to fully comply with the Tribunal's orders. Where Canada failed, the parties filed non-compliance motions to require Canada to take specific steps to end its discriminatory conduct and begin to redress the harm experienced by First Nations children across the country. These efforts resulted in 19 subsequent non-compliance and procedural orders by the Tribunal against Canada.[55] Only four of these orders were made on consent.[56] Canada argued against almost all of the remainder.

26. These decisions document Canada's ongoing discriminatory conduct against First Nations children, and its failure to comply with the Merits Decision. These repeated failures informed the Tribunal's factual findings in the decisions under review in this Application.[57] For example, Canada failed to respond to a July 2016 Jordan's Principle request for mental health services by Wapekeka First Nation related to a suicide pact among young girls. Canada said the proposal "came at an awkward time" and did not respond until after two 12-year-old girls tragically died by suicide in January 2017. In February 2017, two more deaths by suicide of youth occurred in other NAN communities after warnings about suicide pacts were left unaddressed.[58] In January 2017, a First Nations boy with severe cerebral palsy from Alberta needed transportation assistance to access an off-reserve service centre for special needs children. His parents applied to Canada for funding to access these services, but had to wait weeks while it navigated between its own services and program. Canada's witness acknowledged there was additional work to be done but did not "have a better answer for it than that".[59]

27. The findings in relation to discrimination, harm and trauma were further

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[54] Jan 26, 2016 Joint Statement of the Ministers of Justice and Indigenous Affairs, re 2016 CHRT 2, **JER, Tab 349**.
[55] 2016 CHRT 10, 2016 CHRT 11, 2016 CHRT 16, 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35, 2018 CHRT 4, 2019 CHRT 1, 2019 CHRT 7, 2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2020 CHRT 20, 2020 CHRT 24, 2020 CHRT 31; 2020 CHRT 36, 2021 CHRT 6, 2021 CHRT 7, 2021 CHRT 12. Several of these decisions were registered with the Federal Court pursuant to s 57 of the *CHRA*, see: T-469-16; T-1932-16; T-937-17; T-1761-19; T-1840-19; T-1841-19.
[56] 2017 CHRT 7; 2017 CHRT 35; 2019 CHRT 1; 2021 CHRT 12.
[57] 2019 CHRT 39 at paras 21-25.
[58] 2017 CHRT 7 at para 10.
[59] 2017 CHRT 14 at para 95.

corroborated by, among others, the evidence of Marie Wilson, one of the Commissioners for the Truth and Reconciliation Commission ("**TRC**"). She heard over 1500 statements made to the TRC – many from those who grew up in the foster care system as it currently exists, as well as from hundreds of parents with children taken into care. Over and over again, she stated, she heard that the worst part of the residential schools was the child being ruptured from family and home, from everything and everyone familiar and cherished. Canada's existing child welfare programs are, she added, a continuation of, or a replacement for, the residential school system.[60] Ms. Wilson's evidence was not challenged by Canada. These and many other examples show that what Canada euphemistically refers to as "structural problems with funding models"[61] caused "trauma and harm to the highest degree causing pain and suffering."[62]

3. The Compensation Orders

28. In 2014, at the hearing on the merits, the Caring Society requested compensation pursuant to s. 53(3) of the *CHRA* for Canada's wilful and reckless discrimination, including $20,000 plus interest for every First Nations child affected by the FNCFS Program placed in out-of-home care since 2006. The Caring Society requested that the compensation be paid into a trust fund.[63] During the compensation remedy phase, in 2019, the Caring Society also sought $20,000 of compensation under s. 53(3) of the *CHRA*, to be placed in the same trust fund, for First Nations children who experienced discrimination pursuant to Canada's discriminatory interpretation of Jordan's Principle.[64]

29. Canada did not argue that financial compensation could not be awarded in this case during the hearing on the merits in 2014. Instead, Canada argued that "the evidence before the Tribunal was insufficient to award the requested statutory maximum under special compensation" and that the Caring Society's request for wilful and reckless compensation "is also unsupported by the evidence".[65] It opposed the Complainants' requests for monetary compensation because (a) the

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[60] 2018 CHRT 4 at paras 122-124; Dec 18, 2016 Affidavit of Marie Wilson at paras 6-8, **JER, Tab 165.1**.
[61] AGC Memorandum of Fact and Law, dated March 12, 2021 ["**AGC JR Factum**"] at para 89.
[62] 2019 CHRT 39 at para 193.
[63] 2019 CHRT 39 at paras 21-25.
[64] 2019 CHRT 39 at paras 21-25.
[65] AGC Oct 3, 2014 Closing Submissions at paras. 238 and 242, **JER, Tab 96**.

request was based on the premise that all the children were removed from their homes because of Canada's funding practices; (b) the complainants had not demonstrated their authority to speak on behalf of First Nations children and their families; and (c) Canada's funding to First Nations children services had not remained static over the years. [66]

30. As master of its own process, the Tribunal staged its consideration of remedies necessary to redress the discrimination found in the Merits Decision.[67] This approach was never questioned by Canada and was similarly adopted in relation to compensation. Throughout, this Panel took care to protect the parties' procedural rights, including granting many extensions of deadlines to allow all parties to respond, while affording Canada the opportunity to make further submissions or lead further evidence.[68] As Canada notes in its factum, the orders have brought significant change for thousands of First Nations children.[69]

31. On March 19, 2019, the Tribunal put questions to the Parties regarding compensation. By that time, the Tribunal had found Canada to be non-compliant with the Merits Decision on at least five occasions, with the Tribunal making clear in many of its orders that Canada had failed to adequately change its conduct and continued to discriminate against First Nations children.[70] The parties exchanged written submissions and made oral submissions to the Tribunal in April 2019.

32. On September 6, 2019, the Tribunal found that particular victims of Canada's discriminatory conduct are entitled to compensation for both pain and suffering (s. 53(2)(e)) and as a result of Canada's wilful and reckless conduct (s. 53(3)) (**"Compensation Entitlement Order**"). It emphasized the factual findings made in previous decisions were based on its "thorough review of thousands of pages of evidence including testimony transcripts and reports".[71] Notably, it found that Canada's discrimination resulted in "trauma and harm to the highest degree causing

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[66] AGC Oct 3, 2014 Closing Submissions at paras 239-245, **JER, Tab 96**.
[67] Feb 10, 2016 Direction from the Tribunal re remedies process, **JER, Tab 132**.
[68] See for e.g. Feb 18, 2016 Direction from the Tribunal extending timelines for submissions re immediate relief, **JER, Tab 132.1**; Feb 27, 2019 Letter from the Tribunal regarding further evidence by AGC with respect to the Panel's retention of jurisdiction, **JER, Tab 346.1**.
[69] AGC JR Factum at para 44.
[70] See for e.g. the discussion in 2016 CHRT 10 at paras 21-23 and 32-34; 2016 CHRT 16 at pars 7-11; 2017 CHRT 14 at paras 75-81; 2018 CHRT 4 at paras 105-108; and 2019 CHRT 7 at paras 71-73.
[71] 2019 CHRT 39 at para 15 [emphasis added]

pain and suffering".[72] Based on the entirety of the evidence, the Tribunal held that Canada's discrimination was a "worst-case scenario" under the *CHRA* and "devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families".[73] It also found that Canada had continuously focused on "financial considerations rather than on the best interest of First Nations children and respecting their human rights".[74] The Tribunal did not grant compensation to all victims. Instead it ordered compensation only to those who had experienced the greatest pain and suffering:

a. Each First Nations child unnecessarily removed from their home, family and community between January 1, 2006 to an ordered or agreed upon date pursuant to s. 53(2)(e);

b. Each child necessarily removed but placed in care outside of their extended families and communities, temporarily or long-term from January 1, 2006 to an ordered or agreed upon date pursuant to s. 53(2)(e);

c. Each First Nations child who was not removed from the home but who was denied services or received services after an unreasonable delay or upon reconsideration as ordered, and to each parent or grandparent of that child from December 12, 2007 (date of the House of Commons' adoption of Jordan's Principle) to November 2, 2017 (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle) under s. 53(2)(e);

d. Each caregiving parent (or caregiving grandparent) identified in the orders above under s. 53(2)(e), except for parents (or caregiving grandparents who sexually, physically or psychologically abused their children); and

e. Each First Nations child and parent or grandparent identified in the orders above under s. 53(3).

33. It is important to note that this is a narrower remedy than what was sought by the complainants. The Caring Society requested special compensation for <u>all</u> victims based on Canada's wilful and reckless conduct. The AFN requested compensation for pain and suffering for <u>all</u> victims.

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[72] 2019 CHRT 39 at para 193
[73] 2019 CHRT 39 at para 231.
[74] 2019 CHRT 39 at para 231.

34. The Tribunal did not order Canada to immediately pay compensation to the particular victims in the Compensation Entitlement Order. Instead, it outlined a series of parameters and categories of victims and ordered Canada to consult with the Caring Society and AFN to develop a compensation distribution framework to arrive at a final order for compensation. This is in keeping with the Tribunal's practice on past orders, in this case and others.[75]

35. Canada applied for judicial review of the Compensation Entitlement Order and sought a stay of the Tribunal's proceedings. After this Court dismissed the stay motion, Canada finally agreed to work with the Caring Society and the AFN on the framework.

36. On February 21, 2020, the Caring Society, the AFN and Canada submitted a draft compensation framework to the Tribunal (**"Compensation Framework"**). The Compensation Framework arises from the collaborative efforts of the Caring Society, the AFN and Canada to structure a distribution mechanism in keeping with the Tribunal's orders to ensure an efficient, culturally safe and effective process. Informed by several expert reports, including one by youth in care, it includes the following key components: (a) the guiding principles; (b) definitions of key terms; (c) locating and supporting beneficiaries; (d) the notice plan; and (e) a monitoring mechanism for the distribution.

37. From February 2020 to February 12, 2021, the Compensation Framework was finalized by the parties, as the Tribunal made further orders on issues raised by the parties where there was no consensus. These orders were incorporated into the final Compensation Framework and include a determination that the estates of deceased victims are entitled to compensation; definitions of "service gap", "essential service" and "unreasonable delay" for the purpose of Jordan's Principle compensation; and an order that compensation owing to minor beneficiaries and those without legal capacity shall be held in trust.[76]

38. On February 12, 2021, the Tribunal released the **Compensation Payment Order**. Shortly thereafter, Canada amended its Notice of Application and indicated its intent to seek judicial review of the Compensation Payment Order.

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[75] 2017 CHRT 35; 2018 CHRT 4 at para 445; *Hughes v Canada*, 2010 CHRT 4 at para 74.
[76] 2020 CHRT 7 (the "**Estates Order**"); 2020 CHRT 15 (the "**Definitions Order**"); and 2021 CHRT 6 (the "**Trust Order**")

39. Canada seeks to quash the Compensation Payment Order, notwithstanding repeated government statements, including from the Prime Minister and in the Speech from the Throne, agreeing that compensation ought to be paid to the victims of Canada's discrimination. Some of Canada's representatives have suggested that they do not oppose the Compensation Entitlement Order and simply need more time to have "conversations" about compensation.[77]

4. The Jordan's Principle Eligibility Orders

40. In its Merits Decision and in three non-compliance orders that followed, the Tribunal held that Jordan's Principle applies to "all First Nations children" and ordered Canada to implement Jordan's Principle's full meaning and scope.[78] Canada initially stated, including in sworn evidence, that *Indian Act* status was not a mandatory criterion for receipt of services under Jordan's Principle, but later disclosed that *Indian Act* status had always been used as a limiting factor.[79]

41. Faced with Canada's improper narrowing of Jordan's Principle eligibility criteria to children eligible for *Indian Act* status and "non-status Indigenous children who are ordinarily resident on-reserve",[80] the Caring Society brought a further non-compliance motion in December 2018. Prior to the hearing of the motion in March 2019, the Tribunal granted an interim order extending Jordan's Principle eligibility to First Nations children facing urgent and/or life-threatening situations who were recognized by their Nations.[81]

42. In July 2020, the Tribunal held that Canada could not categorically exclude First Nations children where those children were either recognized by their Nation for purposes of Jordan's Principle eligibility or had one parent with s. 6(2) *Indian Act* status.[82] However, the Tribunal suspended the implementation of that order to allow Canada to consult with the parties regarding operational procedures and funding for a voluntary process by which Nations could confirm recognition of First

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[77] Oct 24, 2019 Affidavit of C. Blackstock at para 33, **JER, Tab 285**; *Debates of the Senate*, 43rd Parl, 1st Sess, Vol 151, No 1 (Dec 5, 2019) at 8.
[78] 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).
[79] Feb 6, 2017 cross-examination of R. Buckland at Q 142, **JER, Tab 185**; May 9, 2018 cross-examination of S. Perron at p 47, **JER, Tab 208**.
[80] Dec 21, 2018 Affidavit of V. Gideon at paras 8, 10 and 17 and Exhibit "C", **JER, Tab 232**.
[81] 2019 CHRT 7.
[82] 2020 CHRT 20 at paras 229 and 272.

Nations children without *Indian Act* status living off-reserve.[83] The parties submitted a consent proposal in October of 2020 that the Tribunal later approved.[84]

PART II - ISSUES

43. The Caring Society submits that this Application raises the following issues:

A. What is the appropriate standard of review?

B. Has Canada demonstrated that the Compensation Orders are unreasonable?

C. Has Canada demonstrated that the Jordan's Principle Eligibility Orders are unreasonable?

PART III – SUBMISSIONS

A. What is the appropriate standard of review and how must it be applied?

44. The Caring Society agrees with Canada that the Tribunal's orders must be reviewed using the reasonableness standard.[85] The *CHRA* does not contain any language signaling legislative intention that would rebut the presumption in favour of the reasonableness standard of review.[86] However, despite claiming to support reasonableness review, and contrary to *Vavilov*'s teachings, Canada frequently argues for a standard akin to correctness and seeks to frame this judicial review around its own arguments, rather than the Tribunal's reasons.[87] Moreover, Canada disregards the clear guidance from the Supreme Court that the findings of fact made by the Tribunal are not open for review, absent exceptional circumstances.[88]

45. In *Vavilov*, the Supreme Court makes clear that reviewing courts must search for a "line of analysis within the given reasons that could reasonably lead the

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[83] 2020 CHRT 20 at paras 321-322.
[84] 2020 CHRT 36.
[85] AGC JR Factum at para 46.
[86] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at paras 44-54. See also: *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at paras 231-242.
[87] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 84 ["***Vavilov***"]; cf AGC JR Factum at paras 22, 48, and 140. For examples of Canada's disguised correctness approach, see AGC JR Factum at paras 48-49 (re definition of victim) or paras 66-77 (re Canada's argument the Tribunal created a class action), which do not deal with the Tribunal's reasons on those points (2019 CHRT 39 at paras 112-124 (re victims) and 204-208 (re class actions)).
[88] *Vavilov* at para 125: "It is trite law that [...] absent exceptional circumstances, a reviewing court will not interfere with [the decision maker's] factual findings."

tribunal from the evidence before it to the conclusion at which it arrived".[89] Canada quotes the *Vavilov* reasonableness review as being a "robust exercise"[90], but fails to mention that this standard of review finds "its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision-makers,"[91]. *Vavilov* further holds that:

> The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. […] Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.[92]

46. The Supreme Court also instructed reviewing courts to be attentive to the decision-maker's specialized knowledge relating to the decision under review:

> Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision.[93]

47. This Court has held that *Vavilov* mandates a "posture of restraint" when reviewing the Tribunal's interpretations of the *CHRA* or determinations of mixed fact and law, taking into account the Tribunal's "considerable and specialized expertise"[94]:

> When the decision of the [Tribunal] is considered from a legal perspective – in particular, in light of the constraints imposed by legislation and case law – this Court cannot interfere.[95]

48. The Tribunal's "demonstrated expertise" is a crucial consideration when assessing the orders under review. This particular Panel has been (and remains)

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[89] *Vavilov* at para 102.
[90] AGC JR Factum at para 47.
[91] *Vavilov* at para 13.
[92] *Vavilov* at para 100.
[93] *Vavilov* at para 93 [emphasis added].
[94] *O'Grady v Bell Canada*, 2020 FC 535, para 31, per Justice Diner.
[95] *O'Grady v Bell Canada* at para 2.

seized of this human rights complaint for nearly nine years, adeptly guiding the compliance and remedial process despite Canada's recalcitrance.[96] This Court must take a posture of restraint and pay respectful attention to the Tribunal's expertise, particularly in the context of a lengthy, complex case comprised of mostly uncontested rulings.[97]

49. Human rights tribunals are created by legislatures to help fulfil Canadians' collective aspiration of eradicating discrimination in society. They are "unique in our system of government" because "they operate under a comprehensive and specialized legislative scheme established to address discrimination."[98] Given that discrimination's root causes are often multifaceted and complex, human rights statutes grant these tribunals broad remedial powers to directly tackle the policy issues and social agendas driving discriminatory conduct. The Tribunal, in particular, is mandated by Parliament to examine and redress inequities perpetrated by federally governed entities (whether public or private in nature), and fashion appropriate remedies in keeping with the *CHRA*'s objects.[99]

B. The Tribunal's Compensation Orders are Reasonable

50. Canada does not deny that its discrimination has harmed First Nations children and their families. At the April 2019 compensation hearing, Canada acknowledged that "it was [the Tribunal's] job to find that there was harm. [It] found that. We accept that. We haven't judicially reviewed that."[100] However, in this application, despite acknowledging that its "funding system was broken"[101] Canada attempts to divert the focus away from the harm it has caused, never mentioning the trauma experienced by affected children and families, while raising irrelevant and legally specious arguments. In response, as outlined below, the Caring Society submits that (a) victims of systemic discrimination are entitled to individual remedies; (b) Canada's reference to the ongoing class actions is a red herring; (c) principles of tort law have no application to remedies available under

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[96] *CHRA* s 48.1 requires CHRT members to "have experience, expertise and interest in, and sensitivity to, human rights" and be "members in good standing of the bar of a province or the Chambre des notaires of Québec for at least ten years".
[97] *O'Grady v Bell Canada* at para 31 quoting *Vavilov* at para 24.
[98] G. Brodsky, S. Day & F. Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies", (2017) 6:1 Can J Hum Rts at 29 ["**Brodsky et al 2017**].
[99] Brodsky et al 2017 at 31
[100] Apr 26, 2019 Hearing Transcript at p 198, lines 16-18, see also: p 177 at lines 8-11, p 179 at lines 10-12, p 190 at lines 19-22 [emphasis added], **JER, Tab 105.4**.
[101] AGC JR Factum at para 2.

the *CHRA*; (d) the Estates and Trust Orders are reasonable; (e) the evidence overwhelmingly supports the Tribunal's findings that First Nations children have endured pain and suffering (indeed, some have died); (f) the evidence unequivocally supports the Tribunal's findings that Canada's failure to implement multiple solutions despite its knowledge of the harms being caused demonstrates willful and reckless discrimination; and (g) the Tribunal's finding of ongoing discrimination under the FNCFS Program is reasonable and supported by the evidence.

51. Canada's consistent reference to the compensation awarded as "damages" shows that Canada fundamentally misunderstands human rights law and seeks to conflate wholly unrelated legal concepts to shirk its financial liability to First Nations children. Compensation in human rights law is not the same as damages in tort law. Indeed, discrimination is not a tort.[102] Conflating tort damages with principles of compensation under the *CHRA* is also precisely what the Supreme Court in *Vavilov* enjoined reviewing courts *not to do* when examining decisions of tribunals with specialised knowledge.[103]

52. Presiding over one of the longest human rights proceedings in Canadian history, the Tribunal's specialised knowledge led it to determine that Canada's "racial discrimination is one of the worst possible cases warranting the maximum awards."[104] The Tribunal is uniquely positioned to determine the appropriate level of compensation and the categories of victims entitled to compensation. The Court must show judicial restraint in relation to this specialised knowledge.

53. The reasons for the decision should be read in light of the special duty owed to children, the extensive record before the Tribunal and the history of the proceeding. The Compensation Entitlement Order, and the finding of wilful and reckless discrimination in particular, was made following a lengthy legal battle that continued after the Merits Decision. As emphasized by the Tribunal:

> The Panel has made numerous findings since the hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling.[105]

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[102] *Honda Canada Inc v Keays*, 2008 SCC 39 at para 64.
[103] *Vavilov* at paras 92-93.
[104] 2019 CHRT 39 at para 13.
[105] 2019 CHRT 39 at para 15.

1. The Tribunal has jurisdiction to award individual remedies in response to a systemic discrimination complaint

54. Consistent with rulings by the Federal Court and the Federal Court of Appeal,[106] the Tribunal consistently adopted a victim-centered approach, aimed at promoting and protecting the best interests of the child, while reasonably balancing the public interest and the government's responsibilities. Despite not having judicially reviewed the Merits Decision and welcoming the Tribunal's findings, Canada now seeks to depict its discrimination as a victimless wrong, systemic in nature but with no human consequences. Its submissions portray this case as focused on high-level government policies and complex funding structures, far removed from the real lives of children. Canada erroneously presumes that systemic and individual discrimination are mutually exclusive. This is unsupported by the language of the *CHRA*, is unfounded in law and defies common sense. It also fails to acknowledge the high moral and legal duty governments owe to children.

55. International and domestic law recognise a right to compensation for human rights violations. At its heart, compensation in human rights law is about compensating individuals for the inherent harm caused by the social wrong of discrimination. Compensation is aimed at restoring victims' dignity. Compensation further helps perpetrators recognise their wrong while deterring future violations.[107]

56. Such compensation is not simply symbolically important. The provision of appropriate compensation to victims for their pain and suffering, and compensation for having experienced wilful and reckless discrimination, are also essential to the fulfilment of the *CHRA's* quasi-constitutional objectives. Forward looking orders requiring respondents to cease their unlawful practices, coupled with compensation for victims, are a dual approach adopted in all human rights laws in Canada to eradicate discrimination.

57. Failure to award appropriate human rights compensation is likely to result in respondents deliberately discriminating because it is less costly than compliance.

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[106] 2012 FC 445 at paras 332-340 and 360-363; 2013 FCA 75 at para 22. See also *Aboriginal Peoples Television Network v Canada (Human Rights Commission)*, 2011 FC 810, where on a judicial review of an order refusing camera access to the proceedings below (made by the former panel chair seized of this complaint), Chief Justice Lutfy began his decision by quoting Verna Cowley, a survivor of the child welfare system (at para 3).

[107] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc A/HRC/42/45 at para 29.

This is not a hypothetical risk. If this application is granted, Canada will likely repeat its pattern of discriminatory conduct, if nothing else as a short-sighted "cost-saving" measure. Indeed, after having been found to be in breach of the *CHRA*, Canada continued to prioritize financial considerations above the best interests of First Nations children. As explained by the Tribunal:

> The core of the discrimination found in the *Merit Decision* is systemic and was caused by Canada's structure and funding methodology which was focused on financial considerations and not the best interests of children or their specific needs. The Panel's orders intend to eliminate this racial systemic discrimination.[108]
>
> Canada should not benefit financially because children, youth and family members have died waiting for Canada's racial discrimination to end. The Panel must not encourage incentives for respondents to delay the resolution of discrimination complaints. Even more so, when the victims are children.[109]

58. There is no language in the *CHRA* that supports Canada's claims that the Tribunal cannot award compensation in cases involving systemic discrimination. In fact, the *CHRA* specifically states that orders aiming to prevent discrimination and compensation awards can be made concurrently. The *CHRA* states:

> 53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice **and include in the order any of the following terms that the member or panel considers appropriate:**
>
> (a) that the person ceases the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future,
>
> **and**
>
> (e) that the person compensates 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.[110]

59. Similarly, the *CHRA* grants the Tribunal the authority to make systemic orders and award compensation to victims for having experienced wilful and

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[108] 2020 CHRT 24 at para 41.
[109] 2020 CHRT 7 at para 138.
[110] *CHRA*, s 53(2) [emphasis added].

reckless discrimination. Section 53(3) states that special compensation can be awarded **"[i]n addition to** any order under subsection (2)".[111]

i. Anti-discrimination case law does not accept a bifurcation between systemic and individual discrimination

60. Canada's logic that systemic discrimination does not cause individual harm is faulty and unsupported. *Vavilov* cited such false dilemmas as indicative of irrational logic.[112] The Supreme Court of Canada explained in *Moore* that discrimination is not to be understood in a binary way (systemic vs individual discrimination):

> [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.[113]

61. Canada is wrong in citing *Moore* for the proposition that individual remedies cannot be issued in systemic cases. *Moore* holds that victims of discrimination cannot get systemic remedies when they fail to establish systemic discrimination. However, the Court's reasons suggest that it would have upheld individual and systemic orders had the claim for systemic discrimination been made out.[114] In other words, systemic and individual remedies are not an either/or question. The complainant in *Moore* could not access systemic remedies because he did not establish systemic discrimination. Where complainants have proven both systemic discrimination and individual harm, as in the case at bar, both systemic and individual remedies ought to be awarded.

62. It would be perverse, and contrary to the *CHRA*'s objectives, for discriminating respondents to shield themselves from liability *because* of the sheer magnitude of the harm and the *large* number of victims. Such an interpretation of the *CHRA* would result in an absurd situation in which small "mom and pop"

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[111] *CHRA*, s 53(3) [emphasis added]. Moreover, the s 40(5) of the *CHRA* clearly states that complaints relating discriminatory practices under s. 5 may be dealt with by the Commission even where no particular individual is identifiable as the victim. This implicitly allows victims to be later identified, including during a compensation process.
[112] *Vavilov* at para 104.
[113] *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore* SCC] at para 58.
[114] *Moore* SCC at paras 56-57. See also Hughes v Elections Canada, 2010 CHRT 4 at paras 64-74.

businesses would be liable for isolated acts of discrimination, while widespread harm from systemic breaches by well-resourced respondents (like Canada) would be non-compensable. More victims do not (and must not) translate into less liability. It is not the individual victim's fault that discrimination may be systemic. Nothing in the case law or legislation supports such a patently unjust outcome.

63. There are numerous examples of human rights tribunals making systemic orders in addition to awarding individual compensation. In *Hughes v Canada*, the Tribunal ordered both systemic remedies and compensation to the victim who was harmed by Election Canada's inaccessible polling station.[115] Similarly, in *Hogan v Ontario*, the Ontario Human Rights Tribunal ordered significant changes to Ontario's sex reassignment surgery policy. In that case, the respondent was also ordered to pay each victim of discrimination financial compensation for the infringement of dignity they experienced due to the discriminatory treatment.[116]

64. Canada misrepresents the views of Brodsky, Day and Kelly to support its claim that it is not appropriate to order compensation for individual victims in systemic complaints. In fact, the authors state: "We agree with the Tribunal's September 2019 decision. It is consistent with law and principle and should be upheld."[117] Emphasizing their unconditionally rejection of Canada's position, the authors write:

> Treating compensation for pain and suffering and systemic remedies as though they are mutually exclusive, or as though systemic remedies preclude compensation, creates a kind of absurdity. Systemic discrimination is caused by systems, but its core subject matter is the harmful impact of those systems on, in this case, individual First Nations children and family members. If the victims cannot be compensated individually for the pain and suffering caused by systemic discrimination, then, one more time, they are treated as though their individual lives do not matter; the harms they experience do not count. This is precisely the nature of the discrimination that the Tribunal has identified in this case.[118]

65. Canada also misrepresents the work of Professor (now Justice) Melissa Hart. In her paper, she underscores that systemic discrimination causes "structural injury"

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[115] *Hughes v Elections Canada*, 2010 CHRT 4 at para 100.
[116] *Hogan v Ontario (Health and Long-Term Care)*, 2006 HRTO 32.
[117] G. Brodsky, S. Day and F. Kelly, "Systemic Remedies and Compensation: Both are Needed" (2019) 20:6, Can Human Rights Reporter 1 at 16 ["**Brodsky et al 2019**].
[118] Brodsky et al 2019 at 16

that "often cannot be observed by a narrow focus on individual decisions".[119] In her view, awarding a lump-sum remedy to victims, much like the Tribunal has done in this case, is a fair and efficient deterrent remedy and the best way to make whole those harmed by discrimination.[120]

66. The Caring Society has consistently stressed that Canada's discrimination was, and is, causing widespread compensable harm to First Nations children, a position supported by ample evidence before the Tribunal. It has harmed children with serious medical conditions like brain anoxia and Batten Disease,[121] who were denied essential services that would have been accessible to them had they been non-First Nation children. It had deadly consequences for the children of Deer Lake and Wapekeka First Nation who died by suicide while waiting for equitable mental health services.[122] The Tribunal's finding that systemic discrimination causes individual harm is reasonable in law and supported by the evidence it heard.

67. Conversely, during the hearing on the merits, Canada did not attempt to demonstrate that certain children were not adversely impacted by its "systemic" discrimination. It did not challenge the Tribunal's numerous factual findings in the Merits Decision that its discriminatory conduct was causing widespread pain and suffering to First Nations children. Even on this judicial review, Canada does not deny that its discrimination has harmed First Nations children.

68. Canada cannot claim to accept the findings of discrimination, but contest the *CHRA*'s compensatory consequences for the harms it agrees it caused. As emphasized by the Tribunal, "when evidence establishes pain and suffering caused by unlawful discrimination, an attempt to compensate for it must be made."[123]

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[119] Melissa Hart, "Civil Rights and Systemic Wrongs", (2011) 32 Berkeley J Emp & Lab L 455 at 456 ["**Hart 2011**"].
[120] Hart 2011 at 457.
[121] Merits Decision at paras 366-367; May 1, 2014 cross-examination of C. Baggley at p 117 line 16 to p 118 line 12, **JER, Tab 83**; Oct 6, 2013 AANDC Jordan's Principle Chart Documenting Cases at p 2, CHRC BOD Vol 15 at Tab 422, **JER, Tab 120**.
[122] 2017 CHRT 7 at paras 8-10.
[123] *Grant v Manitoba Telecom Services Inc*, 2012 CHRT 10 at para 115 [emphasis added], citing *Cruden v Canadian International Development Agency and Health Canada*, 2011 CHRT 13 at para 170; *Legros v Treasury Board (Canada Border Services Agency)*, 2017 FPSLREB 32 at para 65 and *Duval v Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52 at para 101 and *Alizadeh-*

ii. The existence of a separate recourse does not impede human rights remedies

69. Canada claims that the Tribunal turned the Complaint into a class action. This argument is a red herring. When systemic discrimination is established, as it has been in this case, the Tribunal's function is to exercise its remedial powers to prevent future discrimination and compensate victims. This is precisely what human rights tribunals were created to do and precisely what Parliament intended when it enacted the *CHRA*.

70. Just as weak is Canada's argument, made for the first time in the history of this 14-year litigation, that the *CHRA* does not grant jurisdiction to consider complaints from "classes" of victims.[124] Canada's argument would preclude complaints involving groups of complainants or with systemic implications. This is contrary to the "preventative, transformative goals" of human rights laws.[125] Systemic complaints allow human rights tribunals to fulfill the legislative objective of eradicating discrimination in an effective and expeditious manner.

71. The fact that two provincial human rights laws refer to "classes" and not "groups" of victims does not indicate that Parliament intended to bar the Tribunal from hearing systemic claims. Professor Sullivan notes that, when seeking to determine whether the use of similar or different language in two statutes is an intentional legislative choice, one must consider whether they were enacted around the same time. One cannot presume that Parliament deliberately chose the supposedly more restrictive language of "group" based on the use of different terms by another legislature decades before or later.[126] Similarly, the enactment of Federal Court Rules on class actions in 2002 cannot be used to infer that Parliament deliberately chose not to use the language of "class" in 1977.[127]

72. The Tribunal's ability to adjudicate the Complaint or to award compensation to victims is not ousted because a monetary remedy *could have* been pursued by way of a class action. As explained by Professor Levesque, the availability of more

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Ebadi v Manitoba Telecom Services Inc, 2017 CHRT 36 at para 213 cited in *Jane Doe v Canada (Attorney General)*, 2018 FCA 183 at para 28.

[124] AGC JR Factum at para 114.

[125] Brodsky et al 2017 at p 4.

[126] Ruth Sullivan, Sullivan on the Construction of Statutes, 5th ed. (Markham: LexisNexis Canada, 2008) at pp 427-428 and 586.

[127] Canada has failed to point to any Parliamentary debate or any other source in support of this assertion.

than one legal recourse to address discrimination from government is a legislative choice: "[f]ar from gaming the system or forum shopping, [victims] who choose to file discrimination complaints relating to government services are availing themselves to an administrative recourse provided by Parliament."[128]

73. Just as the Tribunal's jurisdiction to hear a human rights complaint is not impacted by a complainant's ability to challenge a government service via the *Charter*, the potential for a civil class action in tort has no bearing on the Tribunal's remedial powers. While the *CHRA* allows for the dismissal of complaints that can or have been dealt with in another administrative process,[129] it does not bar the Tribunal from awarding compensation on the basis that another legal recourse may be available to victims. A perpetrator of discrimination should not escape liability under the *CHRA* because its conduct may, in some future proceeding, be found to be tortious or contrary to the *Charter*.

74. Furthermore, it would be unjust and wholly impractical to require every victim, particularly children, in a systemic case to file an individual complaint, as Canada suggests. The language of the *CHRA* supports the view that Parliament has given the Commission, and the Tribunal, broad authority to deal with systemic complaints. Whether a complaint involves one victim or multiple victims, the Tribunal, as master of its own procedure, has broad discretion regarding the conduct of its inquiries. Reinforcing this discretion, the Tribunal's *Rules* aim to ensure that all proceedings are conducted as informally and expeditiously as possible.[130]

75. Canada's proposition that victims of systemic discrimination must individually prove their harm to be compensated under the *CHRA* is particularly absurd in this case, as the vast majority of victims are children. It is reasonable, and necessary, for the Tribunal to compensate child victims of systemic discrimination in a manner that respects their best interests, avoids the risk of revictimization and accounts for the severe consequences that discrimination can have on child development. The Tribunal does not need a parade of thousands of children's stories of individual harm and trauma to compensate eligible victims, just as it does

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[128] A. Levesque, "Gaming the [Human Rights] System? A Critical Look at Discrimination Complaints Involving Government Services", (2020) 9:1 Can J Hum Rts 35 at 54-5.
[129] *CHRA*, s 41. See also for e.g.: *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at paras 83 and 91.
[130] *Canadian Human Rights Tribunal Rules of Procedure*, r 1(1).

not have to require the Complainants to retraumatize victims to recognize the pain and suffering those victims endured. Requiring individualized evidence as to the precise nature and extent of the harm suffered by each victim would have been an impossible task – i.e., not physically impossible but anathema to the intent underlying the *CHRA*.[131] Opting to compensate specific victims who had experienced the "worst case scenario" contemplated under the *CHRA* was a reasonable option available to the Tribunal.

iii. The law of damages in torts does not apply in this case

76. Principles of tort law must be applied in a human rights context with great caution. As emphasized by the Federal Court, human rights legislation is "so basic as to be near-constitutional" and is thus in "no way an extension of the law of tort".[132] While tort law principles can be helpful in assessing compensation for expenses incurred and wages lost due to discrimination under ss. 53(2)(c) and 53(2)(d) of the *CHRA*, these remedial categories were not engaged in this case. Thus, the cases cited by Canada related to recovery of expenses and wages under these sections[133] are of little or no relevance to the case at hand. Nothing in the statutory context or wording of the compensatory mandate under ss. 53(2)(e) and 53(3) of the *CHRA* suggests the Tribunal's awards to victims should be determined by reference to tort law principles.

77. Unlike tort damages, compensation under ss. 53(2)(e) and 53(3) is not a mathematical exercise based on actuarial calculations or quantifiable financial losses. It is a question of fact that fall squarely within the Tribunal's area of specialised knowledge. While awarding the same amount to a category of victims of discrimination may seem "puzzling or counterintuitive" from a tort law perspective, the Tribunal's approach is consistent with the approach taken in other Canadian statutory human rights cases discussed below and should be paid deference.[134]

78. Compensation for pain and suffering under the *CHRA* is designed to rectify the infringement of dignity recognized when an individual experiences

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[131] Aug 29, 2014 Caring Society Closing Submissions at para 513, **JER, Tab 91**; contrary to AGC JR Factum at paras 8, 883 and 88.
[132] *Canada v Morgan*, [1991] 2 FC 401 at para 16 (FCA) [emphasis added].
[133] See AGC JR Factum at para 91 (re s 53(2)(c) compensation) and 93 (re British Columbia's equivalent of s 53(2)(d)).
[134] *Vavilov* at para 93.

discrimination. As emphasized by the Court of Appeal for Ontario and the Federal Court of Appeal, human rights compensation "compensate[s] for the intrinsic value"[135] of the infringement and its "humiliating and degrading nature".[136] In other words, it is paid to recognize the experience of discrimination. This is an exercise of discretion grounded in the decision-maker's human rights expertise. The concept of compensation for human dignity is foreign to tort law, which has different objectives and is not meant to attack the social wrong of discrimination.

79. Canada contends that the compensation order is unreasonable because the compensation was awarded in the absence of proof of causation. This argument overlooks the language of the *CHRA*, the nature of the compensation award and the evidence. The compensation awarded in this case does not merely aim to compensate First Nations children for specific harm flowing from removal from their home, family and community and/or from denials, gaps or delays in the receipt of an essential service. Rather, it redresses the infringement of dignity they experienced as a result of receiving less **because** they are First Nations children. Likewise, compensation under s. 53(3) for wilful and reckless discrimination is intrinsically tied to promoting the *CHRA*'s objectives. It aims to deter, discourage and prevent discrimination. As explained in *Duverger v 2553-4330 Québec Inc. (Aéropro)*, the Tribunal has "broad discretion when assessing the special compensation necessary under s 53(3)" in keeping with "the objectives of deterrence, discouragement and prevention" and taking into consideration factors "that may differ based on the circumstances of each case". [137] For example, the Tribunal indicated that it may "consider the gravity and the nature of the act, which has traditionally been a preferred approach" as well as "the financial situation of the party required to pay special compensation".[138]

80. As Canada notes, the Federal Court in *Lebeau*[139] indicates adjudicators must be able to assess the extent and seriousness of a harm to determine appropriate compensation. However, three points are important in this respect. First, *Lebeau* endorsed a decision of a PLSRB adjudicator that did not require specific medical

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[135] *Doyle v Zochem Inc*, 2017 ONCA 130 at para 48.
[136] *Jane Doe v Canada (Attorney General)*, 2018 FCA 183 at para 28.
[137] *Duverger v 2553-4330 Québec Inc. (Aéropro)*, 2019 CHRT 18 at para 307.
[138] *Duverger v 2553-4330 Québec Inc. (Aéropro)*, 2019 CHRT 18 at para 307.
[139] *Lebeau v Canada (Attorney General)*, 2015 FC 133, cited in AG JR Factum at para 87.

evidence to support an award of compensation.[140] Second, the Tribunal quite appropriately held that it would have been unreasonable to require vulnerable children to testify about the harms done to them as a result of systemic racial discrimination.[141] Third, the Tribunal ruled that this was unnecessary due to the wealth of reliable evidence before it on the hearing on the merits – findings of fact that were unchallenged by Canada.

iv. The amounts awarded are consistent with awards in other cases

81. Administrative tribunals are not bound by their previous decisions in the same way that courts are, but *Vavilov* instructs reviewing courts to consider the general consistency of a decision with other decisions when evaluating its reasonableness.[142] In this case, the Tribunal's determination of the quantum of the compensation and the class of victims that are entitled to compensation are in keeping with the range that has been awarded other Tribunal decisions.[143] It is also reasonable when compared to the amount awarded to Dr. Blackstock as a remedy for Canada's retaliation in this case, which Canada did not judicially review.[144] Moreover, the quantum ordered in this case falls within the range of awards in provincial jurisdictions where there is no legislative cap on human rights compensation. Indeed, adult victims of discrimination have obtained similar or even

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[140] *Lebeau v Canada (Attorney General)*, 2015 FC 133 at para 29.
[141] This is in keeping with the Tribunal's powers under *CHRA* ss 50(3), (4) and (5).
[142] *Vavilov* at para 129.
[143] *Alizadeh-Ebadi v Manitoba Telecom Services Inc*, 2017 CHRT 36 ($20,000 (pain and suffering) and $20,000 (wilful and reckless discrimination) to an adult victim re workplace discrimination based on race, religion and ethnicity); *Kamalatisit v Sandy Lake First Nation*, 2019 CHRT 20 ($20,000 (pain and suffering), with interest from August 2012, to an adult victim re family status discrimination); *NA v 1416992 Ontario Ltd and LC*, 2018 CHRT 33 ($20,000 (pain and suffering) and $20,000 (wilful and reckless discrimination) to an adult woman, re sexual harassment while working at a trucking company for less than a year); *Doug McFee v Canadian Pacific Railway Company*, 2019 CHRT 28 ($15,000 (pain and suffering) and $15,000 (wilful and reckless discrimination) re termination of an adult employee due to disability); *Hicks v Human Resources and Skills Development Canada*, 2013 CHRT 20 ($15,000 (pain and suffering) and $20,000 (wilful and reckless discrimination) re family status discrimination due to forcing an employee to relocate cities despite his wife's care taking obligations towards her sick mother).
[144] 2015 CHRT 14. $20,000 (half of the maximum). Comparatively, compensating a "worst case scenario" involving a child at the maximum is reasonable.

greater compensation for their pain and suffering.[145]

82. Finally, it is noteworthy that in *Moore*, the Supreme Court[146] upheld compensation to parents for the cost a private tutor, private school tuition, and transportation to and from schools,[147] ***plus*** an award to the child victim of $10,000 to compensate for infringement of dignity.[148] The latter award was granted despite finding that the child had *not* suffered any serious consequences from the discrimination and that his demeanour and self-confidence at the hearing demonstrated that his story was one of "personal success".[149]

83. The Tribunal emphasized three particularly important factors in awarding individual compensation for the pain and suffering experienced by First Nations children due to Canada's discriminatory conduct. First, the victims are mostly children and young adults who are more likely to experience historical disadvantage and trauma.[150] Second, the harm was caused by a respondent who had fiduciary obligations to the victims.[151] Third, the discrimination caused harm and trauma that was characterised as a "worst case scenario" under the *CHRA*.[152]

84. In conclusion, the Tribunal's Orders are reasonable and justified in light of the legal and factual constraints at play. In *Vavilov*, the Supreme Court required reviewing courts to consider, amongst other things, the governing statutory scheme; relevant statutory law; the past practices and decisions of the administrative body; and potential impact of the decision on individuals to whom it applies as factors

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[145] *Escobar v WCL Capital Group Inc*, 2020 HRTO 388 ($50,000, re workplace sexual harassment by supervisor); *Fair v Hamilton-Wentworth School Board*, 2013 HRTO 440, aff'd 2014 ONSC 2411 and 2016 ONCA 421 ($30,000 re lack of workplace accommodation of disability); *Garrie v Janus Joan Inc*, 2014 HRTO 272 ($25,000 re underpayment due to disability); *Lambourn v 2471506 Ontario Inc*, 2020 HRTO 526 ($15,000 re constructive dismissal related to mental health illness); *Strudwick v Applied Consumer & Clinical Evaluations Inc*, 2016 ONCA 520 (the Court of Appeal increased an award for injury to dignity to $40,000 for an employee who was not accommodated and experienced workplace harassment).
[146] *Moore v British Columbia (Education)*, 2012 SCC 61 at para 70. However, the Court concluded that the order should apply only against the School District in light of it finding that the province was not liable for the discrimination.
[147] *Moore v BC (Education) et al*, 2005 BCHRT 580 [*Moore* BCHRT] at paras 971, 981 and 983.
[148] *Moore* BCHRT at para 990.
[149] *Moore* BCHRT at para 987.
[150] 2019 CHRT 39 at para 26
[151] 2019 CHRT 39 at para 178.
[152] 2019 CHRT 39 at para 13.

that constrain a decision maker in a particular case. All of these elements support the conclusion that the Tribunal's decision was reasonable.

2. The orders regarding compensation for wilful and reckless discrimination are reasonable

> *We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this.*[153]

85. The Tribunal's finding that Canada's conduct was wilful and reckless is reasonable. Canada commissioned, paid for and participated in multiple studies underscoring the adverse impacts experienced by First Nations children in child welfare and social services.[154] Canada had strong, reliable evidence in the years leading up to the Complaint (and thereafter) that the inherent discrimination built into the FNCFS Program, and the woefully inadequate implementation of Jordan's Principle, was harming First Nations children and their families. Canada's internal documents demonstrated the service disparities and negative impacts. Canada measured and tracked the inequality experienced by First Nations children.[155]

86. Based on the totality of this evidence, including the robust and detailed accounts of the discrimination (much of it produced, collected and analyzed by Canada) the Tribunal determined that Canada knew that its FNCFS Program was harming First Nations children and that its failure to implement Jordan's Principle was adversely impacting children in need of supports, products and services. With respect to the FNCFS Program, Canada knew that its funding formula created incentives to remove children by dramatically underfunding prevention services.[156] Canada chose not to take corrective action, and instead replicated this problem in

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[153] Statement of Apology to former students of Indian Residential Schools, CBD Vol 3 at Tab 10, **JER, Tab 108**.
[154] Merits Decision at paras 150-154. See also Merits Decision, at paras 155-185.
[155] Merits Decision at paras 258, 262, 265-268, 270-271, 273-275, 365-373, 458 and 481. Indeed, Indigenous Services Canada's Chief Financial Officer testified in the compliance process that "the Department was fundamentally aware for a long time of the chronic underfunding and has put forward, over the years, needs for supplemental funding. I think that what has come forward through the Tribunal has been an assistance in demonstrating the needs that the Department, over the years, has already worked out and identified", see: May 15, 2019 cross-examination of P. Thoppil at p 156 line 25 to p 157 line 6, **JER, Tab 346.11**.
[156] Merits Decision at paras. 168, 385, 386, 458 and 461.

its new formula, causing more children to experience harm.[157] The Tribunal was understandably disturbed that Canada had solutions to put an end to these adverse impacts but did not do so.[158]

87. Canada's choice to continue its discrimination despite knowing of the harm being caused to First Nations children is aggravated by another factor: decisions that impact children should be based on an assessment of their best interests.[159] This principle recognizes the inherent vulnerability of children, their differing stages of growth and development, and provides decision-makers with a perspective through which to act on their behalf.[160] The "best interests of the child" is the paramount consideration in the new federal child welfare legislation, provincial /territorial child welfare laws and the UN *Convention on the Rights of the Child*.[161] On top of this, First Nations children continue to struggle with the legacy of colonial practices like residential schools, which "has negatively affected generations of families, leading to an increased need for services and supports in those communities."[162]

88. Considering the overwhelming evidence before the Tribunal, and the context noted above, the Compensation Entitlement Order is both logical and rational. Given the Merits Decision's unchallenged factual findings, Canada's conduct is clearly wilful and reckless, such that it would have been unreasonable for the Tribunal not to make remedial compensation orders under s. 53(3) of the *CHRA.*

89. The Compensation Entitlement Order accords with precedent, notably

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[157] Merits Decision at para 198, 2019 CHRT 39 at paras 235-238. The Auditor General of Canada warned in 2008 and again in 2011 that Canada's funding formulae were flawed and inequitable, and yet Canada continued rolling out its approaches without modifications to address these concerns, see: CBD Vol 3 at Tab 11 (2008 Auditor General Report), **JER, Tab 108** and CBD Vol 5 at Tab 53 (2011 Auditor General Report), **JER, Tab 110**.

[158] Merits Decision at paras 305 and 461.

[159] *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 at para 46.

[160] *Canadian Foundation of Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at paras 56 and 58; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para. 81; *AB v Bragg Communications Inc*, 2012 SCC 46 at para 17.

[161] *An Act respecting First Nation, Inuit and Métis children, youth and families*, SC 2019, c 24. See for example: *Child, Youth and Family Services Act, 2017*, SO 2017 c 14; *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12; *Children and Family Services Act*, SNS 1990, c 5; *Convention on the Rights of the Child, 1989*, 3 U.N.T.S. 1577, GA Res. 44/25. See also: s 718.2(a) of the *Criminal Code*, which notes impacts on child victims as an aggravating circumstance.

[162] AGC JR Factum at para 19.

Johnstone v Canada Border Service Agency[163], in which the Tribunal ordered the CBSA to pay the maximum award under the *CHRA* based on its wilful and reckless conduct. The Tribunal found that the CBSA knew that its conduct gave rise to a discriminatory impact because it had apologized for similar conduct in the past and had done little to remedy it. Both the Federal Court and the Federal Court of Appeal endorsed the Tribunal's approach. The Federal Court noted:

> In making an order for special compensation under subsection 53(3) of the *Act*, the Tribunal must establish the person is engaging or has engaged in discriminatory practice wilfully and recklessly. This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the *Act* is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.[164]

3. The orders for compensation for removed children are reasonable

i. Removed children experienced pain and suffering

90. In this judicial review, Canada is attempting to erase and sanitize the impacts of its discriminatory conduct. This is shameful. Canada claims that "references to individual children or families are almost entirely absent from Tribunal decisions from the *Merits Decision* forward".[165] This statement is untrue. Contrary to Canada's claim that the Complaint "evolved" during the hearing,[166] it has always been about children. While this Complaint is indeed systemic in nature, the Tribunal was presented with irrefutable evidence of the harms experienced by individuals as a result of Canada's discrimination, underpinning the factual finding that "there is absolutely no doubt that the removal of children from their families and communities is traumatic and causes great pain and suffering to them".[167]

91. The Tribunal's finding on the harm caused to children and their families by removals were also informed by the special place children hold in First Nations

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[163] *Johnstone v Canada Border Service Agency*, 2010 CHRT 20.
[164] (*Canada (Attorney General) v Johnstone*, 2013 FC 113 at para. 155, var'd on other grounds, 2014 FCA 110. See also *Hicks v Human Resources and Skills Canada*, 2013 CHRT 20 at paras 105-106, affirmed 2015 FC 599. A respondent may be intentionally or recklessly discriminatory in its conduct. This is a disjunctive requirement; both need not be present for an award under s. 53(3).
[165] AGC JR Factum at para 59
[166] AGC JR Factum at para 65.
[167] 2019 CHRT 39 at para 169.

culture. Quoting the Royal Commission on Aboriginal Peoples in Canada, the Tribunal emphasized that:

> Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations.[168]

92. The Tribunal's factual finding regarding the harm caused by removals is further buttressed by the legislative objectives of child welfare laws and best practices in social work. As noted by the Tribunal, "experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging, in and of itself […]. The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart".[169] Likewise, every child welfare law in Canada recognizes the integrity of the family and harm caused by separating children from their parents and caregivers: the removal of a child is the last resort when seeking to keep them safe. In *Winnipeg Child and Family Services*, the Supreme Court explained:

> The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child. Parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit. Indeed, no one would dispute the fact that the task of raising a child can be difficult, especially when parents experience the types of personal, social and economic problems faced by the appellant in this case.[170]

93. Based on the robust evidentiary record, the Tribunal concluded that "[r]emoving children from their homes, families, communities and Nations destroys the Nations' social fabric leading to immense consequences, it is the opposite of building Nations. That is trauma and harm to the highest degree causing pain and suffering".[171] The Tribunal also noted in its Compensation Entitlement Order, citing numerous previous unchallenged findings it had made, that discrimination against children and young adults is particularly harmful because it perpetuates historical

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[168] 2019 CHRT 39 paras 1-2.
[169] 2019 CHRT 39 at para 168.
[170] *Winnipeg Child and Family Services v KLW*, 2000 SCC 48 at para 72 [emphasis added]. See also *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at paras 61, 76-77.
[171] 2019 CHRT 39 at para 160.

disadvantage and trauma.[172] In its factum, Canada "accepts the finding that discriminatory underfunding led to a higher proportion of children being removed from their homes on reserve."[173] At the April 2019 compensation hearing before the Tribunal, Canada went further, stating that "[t]here is no issue that underfunding caused harm because the [T]ribunal would not have found discrimination if underfunding had had no consequence."[174]

ii. The finding of ongoing discrimination is reasonable and fair

94. Canada's astonishing assertion that it was unreasonable for the Tribunal to conclude that discrimination within the FNCFS Program is ongoing ignores the Tribunal's unchallenged Merits Decision and February 2018 Non-Compliance Order. In addition, it is an argument that ought to have been made during the development and ultimate approval of the Compensation Framework.

95. In the Merits Decision, the Tribunal expressly recognized that the discrimination at issue was ongoing:

> […] the Panel wants to ensure that any additional orders it makes are appropriate and fair, both in the short and long-term. Throughout these proceedings, the Panel reserved the right to ask clarification questions of the parties while it reviewed the evidence. While a discriminatory practice has occurred and is ongoing, the Panel is left with outstanding questions about how best to remedy that discrimination [emphasis added].[175]

96. Since 2016, the Tribunal has consistently determined, including in multiple orders registered with the Federal Court, that the discrimination in the FNCFS Program is ongoing.[176] For instance, in its September 2016 Order, the Tribunal clearly stated "more progress still needs to be made in the immediate and long-term to ensure the discrimination identified in the *Decision* is remedied."[177] In its February 2018 Order, the Tribunal made the following significant findings, none of

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[172] 2019 CHRT 39 at paras 155, 160, 176 and 239.
[173] AGC JR Factum at para 89.
[174] Apr 26, 2019 hearing transcript at p 177, lines 8-11 and p 179, lines 10-12: "I stress that to say this is not to deny that underfunding caused harm", **JER, Tab 105.4**.
[175] Merits Decision at para 483. Indeed, the Caring Society has taken the position since the outset of the Complaint that discrimination in the FNCFS Program is ongoing, see: Complaint Form at p 3, **JER, Tab 4**.
[176] 2016 CHRT 10 at paras 21-22; 2016 CHRT 16 at paras 7-13; 2018 CHRT 4 at paras 40-68.
[177] 2016 CHRT 16 at para 8.

which were challenged on judicial review:

> Para 15: [i]t is also incorrect for Canada to say it did everything that it could do and everything that what was asked of it in the immediate term, which has now become mid-term. [emphasis in original];
>
> Para 119: The Panel finds that the **current manner** in which prevention funds are distributed while unlimited funds are allocated to keep children in care **is harming** children, families, communities and Nations in Canada [emphasis added];
>
> Para 121: This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under **policy**. While the necessity to **account for public funds is certainly legitimate** it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it. There is a need to **shift this right now** to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders [bold in original; underline added]

97. In the face of such clear language, Canada cannot credibly suggest it was unaware of the ongoing nature of its discrimination.[178] The registration of multiple Tribunal orders with the Court reinforces that they are binding on Canada and cannot be disregarded. As the Federal Court of Appeal has held, Court-registered orders under s. 57 of the *CHRA* "deserve respect and consequently the support of the contempt power".[179]

98. In any event, the Tribunal gave Canada a clear avenue in the Compensation Entitlement Order to resolve the end-date of eligibility for compensation respecting the FNCFS Program. The Tribunal was open to finding "that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased"[180] if the evidence supported same. Canada had nearly 18 months between the Compensation Entitlement Order and the final Compensation Framework Order in which to return to the Tribunal to clarify the end date. Indeed, the parties returned to the Tribunal

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[178] Indeed, ongoing discrimination was a live issue, as the Caring Society took the position in its April 3, 2019 written submissions on compensation (at paras 22-24) that discrimination was ongoing within the FNCFS Program, **JER, Tab 273**.
[179] *Canada (Human Rights Commission) v Warman*, 2011 FCA 297 at para 43, quoting *United Nurses of Alberta v Alberta*,1992 CanLII 99 (SCC), at para 69.
[180] 2019 CHRT 39 at paras 245, 248, 249 and 254.

on four separate occasions with further submissions to clarify points in issue (including the beginning of the eligibility period for compensation).

99. Canada makes the specious claim it was denied procedural fairness,[181] notably, as to the ongoing nature of its discriminatory conduct. To the contrary, at every step of the process, the Tribunal went to tremendous effort to ensure the process was fair to Canada, and to the other parties. Canada has had ample notice of the case against it, and ample opportunity to respond to points that arose in the compliance and remedial phases of the process.[182] There is nothing procedurally "egregious", to quote Canada,[183] about finding discriminatory conduct to be ongoing when that was in play from the outset of the Complaint in 2007.

4. The Tribunal's Orders regarding compensation for Canada's discriminatory failure to implement Jordan's Principle are reasonable

100. Canada's main argument in contesting the Jordan's Principle compensation order rests on the erroneous claim that the Tribunal "shifted the goal posts" in its definition of Jordan's Principle. It argues that the Tribunal "effectively created new government policy and then proceeded to award compensation for a failure to implement the policy."[184] This is untrue. Canada refused to comply with the Tribunal's initial order regarding Jordan's Principle, adopting myopic and discriminatory definitions and approaches that it knew fell short of full implementation.[185] As a result, the parties were forced to bring motions before the Tribunal to compel compliance with the *CHRA*. The fact that the Tribunal needed to make more specific orders due to Canada's repeated failures to apply the full meaning and scope of Jordan's Principle was not a creation of new policy and is

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[181] AGC JR Factum at paras 137-143.
[182] See for e.g. Feb 18, 2016 Direction from the Tribunal extending timelines for submissions re immediate relief, **JER, Tab 132.1**; Feb 27, 2019 Letter from the Tribunal regarding further evidence by AGC with respect to the Panel's retention of jurisdiction, **JER, Tab 346.1**. Indeed, the evidence Canada refers to in support of its belief it had ceased its discrimination was filed pursuant to its efforts to end the Tribunal's retention of jurisdiction, and not in relation to compensation. Canada made no reference to the affidavits cited at AGC JR Factum paras 34 and 140 in its April 16, 2019 written submissions re compensation, **JER, Tab 281**.
[183] AGC JR Factum at para 138.
[184] AGC JR Factum at para 110.
[185] 2017 CHRT 14 para 50-53. Indeed, Canada's briefing note on the option selected noted that "[m]aintaining the notion of comparability to provincial resources may not address the criticism of the Tribunal regarding the need to ensure substantive equality in the provision of services" (at para 50).

not a proper basis to curtail the rights of victims to compensation.

101. Canada aggressively resisted the substantiation of the Complaint at the hearing on the merits and fought each non-compliance motion, but did not judicially review them. It now boasts about how the implementation of these orders creates welcome and impressive outcomes for children. [186] It cannot use this judicial review as an opportunity to attack the factual findings in orders made years ago, which it chose not to challenge, and for which it seeks to take credit.

i. The Tribunal reasonably concluded that Jordan's Principle forms part of the complaint

102. Based on formalist arguments regarding the Complaint and the Statements of Particulars filed before the Tribunal, Canada argues that Jordan's Principle did not form part of the Complaint.[187] The Complaint and the Statements of Particulars clearly address Jordan's Principle, such that compensation was open to the Tribunal in the event discrimination was found. This Court ought to defer to the Tribunal's treatment of those foundational documents, as they are intrinsically linked to the administration of the Complaint, which falls within the scope of the authority delegated to the Tribunal by Parliament.

103. In its Merits Decision, the Tribunal specifically addressed Canada's argument that Jordan's Principle was "beyond the scope of this Complaint",[188] holding, based on Canada's own internal evaluations, that Jordan's Principle was intertwined with the FNCFS Program.[189] The Tribunal also found clear deficiencies in Canada's approach to implementing Jordan's Principle,[190] and ordered Canada "to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement" its full meaning and scope.[191] These findings were not challenged by Canada.

104. In the 16 months from January 2016 to May 2017, the Tribunal made four increasingly specific orders with respect to Canada's implementation of Jordan's Principle. The Tribunal ordered Canada to take immediate steps to implement

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[186] AGC JR Factum at paras 112-113.
[187] AGC JR Factum at paras 112 and 114.
[188] Merits Decision at para 361.
[189] Merits Decision at paras 362-375.
[190] Merits Decision at paras 379-382.
[191] Merits Decision at para 481.

Jordan's Principle and report back,[192] and to apply Jordan's Principle to First Nations children living on- and off-reserve.[193] After Canada failed to comply, the Tribunal ordered specific parameters for Canada's definition and implementation of Jordan's Principle.[194] Canada accepted these orders and filed only one judicial review on a narrow issue,[195] which was discontinued after the Tribunal modified its orders on consent.[196] Canada's March 2017 submissions regarding the Jordan's Principle non-compliance motion showed Canada's acceptance of the Tribunal's orders, and thus its acceptance that Jordan's Principle was part of the Complaint.[197]

105. On this judicial review, Canada claims the Tribunal's orders were "accepted by Canada because [the orders] reflected progressive policy choices that Canada could implement to benefit children."[198] Having accepted the 2016 and 2017 binding orders, Canada cannot now argue those orders were unreasonable so as to deny compensation to the children and families who were harmed by Canada's discriminatory conduct.[199]

ii. First Nations children experienced pain and suffering related to Jordan's Principle discrimination

106. As previously discussed,[200] there is ample evidence supporting the Tribunal's findings concerning the pain and suffering experienced by First Nations children from Canada's discriminatory failure to implement Jordan's Principle. The Tribunal found that First Nations children who are not able to access essential services experience adverse impacts on their health and safety.[201] It also held that "some children and families have also experienced serious mental and physical pain as a result of delays in services"[202] and that Canada's non-compliance with the

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[192] 2016 CHRT 10 at paras 32-34; 2016 CHRT 16 at para 160(B)(1)(i).
[193] 2016 CHRT 16 at para 160(A)(7).
[194] 2017 CHRT 14 at para 135.
[195] AGC v FNCFCSC et al, T-918-17.
[196] 2017 CHRT 35.
[197] AGC's Mar 14, 2017 Written Submissions re Immediate Relief at paras 40-54, **JER, Tab 197**.
[198] AGC JR Factum at para 112. It should be noted that Canada did not implement these "progressive policy choices" to benefit children under Jordan's Principle until forced to do so by legal orders.
[199] AGC JR Factum at para 113.
[200] See above at paras 98-107.
[201] 2020 CHRT 15 at para 147.
[202] 2019 CHRT 39 at para 226.

Merits Decision was linked to the deaths of two girls and one youth.[203] It provided reasonably defined and internally coherent eligibility parameters for compensation for Canada's failure to implement Jordan's Principle.

107. Canada charges the Tribunal with "making a compensation award to a broad and essentially indeterminate class of victims without evidence of individual harm."[204] However, this submission discounts the important function of the Compensation Framework, ignores the breadth of Canada's discrimination, and takes a narrow a view of the "harm" compensable under s. 53(2)(e) of the *CHRA*.

108. The Compensation Entitlement Order must be read in tandem with the Compensation Process Order and the Compensation Framework, along with the Tribunal's rulings made while the Compensation Framework was being negotiated. The Tribunal set out categories of eligibility in the Compensation Entitlement Order. The parties were afforded the opportunity to define those categories, either by agreement,[205] or by presenting alternative definitions (along with submissions) which the Tribunal ruled on,[206] The Compensation Framework, and the related Tribunal rulings on compensation, provide the parties with a guide to identifying and compensating the victims of Canada's discrimination.

109. Faced with widespread discrimination, it was open to the Tribunal to take a purposive approach in implementing its remedial mandate. Contrary to Canada's assertion, the Tribunal did not improperly delegate its adjudicative role to the parties.[207] The remedy selected by the Tribunal was in keeping with the human rights context, in which collaboration regarding remedies is encouraged to ensure their effectiveness.[208] Given this Panel's expertise and familiarity with the nature

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[203] 2017 CHRT 7, para 8-10. See also para 5 of the Jan 17, 2017 Affidavit of Dr M. Kirlew, **JER Tab 176**.
[204] AGC JR Factum at para 114.
[205] See e.g. the treatment of the types of placements eligible as compensable removals in section 4.2.1(a) of the Compensation Framework.
[206] See for example: Canada's, the Caring Society's and the AFN's submissions regarding deceased claimants and the age of majority (**JER, Tabs 294, 295, 298 and 304**) and the Tribunal's subsequent ruling (2020 CHRT 7).
[207] AGC JR Factum at para 126.
[208] See, e.g., *Hughes* at para 74, in which the Tribunal's remedial order was modelled on "the collaboration and cooperation of the parties". Despite not taking issue with the Tribunal's remedial approach at the outset of its factum (paras 25-26), Canada later characterizes the Tribunal's remedial approach as "egregious". With respect, this Court should not countenance Canada's attempt to impugn matters that are not before it on this judicial review.

and breadth of Canada's discrimination, this Court should show deference to the measures it selected to make its orders effective.

iii. Definition of Essential Services

110. Having determined that compensation would address the "worst case scenario" of discrimination, the Tribunal limited Jordan's Principle compensation to situations where "essential services" were at stake. This is logical, since essential services are those having the greatest impact on the lives of children.

111. The Tribunal's definition of an "essential service" is tailored to address the circumstances in which the discrimination arose and in particular Canada's systemic disregard of First Nations children's service needs. The definition captures two fundamental concepts: (a) it ensures substantive equality for First Nations children seeking social services, which, until well after the Merits Decision, did not exist, and (b) it speaks to "essential" nature of the service, without which the child will suffer "real harm".[209]

112. The definition selected by the Tribunal focused on situations "that widened the gap between First Nations children and the rest of Canadian society".[210] Far from creating a situation in which "a victim does not need to prove harm to receive compensation for pain and suffering",[211] the Tribunal recognized that "the disruption of services offered to a vulnerable group of peoples, in this case First Nations children and families, amounts to a breach of their dignity".[212] This finding is rooted in the *CHRA*'s purpose,[213] its own findings in rulings Canada did not judicially review,[214] Supreme Court of Canada jurisprudence,[215] and international human rights law.[216] Thus, the harm Canada says must be proven arises from victims' vulnerable status as First Nations children, their particular need for essential services and the breach of their dignity in denying those services.

113. The Tribunal's definition is not a "wholesale rejection of any reasonable

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[209] 2020 CHRT 15 at para. 148
[210] 2020 CHRT 15 at para 147.
[211] AGC JR Factum at para 119.
[212] 2019 CHRT 39 at para 221.
[213] 2019 CHRT 39 at para 216.
[214] 2019 CHRT 39 at paras 222-224.
[215] 2019 CHRT 39 at para 218.
[216] 2019 CHRT 39 at para 217.

limits on compensation."[217] To the contrary, the Tribunal found that "not all supports, products and services as currently approved by Canada" are reasonably "essential".[218] To that end, the Caring Society generated a very specific list of services that would potentially engage a right to compensation.[219] The listed services are consistent with what the Minister of Indigenous Services is required to provide pursuant to s. 6(2) of the *Department of Indigenous Services Canada Act*.[220]

114. Canada criticizes the Tribunal's definition for failing to require evidence of "individual harm". This submission is based in the erroneous view that harm to a victim's safety or security is required to constitute "pain and suffering" compensable under the *CHRA*.[221] "Pain and suffering" within the meaning of statutory human rights schemes is not so narrow; relating as it does to the victim's dignity. As the Federal Court of Appeal has recognized, "the purposes of non-pecuniary damages include providing a remedy to vindicate a claimant's dignity and personal autonomy and to recognize the humiliating and degrading nature of discriminatory practices."[222] Harm is not necessarily physical.

115. Canada also fails to acknowledge the Tribunal's definitional limits designed "accord with a reasonable interpretation of what is "essential"".[223] Under the Compensation Framework, as agreed to by Canada, the professionally recommended service, product and/or support must be reasonably necessary to ensure the best interests and safety of the child as well as substantive equality.[224] A child denied or delayed in receiving such an "essential service", the Tribunal quite reasonably found, experiences real harm compensable under the *CHRA*.[225]

iv. Definition of a Service Gap

116. Canada takes issue with whether a service request must have been made on behalf of a First Nations child to Canada for them to have experienced compensable discrimination. Canada fails to appreciate the nature and breadth of its discrimination and mischaracterizes the Tribunal's remedy. Indeed, the Tribunal's

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[217] AGC JR Factum at para 120.
[218] 2020 CHRT 15 at para 148.
[219] Apr 30, 2020 Caring Society Written Submissions at Annex B, **JER, Tab 315**.
[220] SC 2019, c 29, s 336, s. 6(2).
[221] AGC JR Factum at para 119.
[222] *Jane Doe v Canada (Attorney General)*, 2018 FCA 183 at para 28.
[223] 2020 CHRT 15 at para 151.
[224] Compensation Framework, s. 4.2.2.1.
[225] 2020 CHRT 15 at para 148.

definition provides that the First Nations child's need must have been "confirmed" and the service requested must have been "recommended by a professional".[226]

117. The Tribunal further agreed that an objective confirmation of a service need was required for compensation. However, due to the nature of Canada's discrimination, Canada's knowledge of the specific individual service need was not a prerequisite. Indeed, as Ms. Baggley explained, Canada did not provide its public servants with a mandate to publicize Jordan's Principle and it was not possible for families to make an application for services pursuant to Jordan's Principle.[227] If Canada's officials were unaware of unmet needs resulting from service gaps, it is due to Canada's discrimination. Victims cannot be faulted for not knowing it was possible to make a request of the federal government when that same government left Jordan's Principle shrouded in secrecy with no publicized procedures to submit such requests.

118. Furthermore, in its Merits Decision, the Tribunal concluded that Canada's implementation of Jordan's Principle "result[ed] in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need."[228] This conclusion was based on Canada's own evaluations of its programs, which noted the existence of service gaps and recommended better coordination to support First Nations children.[229] The Tribunal reiterated this concern in its February 2018 order regarding mental health services in Ontario, holding that Canada's lack of knowledge regarding service needs of First Nations children resulted from its own failure to coordinate its programs.[230] Canada cannot shift blame for unmet needs onto families who did not make a formal request for services when the federal government itself was wilfully blind to the state of those needs.

119. In any event, the record indicates that even if thousands of families had made requests when faced with service gaps, those requests would have been denied. At

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[226] 2020 CHRT 15 at paras 106 and 117.
[227] Apr 30, 2014 examination-in-chief of C. Baggley at p 128 lines 13-23, **JER, Tab 82** and May 1, 2014 cross-examination of C. Baggley at p 32, lines 8-14, **JER, Tab 83**. See also 2020 CHRT 15 at paras 84-86.
[228] Merits Decision at para 381.
[229] Merits Decision at paras 368-376.
[230] 2018 CHRT 4 at paras 295-296.

the hearing on the merits, Canada's official position was that there were zero Jordan's Principle cases. Prior to January 26, 2016, all disputes within the federal government were excluded, as were all those related to service needs unrelated to multiple disabilities. From January 26, 2016 to May 26, 2017, children were required to have a disability or a short-term critical need related to health, educational or social services. First Nations children falling outside of these categories were denied, meaning that whether or not a request was made for such children was irrelevant.[231]

v. Definition of Unreasonable Delay

120. In a nuanced manner, the Tribunal dealt with the question of assessing whether service delays were "unreasonable", so as to constitute a compensable "worst-case scenario" of discrimination. Canada states that "[t]he notion that maximum compensation is appropriate for *any* default or delay is manifestly unreasonable".[232] However, the Tribunal's framework does not provide for compensation for any delay, it provides for compensation for unreasonable delay. Specifically, responses to service requests provided within the time thresholds set in the Tribunal's May 2017 Order are reasonable and would not lead to compensation. The Tribunal also recognized that situations falling outside of the mandated standards are not necessarily unreasonable, and as such only established a rebuttable presumption of unreasonable delay.[233]

121. Canada's argument regarding the unreasonableness of the Tribunal's definition of unreasonable delay boils down to the Tribunal placing the onus on Canada for resolving any uncertainty regarding the import of a delay.[234]

122. In considering the evidentiary markers selected by the Tribunal, "unreasonable delays" must be distinguished from "denials" and "service gaps". Unlike victims in the two latter groups, children subject to "unreasonable delays" ultimately received a service. It is reasonable to presume that, for these children, Canada had sufficient information to show there was a service need to be met.

123. Canada once again fails to place the compensation orders in context. As the Tribunal held in its Merits Decision and in its May 2017 Order, Canada's

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[231] 2017 CHRT 14 at paras 75-81
[232] AGC JR Factum at para 124.
[233] 2020 CHRT 15 at para 171.
[234] AGC JR Factum at para 122.

implementation of Jordan's Principle relied on service delays as the starting point.[235] There is nothing unreasonable about presuming delay in a system with no built-in requirement of immediate action, and which was only modified to require immediate action after *four* unchallenged Tribunal compliance orders.[236]

124. Moreover, even when victims were subject to "built in" delays due to Canada's inadequate implementation of Jordan's Principle prior to the 2017 non-compliance orders, the Tribunal's approach does not make compensation automatic. It remains open to Canada to show that the resulting pain and suffering was not a "worst case scenario" under the *CHRA*. It is reasonable for Canada to bear this onus, as it controlled the system that led to these delays.

125. Canada is best placed to explain the reasonableness of delay where it exceeded the Tribunal-mandated timelines, with reference to the five factors listed at section 4.2.4 of the Compensation Framework. Before the Tribunal, Canada provided the example of a child waiting to receive a laptop, but nonetheless receiving that laptop before the school year begins.[237] Before this Court, Canada's example is of a First Nations child waiting six weeks for a federal insurance adjudicator's predetermination with respect to dental services.[238] In both cases, the order provides Canada with a full opportunity to rebut the unreasonable delay presumption based on the child's particular circumstances.[239]

vi. Conclusion re: Jordan's Principle compensation

126. Canada's discriminatory implementation of Jordan's Principle had serious consequences, affecting thousands of First Nations children with a variety of service needs. The extent of the unmet need can be seen in the staggering scale of approvals following Canada's improved compliance starting in November 2017. As acknowledged by the Senior Assistant Deputy Minister responsible for Jordan's

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[235] Merits Decision at para 379 and 2017 CHRT 14 at paras 5 and 92.
[236] Merits Decision, 2016 CHRT 10, 2016 CHRT 16 and 2017 CHRT 14.
[237] 2020 CHRT 15 at para 148.
[238] AGC JR Factum at para 123.
[239] With respect to the "laptop example", the lack of a potential for delay to adversely impact the child's needs would be significant, given that the laptop was received in time for the school year (see Compensation Framework at s. 4.2.4(c), **JER, Tab 345**). In the dental services example, the potential for delay to adversely impact the child and the applicable normative standards, which are both factors Canada cites in describing this example, would also be considered (see Compensation Framework at s. 4.2.4(c) and (e), **JER, Tab 345**).

Principle, these approvals reflect needs that were previously unmet.[240] The Tribunal restricted compensation for this discrimination to "worst case scenarios", which involved needs for essential services. In so doing, the Tribunal emphasized contextual factors over categorical approaches. This was reasonable in light of the broad nature of the discrimination and was open to the Tribunal as a means of ensuring that its orders were effective.

5. The orders regarding compensation to parents (or caregiving grandparents) were reasonable

127. The Caring Society adopts the submissions of the AFN regarding the harm experienced by care giving parents and grandparents as a result of Canada's discriminatory conduct.

6. The Estates Order and the Trust Order are Reasonable

128. Canada is not challenging the Estates Order or the Trust Order. Instead, Canada attempts to cast aspersions on the Tribunal's analysis and invites this Court to infer that the Tribunal's other rulings under review should be set aside. This approach reflects Canada's attempts to score political points while seeking to undermine the parties' work on these important issues. Canada's drive-by attack of orders that are not being challenged should not be tolerated.

129. Should the Court find it necessary to address them, the Estates Order and the Trust Order are reasonable and anchored in sound legal principles. The Tribunal grounded its analysis in the evidence and the broad and purposive parameters of the *CHRA*, examining and interpreting the remedial nature of the legislation. The line of analysis followed by the Tribunal in relation to both orders is clear and demonstrates a reasonable basis for its conclusions.

130. Canada argued against compensating the estates of victims who died before compensation was payable – something that would have amounted to a financial windfall for Canada. However, the Tribunal's reasoning is not, as suggested by Canada, opaque. Instead, the Tribunal undertook a transparent analysis using a purposive and contextual approach, distinguishing *Canada (Attorney General) v. Hislop*[241] on a number of reasonable grounds. The Tribunal reviewed both the wording of the *CHRA* (which does not bar claims from estates), as well as the

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[240] Oct 31, 2018 cross-examination of V. Gideon at p 193, lines 15-25, **JER, Tab 220**.

[241] *Canada (Attorney General) v Hislop*, 2007 SCC 10.

relevant human rights jurisprudence, which clearly supports the payment of compensation to the estates of deceased victims. The Panel relied on the 2001 Tribunal's ruling in *Stevenson v. Canadian National Railway Company*[242] as well as the persuasive reasoning found in *Clark v Toshack Brothers (Prescott) Ltd.* and *Barber v. Sears Inc. (No. 2).*[243]

131. Second, the Tribunal closely examined *Hislop*'s specific reasoning through a human rights jurisprudential lens. The *Charter* analysis in *Hislop* was made in the context of deceased survivors whose estates sought to pursue equality claims related to remedial legislation passed after the death of the claimants at issue. The Tribunal cited the Supreme Court's reasoning on this point, as well as the Manitoba Court of Appeal's ruling in *Grant v. Winnipeg Regional Health Authority.*, which made clear that the remarks in *Hislop* were tailored to the context of the claims in that case.[244]

132. With respect to the Trusts Order, the Tribunal made no legal error in rejecting Canada's arguments that would render its decision unreasonable. The provisions under the *Indian Act*, and other statutory mechanisms available to manage funds on behalf of minors and those who lack legal capacity, are not mandatory. These legislative provisions essentially fill a gap where individuals without legal capacity benefit from the receipt of property without a mechanism of distribution. As noted by the Tribunal, nothing in the *Indian Act* ousts the ability of an individual to benefit from a trust and have their property managed by a trustee.[245] Moreover, the suggestion the Tribunal was somehow obliged to follow permissive provisions in the *Indian Act* is plainly incorrect as a matter of law.

7. Conclusion

133. The Compensation Entitlement Order is both logical and rational. The Tribunal's determination of the appropriate quantum and category of victims entitled to compensation is the logical consequence of its multiple findings that

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[242] 2020 CHRT 7 at para. 110
[243] 2020 CHRT 7 at paras 112-116, relying on *Clark v Toshack Brothers (Prescott) Ltd.* 2003 HRTO 27 and *Barber v Sears Inc. (No 2)*, (1993) 22 CHRR D/409 (Ont Bd Inq).
[244] 2020 CHRT 7 at paras 120-124, relying on *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44 at para. 66
[245] 2021 CHRT 6 at para 32. In any event, Parliament repealed s 67 of the *CHRA* in 2008, which stated "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." Section 67 of the *CHRA* having been repealed, there is no reason for any default administrative provisions in the *Indian Act* to limit the scope of remedies under the *CHRA*.

Canada knew its discriminatory conduct was causing harm to First Nations children and their caregiving parents or grandparents and did not implement solutions to fix it. The Tribunal repeated these factual findings in ten subsequent unchallenged decisions over the past five years. In fact, numerous government representatives have repeatedly stated publicly that they agree with the Tribunal's findings. Even in this judicial review, Canada does not contest the undeniable fact that its wilful and reckless discrimination has harmed First Nations children and their families and that that harm has included being linked to the deaths of some children.

134. There was ample evidence before the Tribunal supporting the determination that these victims are entitled to compensation for having experienced pain and suffering as a result of Canada's discriminatory conduct and that Canada had breached the *CHRA* in a wilful or reckless way. In its reasons, the Tribunal underscored that its Compensation Entitlement Order was based on its "numerous findings since the hearing on the merits contained in 10 rulings". These findings, it emphasized, were based on its "thorough review of thousands of pages of evidence including testimony transcripts and reports."[246]

C. The Jordan's Principle Eligibility Order was reasonable

135. On this judicial review, Canada seeks to impose its colonial *Indian Act* in order to limit the number of First Nations children living off-reserve who are eligible to receive assistance under Jordan's Principle and the *CHRA*. The reductive approach Canada advances is contrary to the jurisprudence, including from this Court, recognizing the historic disadvantage suffered by First Nations persons regardless of *Indian Act* status, the absurd results that can flow from imposing colonial definitions of identity, and the *sui generis* nature of the Crown's relationships with First Nations peoples. Canada's approach also disregards the fact that distinctions flowing from the *Indian Act* are no longer immune to review under the *CHRA*, as s. 67 of the *CHRA* was repealed in June 2008.[247]

1. Jordan's Principle is not limited to children with Indian Act status

136. The Tribunal reasonably concluded that for the purposes of Jordan's Principle, 'all First Nations children' does not just mean 'children with status under the *Indian Act*'. By holding that Canada cannot categorically exclude First Nations

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[246] 2019 CHRT 39 at para 15.

[247] *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30. Indeed, even when this complaint was filed, prior to s. 67's repeal, Canada did not seek to immunize its conduct from review on the strength of the *Indian Act*.

children who are 'recognized by their Nation for the purposes of Jordan's Principle' or who have 'one parent with status under s. 6(2) of the *Indian Act*', the Tribunal ensured that its Jordan's Principle orders did not create further discrimination among First Nations children. In the hearing on the merits, the Tribunal was provided with expert evidence regarding the deeply harmful impacts of the colonial *Indian Act* on First Nations peoples. Professor John Milloy noted that:

> the heart of the *Indian Act* of 1869 and the *Indian Act* of 1876 and every *Indian Act* thereafter […] becomes, in a sense, the disappearance of communities rather than what it had been before […] because now the civilized people would march forward into Canadian citizenship and the old people will die off.[248]

137. Canada alleges that the Tribunal's definitions are unreasonable because they go beyond the scope of the Complaint, contradict previous rulings, and unreasonably include non-status children living off-reserve in the absence of evidence that these children experience the same harm as those on-reserve.[249] These claims misapprehend the purpose of the Tribunal's definition and improperly characterize the impacts on First Nations, in three respects. First, the definition adopted by the Tribunal is strictly limited to the threshold question of whose service requests ISC must consider.[250] Second, First Nations are not obliged to render any determination with respect to recognition by the community. Except for urgent cases (including children in palliative care), the Tribunal's order specifies that once such recognition has been provided, Canada must determine the service request on its merits. Finally, the First Nations parties in this matter actively reject Canada's judicial review, no First Nation has intervened to support Canada's position and there is no evidence that First Nations seek to quash the Tribunal's order.

138. Once again, contrary to the Supreme Court's guidance in *Vavilov*, Canada fails to begin with the Tribunal's reasons. The Tribunal considered the nature of First Nations identity, First Nations' right to self-determination, international legal principles, federal legislation regarding child and family services and "Indian" status, s. 35 rights, and the scope of the complaint.

139. The Tribunal's definition is reasonable, as it is properly situated within the unique context applicable to First Nations identity. It is also reasonable in light of

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[248] Oct 28, 2013 examination-in-chief of John Milloy at p 9, lines 16-23, **JER, Tab 60**.
[249] AGC JR Factum at para 146.
[250] 2020 CHRT 20 at paras 213-215.

the context in which it arose: a remedial decision that clarified a prior order to ensure that Canada's discrimination was not perpetuated in the process of resolving the discrimination identified in the Tribunal's earlier orders.

i. The Tribunal reasonably considered the application of Jordan's Principle to children without Indian Act *status living off-reserve*

140. Canada faults the Tribunal for finding that certain children without *Indian Act* status living off-reserve are eligible to request Jordan's Principle services. It cites language in the Complaint focusing on the circumstances of children living on-reserve.[251] However, this portion of the Complaint specifically referred to underfunding in the FNCFS Program. What is more, in its June 5, 2009 Statement of Particulars, the Caring Society sought broad relief with respect to Jordan's Principle, asking that Canada be required to apply it "to federal government programs affecting children".[252] Canada's own statement of particulars made no reference to limiting Jordan's Principle based on reserve residency.[253]

141. In any event, the Tribunal firmly resolved the question of whether Jordan's Principle applies off-reserve in its September 2016 non-compliance ruling, which Canada did not judicially review. Contrary to Canada's argument, there is no contradiction in the Tribunal's rulings.[254] In response to an argument by Canada indicating that it understood the Merits Decision to apply only on-reserve, the Tribunal clearly stated that "[t]his type of narrow analysis is to be discouraged moving forward as it can lead to discrimination as found in the [Merits Decision]."[255] Having made a final order that Jordan's Principle applies off-reserve, it would have been unreasonable for the Tribunal to then restrict Jordan's Principle to the on-reserve context based on submissions it had already rejected. Moreover, until 2019, Canada used the phrase "all First Nations children" on its official Jordan's Principle website to describe those who could apply.[256]

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[251] AGC JR Factum at para 146.
[252] Caring Society June 5, 2009 Statement of Particulars at para 21(2), **JER, Tab 6**.
[253] Canada's July 22, 2009 Statement of Particulars at para 24: "Jordan's Principle is a 'child first' approach, which engages various health and social services and not solely child and family services.", **JER, Tab 9**.
[254] AGC JR Factum at para 146.
[255] 2016 CHRT 16 at para 118.
[256] Jan 28, 2019 Affidavit #4 of D. Navarro at Exhibit "D" (Submit a request under Jordan's Principle: Step 2. Who is covered) at p 2, **JER, Tab 252**.

ii. The context related to First Nations identity and rights supports the reasonableness of the Tribunal's order

142. The Tribunal recognized that "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."[257] The Tribunal expressly limited the effect of its ruling to the latter category. This was entirely appropriate, given the Supreme Court's recognition in *Daniels v Canada (Indian Affairs and Northern Development)* that First Nations identity is not a subject that is amenable to clear definitions as "[c]ultural and ethnic labels to not lend themselves to neat boundaries".[258] Consistent with the Tribunal's approach, *Daniels* also speaks to the "undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress."[259]

143. The Tribunal reasonably held that Jordan's Principle eligibility could not be limited to *Indian Act* status or on-reserve residency, as "[a]n eligibility criteria […] ought to respect the protected rights discussed above such as First Nations [s]elf-government agreements, treaties, customs, laws, traditions, [and] the *UNDRIP*."[260]

144. This consideration of the broader context is entirely consistent with this Court's guidance at an earlier stage of this litigation. In *CHRC v Canada*, Mactavish J (as she then was) noted that "Aboriginal people occupy a unique position within Canada's constitutional and legal structure. They are, moreover, the only class of people identified by the Government of Canada for legal purposes on the basis of race."[261] She went on to recognize that "[t]his creates many unusual or singular situations. Indeed, the *sui generis* nature of the Crown's relationship to First Nations people has long been recognized by the Supreme Court […]."[262] Accordingly, the Tribunal properly considered this broader context when determining whether it was appropriate for Canada to have automatically excluded well-defined groups of First Nations children from Jordan's Principle eligibility.

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[257] 2020 CHRT 20 at paras 84 and 129.
[258] 2016 SCC 12 at para 17 ["***Daniels***"].
[259] *Daniels* at para 15.
[260] 2020 CHRT 20 at para 212.
[261] 2012 FC 445 at para 332.
[262] 2012 FC 445 at para 333.

iii. The Tribunal's definition flows from a purposive approach

145. The Tribunal's approach is consistent with jurisprudence concerning Canada's relationship with First Nations peoples. As illustrated by the Supreme Court of Canada's recent decision in *R v Desautel*, there is a significant difference between threshold and substantive questions when dealing with matters of Aboriginal law. In that appeal, the question before the Court was whether a non-resident group located outside of Canada could qualify as an "Aboriginal People of Canada". The Court held that this was a separate question from whether the "Aboriginal People of Canada", if so identified, held an Aboriginal right under s. 35 of the *Constitution Act, 1982*.[263] This is entirely consistent with the Tribunal's reasoning that determining whether a child is a "First Nations child" eligible for Jordan's Principle is a separate question from whether Canada is required to provides services to that child.

146. The Supreme Court's approach in *Desautel* also reinforces the substantive reasonableness of the Tribunal's approach. The Supreme Court approached the "eligibility" criterion in that case with the dual purpose of s. 35 rights in mind: (1) recognizing the prior occupation of what is now Canada by Aboriginal peoples; and (2) recognizing the *sui generis* legal relationship between Aboriginal peoples and the Crown. In taking a purposive approach, the Supreme Court noted that legal interpretations that risked perpetuating historical injustices ought to be avoided.[264]

147. In the Jordan's Principle context, the dual purposes are correcting: (1) long-standing disadvantage facing First Nations children (recognized by Mactavish J. in this Court's earlier ruling in this case,[265] and recognized by Prime Minister Harper in his apology regarding Indian Residential Schools[266]); and (2) the longstanding and discriminatory jurisdictional conflicts that First Nations children have faced when seeking public services. Consistent with the Supreme Court's reasoning in *Desautel*, the Tribunal's approach avoids perpetuating historical injustices by

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[263] *R v Desautel*, 2021 SCC 17 at para 19.
[264] *R v Desautel*, 2021 SCC 17 at para 33.
[265] 2012 FC 445 at para 334: "At the same time, no one can seriously dispute that Canada's First Nations people are amongst the most disadvantaged and marginalized members of our society."
[266] Statement of Apology – to former students of Indian Residential Schools, CBD Vol 3 at Tab 10, **JER, Tab 108**.

relying on colonial concepts like the *Indian Act* and reserve boundaries.[267] Indeed, as Professor Milloy observed, the entire purpose of such categorization was to break down First Nations cultures:

> […] they decided they had to reorganize it, and they did with the Civilization Act which said, you know, kids can -- and adults, who can demonstrate a competence – can be enfranchised and become white citizens, right, become British citizens, […] colonial citizens, they could transfer over from one category to the other.[268]

148. As such, the *Indian Act* is by no means a sufficient metric of an individual's First Nations identity, or of the obstacles they face in achieving access to services that are substantively equal to those available to non- First Nations peoples in Canada. Indeed, the Tribunal placed no emphasis on *Indian Act* status in considering historic disadvantage in the Merits Decision.[269] Nor did the Supreme Court of Canada when it considered historic disadvantage in the context of First Nations adults in the criminal justice system in *R v Gladue*, *R v Ipeelee* and *Ewert v Canada*.[270] Indeed, Mr. Ipeelee and Mr. Ewert were Inuk and Métis, respectively.[271] In the context of sentencing, the Supreme Court has been clear that:

> courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how this history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[272]

149. No part of the Supreme Court's direction regarding sentencing is linked to *Indian Act* status or on-reserve residency. To the contrary, the focus is on systemic disadvantage. Canada recognizes this as well. A September 2017 Department of Justice Report stipulates that *Gladue* sentencing principles apply to First Nations

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[267] These concepts find their genesis in the "Victorian mores of Europe as transplanted to Canada", see: *Descheneaux v. Canada (Attorney General)*, 2015 QCCS 3555 at para 21, citing *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 at para 17.
[268] Oct 28, 2013 examination-in-chief of Dr. J. Milloy at p 75, lines 16-23, **JER, Tab 60**.
[269] Merits Decision at paras 403-427.
[270] *R v Gladue*, [1999] 1 SCR 688 at paras 58-69; *R v Ipeelee*, 2012 SCC 13 at paras 56-87; *Ewert v Canada*, 2018 SCC 30 at paras 57-61.
[271] *R v Ipeelee*, 2012 SCC 13 at para 2; *Ewert v Canada*, 2018 SCC 30 at para 8.
[272] *R. v. Ipeelee*, 2012 SCC 13 at para. 60.

peoples "regardless of whether they have status, live on- or off-reserve".[273] Significantly, the same approach is taken up in *An Act respecting First Nations, Inuit and Métis children, youth and families*, which came into force while the Tribunal's decision in this matter was under reserve, makes no distinction between First Nations children based on *Indian Act* status, and applies on- and off-reserve.[274]

150. Canada has offered no explanation for its acknowledgement in some contexts that a lack of *Indian Act* status and off-reserve residency are markers of systemic disadvantage while insisting that Jordan's Principle entrench those very concepts. It would be inconsistent for a legal principle applicable to "all First Nations children" to have a narrower scope than legislation enacted by Parliament to deal with similar subject-matter, or a sentencing principle that Canada itself acknowledges is applicable to "all Aboriginal offenders".

2. It is reasonable for Canada to consider Jordan's Principle requests from children without Indian Act *status living off-reserve where those children are recognized by their Nation*

151. The Tribunal concluded that Canada is required to consider, on a case-by-case basis, requests under Jordan's Principle from First Nations children without *Indian Act* status living off-reserve, who are recognized by their Nations for the purpose of Jordan's Principle eligibility. Taking a common-sense approach, the Tribunal held that instead of excluding groups of children based on colonial assumptions, the merits of each request ought to be appraised to ensure substantive equality for each child.[275]

152. Canada evidently agrees that the Tribunal's common-sense approach is practical. Indeed, on the day Canada filed this application for judicial review, the Minister of Indigenous Services issued a statement titled "Government of Canada supports changes to Jordan's Principle eligibility to help more First Nations children access the supports they need." The statement said that, in response to the rulings under judicial review, Canada was "expand[ing] eligibility under Jordan's

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[273] Feb 4, 2019 Affidavit #5 of D. Navarro at Exhibit "A" (Spotlight on *Gladue*) at p 7, **JER, Tab 252.1**.
[274] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, Preamble ("Whereas Parliament affirms the need […] to address the needs of Indigenous children and to help ensure that there are no gaps in the services that are provided in relation to them, whether they reside on a reserve or not […]") and s 1 "Indigenous" ("when used in respect of a person, also describes a First Nations person, an Inuk or a Métis person").
[275] 2020 CHRT 20 at paras 214-215.

Principle to children who are recognized as members by their nation regardless of where they live in Canada on an ongoing basis."[276] According to the statement, this change is "permanent", such that children recognized by their Nations will continue to be eligible to submit Jordan's Principle requests, irrespective of the outcome of this judicial review. It is an abuse of this Court's process and an improper use of finite judicial resources for Canada to challenge as unreasonable an order that it has publicly undertaken to implement.[277]

3. It was reasonable not to exclude First Nations children from Jordan's Principle solely due to the Indian Act's second-generation cut-off

153. The Tribunal's particular concern in requiring Canada to consider Jordan's Principle requests from First Nations children with only one parent with s. 6(2) of the *Indian Act* status was to prevent the perpetuation of further discrimination.

154. The Tribunal heard clear evidence of the dangers posed to children flowing from Canada's limiting eligibility for Jordan's Principle to those with *Indian Act* status. Both the Caring Society and Canada led evidence regarding S.J., an 18-month old First Nations child who was not eligible for *Indian Act* status due to having only one parent with s. 6(2) *Indian Act* status.[278] Doctors from Sick Kids Hospital in Toronto said S.J. required out-of-province travel assistance to receive a diagnostic scan to inform potentially life-saving surgery. The scan was only available in three hospitals in the world, including one in Edmonton. Canada refused to help S.J. due to her lack of *Indian Act* status.[279] Based on evidence from the Senior Assistant Deputy Minister responsible for the First Nations and Inuit Health Branch, the Tribunal found that S.J.'s request would have been approved if she had *Indian Act* status.[280] As Canada did not provide an alternative to meet S.J.'s needs, the Caring Society paid for her travel.[281]

155. Status under the *Indian Act* and Canadian equality law do not align.[282] The

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[276] Dec 22, 2020 Statement by the Minister of Indigenous Services re 2020 CHRT 20 and 2020 CHRT 36, **JER, Tab 357**.
[277] *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 37.
[278] 2019 CHRT 7 at para 73.
[279] 2019 CHRT 7 at paras 58-59.
[280] 2019 CHRT 7 at para 69.
[281] 2019 CHRT 7 at para 57.
[282] *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153; *Descheneaux v Canada (Attorney General)*, 2015 QCCS 3555; *Gehl v Canada (Attorney General)*, 2017 ONCA 319; *Attorney General of Canada v Sarrazin*, 2018 QCCA 1077.

Quebec Superior Court has characterized the discrimination occasioned by *Indian Act* status as a "deplorable situation".[283] That same Court described the *Indian Act*'s status provisions as an outdated law, giving rise to absurd results.[284] In this context, it was entirely reasonable for the Tribunal to craft a remedy that would attempt to avoid perpetuating further discrimination.

156. In its reasons, the Tribunal aptly identified the problematic example of the different treatment of two children living off-reserve sharing a common parent with s. 6(2) *Indian Act* status, one of whom has a parent without *Indian Act* status. In this situation, even if both children lived with the common parent, one child would be eligible for consideration by Canada under Jordan's Principle, while the other would be rejected out of hand.[285] It was entirely reasonable for the Tribunal to clarify its remedy to avoid any such absurdity from arising.

157. Canada argues that the Tribunal "ignored" the second-generation cut-off rule "without an adequate evidentiary record to decide whether children affected by the rule were experiencing the discrimination alleged in the complaint."[286] This misunderstands the issue before the Tribunal. In the Decision on the Merits and the non-compliance orders that followed, Canada was ordered to ensure it considered requests from "all First Nations children". Those requests are to be approved by the government of first contact, either on the basis that the service is available to all other children or in order to ensure substantive equality or cultural appropriateness in the provision of services to the child, or to safeguard the best interests of the child.[287] As such, the question before the Tribunal was whether this standard could be met by Canada categorically excluding all children not eligible for *Indian Act* status living off-reserve. The Tribunal reasonably rejected Canada's categorical approach in favour of a case-by-case assessment of each child's request.

158. In any event, Canada's own internal materials substantiate the disadvantage experienced by First Nations children without *Indian Act* status. Justice Canada's September 2017 report on the *Gladue* principles, tendered in evidence on the motion below, notes the insidious effects that *Indian Act* status has had in perpetuating disadvantage against First Nations women in particular. Regarding

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[283] *Landry v Canada (Attorney General)*, 2017 QCCS 433 at para 481.
[284] *Hele v Canada (Attorney General)*, 2020 QCCS 2406 at para 207.
[285] 2020 CHRT 20 at para 243.
[286] AGC JR Factum at para 150.
[287] 2017 CHRT 35 at para 135(B)(iii) and (iv).

access to services, the report notes that "[w]ithout status, women were no longer able to access resources, such as on-reserve housing, cultural resources, interaction with elders, subsidies for education, and land claim settlement resources."[288] With respect to off-reserve residency, the report states that First Nations "women, their children and grandchildren are displaced to urban areas – as of 2006, 72% of Indigenous women live off-reserve" and that "living in urban areas also means greater risk of poverty, systemic and direct racism, and sexual exploitation."[289]

159. Canada also says that discussions are required with First Nations before action can be taken regarding the "second generation cut-off rule".[290] However, Canada, alone, is subject to the Tribunal's orders and must consider Jordan's Principle claims from these children and provide services where required. This is entirely consistent with the Supreme Court of Canada's approach in *Daniels*, which recognized that the federal government's obligation to individual First Nations persons is a separate question from any collective rights such persons might enjoy by virtue of their membership with a particular First Nation.[291]

160. The Tribunal applied reason, logic and case law to determine the threshold that would be least likely to perpetuate discrimination by categorically excluding First Nations children who, despite lacking *Indian Act* status, had a parent with that status. This is a justifiable chain of reasoning that should not be interfered with.

4. A further ruling was required due to Canada's contradictory statements

161. Canada charges the Tribunal with having created "an open-ended series of proceedings".[292] However, the procedures selected by the Tribunal are entirely consistent with the Consultation Protocol signed by all parties, including the Minister of Indigenous Services, following the Tribunal's February 2018 non-compliance order (which Canada did not judicially review).[293] Moreover, Canada prolonged these proceedings by failing to promptly comply with the Merits Decision.

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[288] Feb 4, 2019 Affidavit #5 of D. Navarro at Exhibit "A" (Spotlight on *Gladue*) at p 15, **JER, Tab 252.1**.
[289] Ibid.
[290] AGC JR Factum at para 150.
[291] *Daniels* at para 49.
[292] AGC JR Factum at paras 158-160.
[293] 2018 CHRT 4 at para 431; Consultation Protocol, **JER, Tab 204.1**.

162. Canada's criticism is particularly unfair in this instance. The Caring Society challenged Canada's narrow implementation of the Merits Decision with respect to Jordan's Principle in a non-compliance motion brought in November 2016. In cross-examination, the Caring Society specifically questioned whether *Indian Act* status was being used to limit Jordan's Principle eligibility and was told, by one of Canada's officials testifying under oath, that it was not. Canada's evidence was that *Indian Act* status was simply a "point of information" being collected.[294]

163. It took a further fifteen months for a more senior federal official to reveal, under cross-examination, that in fact Canada had made *Indian Act* status an eligibility criterion "since the beginning".[295] The Caring Society pursued the matter at the Consultation Committee for Child Welfare for many months, before bringing a further non-compliance motion in December 2018. Had Canada been transparent from the beginning, the matter would have been dealt with in the May 2017 order. Any "open-endedness" results solely from Canada's conduct, and not from the Tribunal's choice of procedure. It was reasonable and necessary for the Tribunal to intervene given Canada's decision to restrict consideration of Jordan's Principle requests to First Nations children with *Indian Act* status and those living on-reserve, without seeking guidance from the Tribunal.[296]

PART IV – ORDER SOUGHT

164. Canada's discriminatory practices have and are causing harm to First Nations children. Canada does not deny this. In fact, it has publicly stated this repeatedly.

165. At the same time, and indeed throughout this litigation, Canada has continuously sought to evade liability for its unlawful conduct for technical reasons. Having been found to be discriminating against 165,000 First Nations children and their families, Canada continues to grasp at self-serving arguments bereft of consideration for the children, unsupported by case law and contrary to the *CHRA*'s objectives. This Court must not disturb the Tribunal's compensation orders, which aim to compensate child victims for "wilful and reckless" discrimination creating a "worst case scenario". The Court must sustain remedies designed to redress the pain and suffering of victims and incentivise Canada's compliance with the *CHRA*.

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[294] Feb 6, 2017 cross-examination of Robyn Buckland at Q 142, **JER, Tab 185**.
[295] May 9, 2018 cross-examination of Sony Perron at p 47, **JER, Tab 208**.
[296] 2020 CHRT 20 at para 115.

166. This Court must uphold the Jordan's Principle Eligibility Orders to prevent the discrimination caused by Canada's "dicing and slicing" approach. Canada has recognized this danger, given that it has publicly stated its agreement that Jordan's Principle should apply to many of those children, irrespective of the outcome of its judicial review.

167. In the event that the Court returns any part of these matters to the Tribunal for re-determination, the request for a differently constituted panel must be rejected. Given that the Panel is seized of many matters in the proceeding that are not before this Court, and given the Panel's significant expertise in this matter, acquired over the past nine years, remitting the matter to a differently constituted Panel would be contrary to the proper administration of justice. Indeed, Canada has pointed to no concerns that would warrant such a disproportionate outcome.

168. Accordingly, the Caring Society requests that the applications be dismissed, with solicitor-client costs, or alternatively lump sum costs "on an elevated scale", to the Caring Society in any event of the cause. These costs are sought as the Caring Society's response to these applications is being made "in the public interest", in particular given the widespread societal impact of the orders under review.[297]

All of which is respectfully submitted, this 12th day of May, 2021.

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[297] *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at paras 13 and 15.

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PART V – LIST OF AUTHORITIES

Statutes	
1	*An Act respecting First Nation, Inuit and Métis children, youth and families*, SC 2019, c 24
2	*Canadian Human Rights Act*, RSC 1985, c H-6
3	*Canadian Human Rights Tribunal Rules of Procedure*
4	*Child, Youth and Family Enhancement Act, RSA 2000*, c C-12
5	*Child, Youth and Family Services Act, 2017*, SO 2017 c 14
6	*Children and Family Services Act*, SNS 1990, c 5
7	*Criminal Code*, R.S.C., 1985, c. C-46
8	*Indian Act*, R.S.C., 1985, c. I-5
Case Law	
9	*AB v Bragg Communications Inc*, 2012 SCC 46
10	*Aboriginal Peoples Television Network v Canada (Human Rights Commission)*, 2011 FC 810
11	*AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30
12	*Alizadeh-Ebadi v Manitoba Telecom Services Inc*, 2017 CHRT 36
13	*British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52
14	*Canada (Attorney General) v Hislop*, 2007 SCC 10
15	*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31
16	*Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445
17	*Canada (Human Rights Commission) v. Warman*, 2011 FCA 297
18	*Canadian Foundation of Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4
19	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

20	*Canada v Morgan*, [1991] 2 FC 401
21	*Cruden v Canadian International Development Agency and Health Canada*, 2011 CHRT 13
22	*Doug McFee v Canadian Pacific Railway Company*, 2019 CHRT 28
23	*Doyle v Zochem Inc*, 2017 ONCA 130
24	*Duval v Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52
25	*Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2019 CHRT 18
26	*Escobar v WCL Capital Group Inc*, 2020 HRTO 388
27	*Fair v Hamilton-Wentworth School Board*, 2013 HRTO 440, aff'd 2014 ONSC 2411 and 2016 ONCA 421
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)*, 2012 CHRT 16
29	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2013 CHRT 16
30	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2014 CHRT 2
31	*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)*, 2015 CHRT 1
32	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14
33	*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
34	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 10
35	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 16

36	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 7
37	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14
38	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 35
39	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4
40	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 1
41	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 7
42	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39
43	*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 7
44	*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 15
45	*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
46	*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 24
47	*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

48	*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 6
49	*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 7
50	*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
51	*Garrie v Janus Joan Inc*, 2014 HRTO 272
52	*Grant v Manitoba Telecom Services Inc*, 2012 CHRT 10
53	*Hicks v Human Resources and Skills Development Canada*, 2013 CHRT 20
54	*Hogan v Ontario (Health and Long-Term Care)*, 2006 HRTO 32
55	*Honda Canada Inc v Keays*, 2008 SCC 39
56	*Hughes v Canada*, 2010 CHRT 4
57	*Jane Doe v Canada (Attorney General)*, 2018 FCA 183
58	*Johnstone v Canada Border Service Agency*, 2010 CHRT 20, var'd on other grounds, 2014 FCA 110
59	*Kamalatisit v Sandy Lake First Nation*, 2019 CHRT 20
60	*Lambourn v 2471506 Ontario Inc*, 2020 HRTO 526
61	*Lebeau v Canada (Attorney General)*, 2015 FC 133
62	*Legros v Treasury Board (Canada Border Services Agency)*, 2017 FPSLREB 32 at para 65
63	*Moore v BC (Education) et al*, 2005 BCHRT 580
64	*Moore v British Columbia (Education)*, 2012 SCC 61
65	*NA v 1416992 Ontario Ltd and LC*, 2018 CHRT 33
66	*New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46
67	*O'Grady v. Bell Canada*, 2020 FC 535

68	*Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342
69	*Strudwick v Applied Consumer & Clinical Evaluations Inc*, 2016 ONCA 520
70	*Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38
71	*Winnipeg Child and Family Services v KLW, 2000 SCC 48*
Commentary	
72	Anne Levesque, "Gaming the [Human Rights] System? A Critical Look at Discrimination Complaints Involving Government Services", (2020) 9:1 Can J Hum Rts 35
73	
74	Gwen Brodsky, Shelagh Day and Frances Kelly, "Systemic Remedies and Compensation: Both are Needed" (2019) 20:6 Can Human Rights Reporter 1
75	Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies", (2017) 6:1 Can J Hum Rts
76	Melissa Hart, "Civil Rights and Systemic Wrongs", (2011) 32 Berkeley J Emp & Lab L 455
77	*Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, UN Doc A/HRC/42/45
78	Ruth Sullivan, Sullivan on the Construction of Statutes, 5 ed. (Markham: LexisNexis Canada, 2008)
International Treaties	
79	*Convention on the Rights of the Child, 1989*, 3 U.N.T.S. 1577, GA Res. 44/25