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 NISHNAWBE ASKI NATION ("NAN")

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"*On the issue of child and family services, we recognize the tribunal's ruling that says that children need to be compensated, and we will be compensating them*."

- The Right Honourable Justin Trudeau, October 7, 2019[1]

PART I: STATEMENT OF FACTS

A. Overview

1. These are the written submissions of Nishnawbe Aski Nation ("NAN") who is a respondent in these twinned judicial review proceedings commenced by the Applicant Attorney General of Canada ("Canada").

2. Canada seeks to overturn orders made by the Canadian Human Rights Tribunal ("Tribunal") with respect to compensation and Jordan's Principle. Such orders flow from the Tribunal's landmark finding on January 26, 2016[2] ("the Merits Decision") which found that Canada has been racially discriminating against 165,000 Indigenous children and their families through flawed and inequitable funding of child and family services and through failure to properly implement Jordan's Principle. Child and family services are provided by Canada through the First Nations Child and Family Services Program ("FNCFS Program") and related agreements including the *1965 Indian Welfare Agreement* ("the *1965 Agreement*") in Ontario.

3. Jordan's Principle is a child-first, human rights-based, remedial legal rule intended to provide an immediate solution to entrenched practices of discriminatory conduct against First Nations children in the context of provision of public services. Jordan's Principle is

[1] Exhibit 7 to the Affidavit of Cindy Blackstock affirmed October 24, 2019.

[2] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 2

named in honour of Jordan River Anderson, a young First Nations boy from a Treaty 5 First Nation in Manitoba who never had the opportunity to live in a family environment because both Canada and the province of Manitoba refused to provide him with needed medical services and equipment to live outside of hospital walls.

4. At the centre of these proceedings are First Nations children: children who for generations have been denied equitable child and family services and much needed wrap-around supports; and children who bear the brunt of intergenerational traumas caused by racist, colonial policies and practices including the Indian Residential Schools system and the 60's Scoop. Children are vulnerable and First Nations children even more so. The Tribunal received voluminous evidence of harms caused to First Nations children due to Canada's conduct, representing lost childhoods and in some cases, lost lives.

5. The harm caused is undeniable, even by Canada. Yet Canada now seeks to evade ultimate responsibility by judicially reviewing the Tribunal's orders with respect to compensation. In an era when First Nations across this country continue to assert their inherent rights and the right to shape the destinies of their people, Canada is attempting, through judicial review, to cut First Nations off at the knees: Canada is sending the message loud and clear that First Nations should not have a right in determining who is considered a "First Nations child" for the purposes of Jordan's Principle eligibility.

6. With respect to the Tribunal's Compensation Orders, NAN's responding submissions will focus on how the orders' definition of certain key terms, in particular "service gap", were reasonable. NAN will focus a portion of its submissions on the tragic losses of life to suicide of two children in Wapekeka First Nation, a member community of NAN. In NAN's view,

this tragedy is demonstrative of the fact that there was ample evidence of individual harm of the gravest degree before the Tribunal, even in a case involving systemic harms and systemic remedies; further, that Canada's conduct was wilful and reckless. With respect to the Tribunal's Jordan Principle Orders, NAN's responding submissions will focus on how the Tribunal's orders defining a "First Nations child" for the purposes of Jordan's Principle were reasonable, respectful and responsive to First Nations inherent rights to determine membership.

B. The Facts

i) Overview

7. NAN has had the opportunity to view an advance, next-to-final copy of the Caring Society's responding written submissions on these applications. NAN agrees with the Caring Society that the Tribunal's Compensation Orders and Jordan's Principle Orders are reasonable and that such orders flowed from the central finding of discrimination and subsequent findings of non-compliance against Canada since the 2016 Merits Decision.

8. NAN relies on the facts as set out in the submissions of the Caring Society. Further, NAN is setting out additional facts supportive of its submissions with respect to:

   A. Key facts and processes established by the Tribunal in its January 26, 2016 Merits Decision;

   B. NAN's intervention as an interested party after the Merits Decision;

   C. The March 2017 Compliance Hearing and losses of life in Wapekeka First Nation;

D. NAN's Submissions on the definition of a "Service Gap" with respect to Jordan's Principle related compensation; and

E. NAN's Submissions on the definition of a First Nations Child with respect to eligibility for Jordan's Principle funding.

ii) Merits Decision: Key Findings and Tribunal's Forecasted Remedial Approach

9. The Tribunal held off on ordering specific remedies in the Merits Decision in order to receive detailed submissions from the Parties:

A. The complainants are the First Nations Child and Family Caring Society ("the Caring Society") and the Assembly of First Nations ("the AFN");

B. The Canadian Human Rights Commission ("Commission");

C. The respondent is Canada;

D. The interested parties are Chiefs of Ontario ("COO"), Amnesty International ("Amnesty"), and later NAN; and,

E. The Congress of Aboriginal Peoples was granted limited interested party status to provide submissions on "the eligibility and/or effectiveness of remedies under Jordan's Principle for non-status First Nations children living off-reserve,"[3] and as such, is an intervenor in application T-1559-20 on this issue.

[3] *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 11 (CanLII), at para 52.

10. Since issuing its Merits Decision and more detailed remedial orders, the Tribunal has engaged in numerous rounds of receiving and reviewing evidence and submissions with respect to compliance with its orders and the implementation efforts of the Parties. In NAN's view – undoubtedly shared by the responding parties to these applications – the Panel for this Tribunal proceeding has gone out of its way to work with the parties, including Canada, to seek detailed submissions and evidence where warranted, to encourage collaboration and negotiation between the Parties, and to deliberate carefully and without haste. This collaborative, deliberative approach is in keeping with the sheer complexity and sensitivity of the case before the Tribunal.

11. When the Tribunal issued its Merits Decision on January 26, 2016, NAN was not yet a party to the Tribunal proceedings. Upon finding that the complaint was substantiated, the Tribunal made two key orders in its Merits Decision:

    A. That Canada ceases its discriminatory practices and undertake reform of the FNCFS Program and *1965 Agreement* to redress and prevent the discrimination from re-occurring;[4]

    B. That Canada cease applying its narrow definition of Jordan's Principle and take measure to immediately implement the full meaning and scope of Jordan's Principle;[5]

[4] Merits Decision, 2016 CHRT 2, at paras. 474-484, in particular, para. 481.
[5] Merits Decision, 2016 CHRT 2,, at para. 481.

12. The Tribunal declined to make further orders in its Merits Decision out of an abundance of caution and recognition of the complexity of any potential remedial orders.

> [483] That said, given the complexity and far-reaching effects of the relief sought, 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. The Panel requires further clarification from the parties on the actual relief sought, including how the requested immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis.
>
> [484] Within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered on an expeditious basis.[6]

13. The Tribunal stated its understanding that the above contemplated remedies would be of a systemic nature, including funding, "[b]ut more than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice."[7]

14. The Tribunal then proceeded to address its remaining tool for remedying substantiated discrimination: namely, compensation. The Tribunal identified the relevant sections of the *Canadian Human Rights Act* which would permit it to order compensation to a victim of discrimination for any pain and suffering resulting from the discriminatory practice. The Tribunal noted that there is, additionally, a separate category of compensation awards for discrimination that is wilful and reckless, and that both categories have caps of $20,000.[8] The Tribunal then summarized the position of the parties with respect to compensation.[9] In

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[6] Merits Decision, 2016 CHRT 2,, at para. 483-4.
[7] Merits Decision, 2016 CHRT 2,, at para 482.
[8] Merits Decision, 2016 CHRT 2,, at para. 485.
[9] Merits Decision, 2016 CHRT 2,, at paras. 485-490.

particular, the Caring Society requested the maximum amount for both categories of compensation.[10]

15. After addressing its remedial powers to award compensation and summarizing the positions of the parties on compensation, the Tribunal again declined to award compensation in the Merits Decision and instead forecasted that the Tribunal would be seeking submissions from the parties to address the panel's questions on compensation.[11] The Tribunal made this statement in a similar vein to its statements on systemic remedies (i.e. noting the complexity of the potential remedies to the substantiated discrimination).

16. The Tribunal restated its retention of jurisdiction over the matter, on the basis of outstanding questions on remedies and advised that it would evaluate its retention of jurisdiction at the determination of forthcoming remedial orders.[12]

iii) Nishnawbe Aski Nation ("NAN") intervenes as interested party

17. As stated, NAN was not a party at the time the Tribunal issued its Merits Decision. NAN reviewed the Merits Decision and determined that the Tribunal had bifurcated the proceedings into findings on the discrimination and a remedial phase. This presented an opportunity for NAN to intervene as an interested party. NAN sought intervention on the basis that it could assist the Tribunal with crafting remedies, taking into account the unique challenges of child welfare service delivery and allied services to remote First Nations.

[10] Merits Decision, 2016 CHRT 2,, at para. 486.
[11] Merits Decision, 2016 CHRT 2,, at para. 490.
[12] Merits Decision, 2016 CHRT 2, at para. 494.

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

19. In NAN's motion record for leave to intervene, NAN filed supporting affidavit evidence[13] summarizing challenges particular to child welfare service delivery which are either unique to remote communities and/or are challenges that are exacerbated by the isolation of NAN communities. These challenges include the following: transportation; staff recruitment and retention; access to suitable housing; lack of other social services; geography and socio-demographic characteristics; high cost of food; health problems; high cost of heat and hydro; economic poverty; growing suicide epidemic; and funding disparities.

20. NAN identified that northern remoteness realities have served to create social, health and education disparities in NAN communities. The impact of these disparities on the developmental health of children in northern remote communities is such that the needs of children and youth almost always involve compounded and concurrent conditions. As a result, the required intervention is complex. Further, the lack of adequate access to diagnostic and care services in these communities has created a significant backlog of unidentified

[13] Affidavit of then Deputy Grand Chief Anna Betty Achneepineskum; and Affidavit of Bobby Narcisse, both sworn March 18, 2016.

needs. Absent early detection, attention and intervention, the complexity of children's needs increases dramatically and unnecessarily compromises the quality of life of children with such needs and the families responsible for their care.[14]

21. The Tribunal has found that the absence of essential services has created perverse incentives with respect to children in care, in particular that parents are sometimes forced to place children and youth with a child welfare agency so that the children/youth can access necessary services. This reality was recognized by the Tribunal in its Merits Decision where the Tribunal stated, "[H]aving to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made."[15]

22. NAN notes that the Tribunal has consistently addressed issues of remoteness, both in its Merits Decision and in subsequent decisions.[16] On May 5, 2016, the Tribunal issued its Ruling granting NAN's motion to intervene as an interested party to the proceedings. The Tribunal noted that allowing a new party at this late stage in the proceedings was "rare"; however, the Tribunal identified several unique factors regarding NAN's participation:[17]

> [10] The NAN's direct affiliation with remote communities experiencing these issues will ensure their interests inform any remedy issued by the Panel and will assist in crafting an effective and meaningful response to these issues. In the same vein, the NAN's involvement in developing an Aboriginal child and youth strategy with the Government of Ontario may assist the Panel in crafting effective and meaningful orders to address other findings it made regarding the 1965 Agreement …

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[14] Affidavit of Bobby Narcisse, both sworn March 18, 2016, at para. 35.
[15] 2016 CHRT 2, at para. 382.
[16] For example: see 2016 CHRT 2 at paras. 213-233 and 291; 2016 CHRT 10 at para 20; 2016 CHRT 16 at paras 36-81)
[17] 2016 CHRT 11, at para. 13.

> [11] Given these findings in the Decision and the Panel's order to reform the 1965 Agreement to reflect those findings, it is clear that the NAN has an interest in these proceedings and, more importantly, that it can potentially provide a meaningful contribution and assistance in determining the remaining remedial issues in this case.[18]

23. The chronic absence of essential services was identified at the outset of NAN's intervention and are directly relevant to the issue of Jordan's Principle. In effect, the above identified issues are service gaps that remote communities are forced to contend with. NAN's experience concerning the significant service gaps to remote communities informed its subsequent submissions to the Tribunal on Jordan's Principle and informs the position it takes with respect to this judicial review as it relates to Jordan's Principle-related compensation.

iv) March 2017 Compliance Hearing & Losses of Life in Wapekeka

24. In the year following the Tribunal's Merits Decision, the Parties engaged in rounds of "immediate relief" submissions and reviews of compliance reports filed by Canada. Through this process, the responding parties to the Tribunal's process sought a compliance hearing in March 2017. In the intervening time between NAN filing its notice of motion in December 2016 and the compliance hearing itself in March 2017, an entirely preventable tragedy occurred in Wapekeka First Nation ("Wapekeka"), a member community of NAN: two 12-year old girls died by suicide. Jolynn Winter died on January 8, 2017, and Chantel Fox died on January 10, 2017.

25. Before the loss of these children, Wapekeka had alerted Health Canada to concerns about a suicide pact amongst a group of young girls. This information was contained in a July 2016

[18] 2016 CHRT 11, at paras. 10-11.

proposal seeking funding for an in-community mental health team as a preventative measure ("the Wapekeka proposal"). The Wapekeka proposal was left unaddressed by Canada for several months with a response coming only after the loss of Jolynn Winter and Chantal Fox.

26. NAN amended its notice of motion to seek remedies with respect to the tragic loss of these children. In support of the amended notice of motion, NAN filed an affidavit by Doctor Michael Kirlew on January 27, 2017. Dr. Kirlew was a community and family physician for Wapekeka First Nation, a Staff Physician at the Sioux Lookout Meno Ya Win Health Center, and an Investigating Coroner for Ontario's northwest region. Further, NAN filed a reply affidavit by NAN's Health Advisor, Sol Mamakwa, on February 13, 2017. Sol Mamakwa is now Ontario's Member for Provincial Parliament for the recently created riding of Kiiwetinoong.

27. Dr. Kirlew swore his belief that the deaths of the two girls in Wapekeka were preventable[19] and that the Wapekeka proposal (attached as an exhibit to Dr. Kirlew's affidavit) was intended to implement suicide prevention and intervention alongside land-based and cultural activities.[20] In keeping with affidavit material filed by NAN on its motion seeking leave to intervene on gaps in services to remote First Nations, Dr. Kirlew's affidavit outlined the lack of mental health services available within the community of Wapekeka, compounded by the lack of developmental supports for children/youth and the infrequent mental health services that are periodically flown into the community. Dr. Kirlew explained that the Wapekeka proposal had not been funded by Health Canada, though the proposal was received. Keith Conn, Health Canada's regional executive for Ontario Region at the time, stated that the

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

proposal went unfunded because it was received at an "awkward time" in the federal funding cycle.[21]

28. Canada responded to NAN's motion through affidavit evidence, including through Ms. Robin Buckland, then Executive Director of the Office of Primary Health Care within Health Canada's First Nations Inuit Health Branch. At the time, Ms. Buckland was the national lead for Jordan's Principle.

29. The Wapekeka proposal was put to Ms. Buckland on cross-examination. Ms. Buckland agreed that the Wapekeka proposal identified an example of a gap in services for children and evinced a need but could not say why this need was not met.[22] Throughout Ms. Buckland's cross-examination, Ms. Buckland was unequivocal and steadfast in her responses that the Wapekeka crisis was an example of a clear need, resulting from a clear gap in mental health services, and therefore, the Wapekeka proposal would qualify as a Jordan's Principle case. Ms. Buckland admitted that she had not read the Wapekeka proposal.[23]

30. In the Merits Decision, the Tribunal made a finding that Ontario's *1965 Agreement* did not provide for mental health funding, representing a systemic gap in services to Ontario First Nations. Ms. Buckland did not appreciate the implications of this finding with respect to her responsibilities for administering Jordan's Principle. Ms. Buckland acknowledged that no one with a comprehensive understanding of the *1965 Agreement* directly reported to Ms.

[21] Affidavit of Dr. Kirlew, sworn January 27, 2017, at para. 16, and see also Exhibit D.
[22] Buckland Cross-Examination, February 6, 2017, Pg. 155-6, Para. 438-440.
[23] Buckland Cross-Examination, February 6, 2017, Pg. 175-6, Paras. 506-513.

Buckland to assist in decision-making relating to Jordan's Principle[24] and that this gap in mental health services was not discussed within her department.

31. In responding submissions, Canada acknowledged that the gap in mental health services should be addressed through Jordan's Principle funding.[25] At that time of these spring 2017 submissions, Canada reported that only ten children had been approved for mental health coverage under Jordan's Principle.[26]

32. On the basis of this evidence and Canada's submissions, NAN sought the following orders: (1) a declaration that Canada has failed to comply with the Tribunal's Merits Decision by not funding mental health services; (2) that Canada immediately fund mental health services; and (3) A Choose Life Order, i.e. an order that any NAN community that files a proposal (akin to the Wapekeka proposal) identifying children and youth at risk of suicide should be funded under Jordan's Principle. The sought Choose Life Order was adjourned *sine die* as Canada and NAN came to an agreement that Canada would fund NAN's sought Choose Life Order.

v) NAN's Submissions to the Tribunal re. Definition of a "Service Gap"

33. The focus of this section will be on NAN's submissions with respect to key definitions in the Compensation Framework concerning Jordan's Principle-related compensation. In its Merits Decision, the Tribunal found that there was an absence of health and social services

[24] Buckland Cross-Examination, February 6, 2017 Pg. 214-215, Para. 641.
[25] Canada's March 14, 2017 Factum, at paras. 47 & 52.
[26] Canada's March 14, 2017 Factum, at para. 47

in remote and isolated communities.[27] The Tribunal stated that Jordan's Principle is intended to fill the gaps left by this lack of other health and social programs:

> Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.[28]

34. On the basis that Canada should not benefit from its discriminatory conduct, NAN submitted that a claimant for compensation should not automatically be denied compensation eligibility if the claimant is unable to demonstrate that a request for a service/support was made, and/or if the claimant is unable to establish that the service/support was, historically, recommended by a professional.

35. Requiring a claimant to prove that a request was made to the federal government for a required service would allow Canada to benefit from its own discriminatory conduct in two related ways. Firstly, when systemic service gaps in remote First Nations create a normative on-reserve standard in which there is no expectation that a given service will be provided, individuals are discouraged from making requests for that service because they know the service is not available.[29]

36. NAN filed a March 2016 report entitled *Nishnawbe Aski Nation Children and Youth with Special Needs Preliminary Engagement Report: The Forgotten People* with the Tribunal to illustrate issues with service gaps and how they relate to compensation eligibility. The reality of disparate normative standards and the feeling that requesting services is a wasted exercise

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[27] Merits Decision, 2016 CHRT 2, at para. 233.
[28] *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, at para 135
[29] NAN written submission re. Compensation Framework, April 30, 2020.

was touched upon by a physician who participated in a focus group held by NAN in early 2016 to discuss services for children with special needs:

> "I know urban parents, if a child is not talking in sentences they worry, but up north if the child is even five and not talking it's not a huge concern. There are different expectations of what is normal because even if there was a way to get a child identified there's no follow up because there are no programs anyway. And if a three year old has zero speech NIHB [Non-Insured Health Benefits] won't pay for travel so **it's like you're identifying something you can't do anything about anyway**."
>
> – Physician Participant, Service Provider Focus Groups[30]

37. To be clear, the above evidence was put before the Tribunal; however, the Tribunal did not explicitly rely on this evidence in its decisions. NAN is simply referencing this evidence to illustrate the concept of disparate normative standards. In essence, disparate normative standards work to discourage requests for services. Secondly, by utilizing a narrow, discriminatory definition of Jordan's Principle, Canada likely discouraged requests on behalf of children who fell outside the narrow definition being advertised and implemented by Canada.

38. A discriminatory normative standard of service gaps for on-reserve individuals in remote First Nations, coupled with an improperly narrow definition of Jordan's Principle, means that many First Nations children who were deprived of services may not have had a specific request for services made to Canada on their behalf.[31] Furthermore, denying compensation eligibility on the sole basis that a child was unable to access a referral from a professional

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[30] Exhibit "A" to the Affidavit of Bobby Narcisse affirmed February 21, 2020: *Nishnawbe Aski Nation Children and Youth with Special Needs Preliminary Engagement Report: The Forgotten People*, March 31 2016, at p. 48 (emphasis added). See at p. 4: "Parents don't know what services are 'out there.'". Additionally, see at pp. 16, 47 for information on why it would be inappropriate to require a claimant to establish proof of referral from a professional given the significant barrier to accessing diagnostic services experienced in remote First Nations.

[31] NAN written submission re. Compensation Framework, April 30, 2020.

would permit inaccessibility of professionals – one of the very gaps at issue that Jordan's Principle is intended to address – to justify denial of compensation.

39. NAN submitted that the absence of a specific request or referral should not automatically render an individual ineligible for compensation. Where it can be established that a First Nations child required a service/product to respond to his/her/their needs and promote healthy development, and that the First Nations child did not receive the service/product due to a gap in services, that individual should be eligible for compensation.

40. This key submission ended up informing the Tribunal's ordered Compensation Framework. In that framework, a service gap has been defined as follows:

> 4.2.3. **"Service gap" means** a situation where there was a service, and/or product and/or support based on the child's confirmed need that:
>
> a) was necessary to ensure substantive equality in the provision of services, products and/or supports to the child;
>
> a.1) was recommended by a professional with expertise directly related to the child's need(s). Documentation provided by a medical professional or other registered professional is conclusive, unless Canada can demonstrate to the satisfaction of the Central Administrator that, based on clinical evidence available at the time, the potential risk to the child of the service, product and/or support outweighed the potential benefit; or
>
> a.2) an Elder or Knowledge Keeper, who is recognized by the child's specific First Nations community, recommends a linguistic or cultural product, support and/or service; and
>
> c) the child's needs were not met.[32]

41. The framework specifies how "confirmed need" and "recommended by a professional" must be interpreted to ensure substantive equality:

[32] December 23, 2020 Compensation Framework, section 4.2.3, at pages 5-6.

> [These terms] must be interpreted in a manner such that a claimant's inability to provide proof of assessment, referral or recommendation contemporaneous with the necessity of support, product and/or service will not automatically disentitle the individual from eligibility for compensation. For example, particularly in remote communities there may not have been timely access to specialists, but there may have been access to community health nurses, social support workers, mental health workers. However, these individuals may not have designations in a specific profession related to the service being recommended. In these situations, flexibility is necessary to ensure that First Nations children who were unable to access an assessment, referral or recommendation in a timely manner due to systemic barriers (e.g. lack of approval to travel, long wait time prior to physician, therapist or specialist visits in community) are not unfairly excluded from compensation eligibility.[33]

42. As stated, NAN submitted, alongside the responding parties, that Canada's narrow definitional approach to Jordan's Principle likely discouraged requests on behalf of children who fell outside the narrow definition being advertised and implemented by Canada. This is why the ordered Compensation Framework explicitly sets out Canada's discriminatory definitions and the timeframes in which these definitions applied.

> 4.2.3.2. For greater certainty, the discriminatory definitions and approach employed by the federal government demanded satisfaction of all of the following criteria during the following time periods:
>
> a) Between December 12, 2007 and July 4, 2016
> - A child registered as an Indian per the *Indian Act* or eligible to be registered and resident on reserve;
> - Child with multiple disabilities requiring multiple service providers;
> - Limited to health and social services;
> - A jurisdictional dispute existed involving different levels of government (disputes between federal government departments and agencies were excluded);
> - The case must be confirmed to be a Jordan's Principle case by both the federal and provincial Deputy Ministers; and
> - The service had to be consistent with normative standards.
>
> b) Between July 5, 2016 and November 2, 2017
> - A child registered as an Indian per the *Indian Act* or eligible to be registered and resident on reserve (July 5, 2016 to September 14, 2016);

[33] Compensation Framework of December 23, 2020, as ordered by the Tribunal on February 11, 2021, at ss. 4.2.2.2, 4.2.3.1.

- The child had a disability or critical short- term illness (July 5, 2016 to May 26, 2017);
- The service was limited to health and social services (July 5, 2016 to May 26, 2017).[34]

vi) NAN's Submissions to the Tribunal regarding Definition of a First Nations Child

43. NAN joined the other parties in submitting that Canada's operationalization of Jordan's Principle continued to be unduly restrictive and therefore non-compliant with the orders of the Tribunal. Specifically, NAN stated that by using the twin pillars of *Indian Act* status and on/off reserve residency to determine which children are entitled to services pursuant to Jordan's Principle was a reinforcement of Canada's colonial, paternalistic, bureaucratic practices of exclusion, incompatible with non-discrimination, reconciliation, and self-determination.[35]

44. NAN explicitly rejected the idea of using the twin foundations of *Indian Act* status and residency as a legitimate way to determine who was a "First Nations child" for the purposes of Jordan's Principle and stated that this is at odds with First Nations' inherent jurisdiction regarding citizenship.[36]

45. In making these submissions, both NAN and COO, as representatives of First Nations, were careful to indicate that such submissions were limited to the application of determining a First Nations child for the purposes of Jordan's Principle and that such a definition did not extend to any other purpose. Further, that such submissions should not be interpreted as a

[34] December 23, 2020 Compensation Framework, section 4.2.3.2, at pages 6-7.
[35] NAN's written submission re. Definition of a First Nations Child, March 20, 2019.
[36] NAN's written submission re. Definition of a First Nations Child, March 20, 2019.

rejection or limitation of First Nations inherent jurisdiction and law-making authority, including regarding citizenship.[37]

46. As a result of such submissions, the Tribunal's ordered Compensation Framework was responsive to these concerns and defined a First Nations Child, for the purposes of Jordan's Principle, as follows:

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

[37] NAN's written submission re. Definition of a First Nations Child, March 20, 2019, in particular at paras. 7-8.

e) The extent of the connection of the child's parents and/or other caregivers to the First Nation community, excluding those non-status individuals working on a reserve (i.e., RCMP, teachers, medical professionals, and social workers)

4.2.5.2 The timeframe for children referred to in section 4.2.5(b) to (d) above are eligible for compensation in relation to denials, gaps and unreasonable delays with respect to essential services is January 26, 2016 to November 2, 2017.[38]

PART II: ISSUES

47. NAN submits that these applications raise the following issues:

A. The applicable standard of review;

B. Whether the Tribunal's Compensation Orders are unreasonable; and,

C. Whether the Tribunal's First Nations Child Definition Orders are unreasonable.

PART III: SUBMISSIONS

A. The Applicable Standard of Review is Reasonableness

48. NAN agrees with Canada that the applicable standard of review of the Tribunal's orders is reasonableness[39] and that this standard is as described by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"). [40]The relevant indicia of reasonableness are as follows:

A. Reasonableness is a single standard applicable to all elements of a decision;

[38] December 23, 2020 Compensation Framework, section 4.2.5, at pages 8-9.
[39] Canada's Factum, at para. 46.
[40] *Vavilov* 2019 SCC 65, at para. 89.

B. The standard is not perfection;[41]

C. The legal and factual constraints imposed on a decision (i.e. the context of a decision) is part of considering the reasonableness of a decision.[42] Put another way by the Supreme Court: "The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings."[43] In sum, history and context of the proceedings is a relevant consideration.[44]

D. The review of a decision requires consideration of the expertise relied upon by the decision-maker;[45]

E. The decision-maker's reasoning must have the hallmarks of reasonableness: justified, intelligible and transparent[46] and the "chain of analysis" must be reasonable;[47]

F. The burden is on the Applicant to demonstrate that a decision is unreasonable;[48] and

[41] *Vavilov* 2019 SCC 65, at para. 91.
[42] *Vavilov* 2019 SCC 65, at para. 90.
[43] *Vavilov* 2019 SCC 65, at para. 91.
[44] *Vavilov* 2019 SCC 65, at para. 94.
[45] *Vavilov* 2019 SCC 65, at para. 93.
[46] *Vavilov* 2019 SCC 65, at para. 95.
[47] *Vavilov* 2019 SCC 65, at para. 96.
[48] *Vavilov* 2019 SCC 65, at para. 100.

G. A decision is unreasonable when there is a fundamental flaw[49], a sufficiently serious shortcoming[50], examples of which include a decision that is internally incoherent and/or where the decision is untenable.[51]

49. NAN submits that the Applicant has not demonstrated that *any* of the Tribunal's orders are unreasonable. NAN relies in general on the Caring Society's submissions to this effect.

50. In keeping with NAN's role as an intervenor in the Tribunal proceedings, NAN will focus its legal submissions on:

A. Evidence of harm supportive of compensation orders for reckless and wilful conduct by the Applicant;

B. The reasonableness of the Compensation Framework decision regarding the definition of the term "service gap"; and

C. The reasonableness of the Jordan's Principle eligibility orders with respect to the definition of a First Nations child for the purposes of Jordan's Principle.

B. Evidence of harm supportive of compensation orders for reckless and wilful conduct by the Applicant

51. Canada states that there was no evidence of wilful and reckless conduct in the Tribunal proceedings "because the proceedings focused on the government's discriminatory policies, not the harms experienced by the individuals."[52] Canada further states that "there was no

[49] *Vavilov* 2019 SCC 65, at para. 101.
[50] *Vavilov* 2019 SCC 65, at para. 100.
[51] *Vavilov* 2019 SCC 65, at para. 101
[52] Canada's Factum, at para. 51.

deliberate attempt to ignore the needs of First Nations children."[53] A quick search of the Applicant's materials shows no mention of the tragic losses of children's lives in Wapekeka.

52. NAN agrees with Canada's articulation of the law with respect to 'willful and reckless' conduct, as defined in *Canada (AG) v. Johnstone*[54].

> In *Canada (AG) v. Johnstone*, Justice Mandamin set out the purpose of s. 53(3) and defined "wilful and reckless." He determined that s. 53(3) is a punitive provision, intended to provide a deterrent and to discourage those who deliberately discriminate. To be wilful, the discriminatory action must be intentional. Reckless discriminatory acts "disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly."[244] In applying punitive provisions such as this, decisionmakers must be guided by a principle of proportionality.[245] [55]

53. Where NAN disagrees with Canada is on its determination that its conduct was not wilful and reckless. Canada's conduct was not just about Canada's underfunding of child and family services, somehow divorced from the lives of children and families, as Canada suggests. Canada's conduct was also about ignoring the express needs of First Nations children seeking Jordan's Principle funding, in a context where a gap with respect to mental health services had been clearly identified by the Tribunal and the parties. In the Wapekeka context, there was an express request for funding that went ignored for months. The inordinate delay was inexplicable on its face, and Canada's senior officials could not explain it on cross-examination. The Wapekeka tragedy – heartbreaking, gruesome, enraging – was a completely predictable and foreseeable result of Canada not responding to the Tribunal's orders and findings. It is a specific example of harm experienced much more broadly due to systemic failures by Canada.

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[53] Canada's Factum, at para. 132.
[54] Canada (Attorney General) v Johnstone, 2013 FC 113 ["Johnstone"], varied in part on appeal on different issues, Canada (Attorney General) v Johnstone, 2014 FCA 110.
[55] Canada's Factum, at para. 130.

54. Canada's conduct was unreasonable in light of the fact that the Tribunal made a series of findings throughout its various decisions concerning the lack of mental health services in Ontario. Specifically, the Tribunal found that Ontario's *1965 Agreement* does not fund mental health services, leading to a gap in services:

> In the provision of child and family services, the Panel finds the situation in Ontario falls short of the objective of the *1965 Agreement*… "to make available to the Indians in the province the full range of provincial welfare programs"[12]
> **…** _AANDC does not have a mandate for mental health service and … these expenditures are not eligible under the *1965 Agreement*. Rather, Health Canada has the federal mandate on mental health and provides funding through a number of programs. However, those programs focus more on prevention and mostly deal with adult issues. Health Canada programs do not specifically deal with children in care and do not cover mental health counselling.[56]
>
> …The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act*.
>
> The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.
>
> The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.[57]

55. Following these evidentiary findings in relation to the gaps and adverse impacts, denials and delays, the Tribunal directed Canada to provide specific information, in the form of compliance reports to the Tribunal.[58] Canada filed a compliance report on October 31, 2016 wherein Canada stated that it was reviewing such supports but failed to identify how it was addressing mental health services in Ontario in the short term, as directed by the Tribunal.

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[56] Merits Decision, 2016 CHRT 2, at para. 241.
[57] Merits Decision, 2016 CHRT 2, at para. 458. See also April Decision, 2016 CHRT 10 at para 25, and September Decision, 2016 CHRT 10 at paras 74.
[58] 2016 CHRT 10, at paras 73-74.

In keeping with many of Canada's responses to the Tribunal, the responding parties were served with platitudes instead of concrete action.

56. What we learned from the Wapekeka experience was that Canada does not understand its funding obligations and how they bear directly on human rights and human lives. Despite findings by the Tribunal, Canada did not appreciate that there was a gap in mental health services and that Jordan's Principle should apply. NAN submits that this was inexplicable conduct on the part of Canada: the Applicant had the benefit of Tribunal findings and party submissions; the Applicant was directed to provide further information regarding compliance on this issue and failed to do so, all of which led, in part, to the March 2017 compliance hearing. Under cross-examination, we learned how Canada ignored the Wapekeka proposal for months, without explanation, and that Canada did not appreciate the systemic gap that the proposal represented. Most importantly, we learned that Canada did not have any good reason for this conduct. The degree of closed-mindedness was wilful and reckless. It suggested that Canada had no intention of faithfully considering and implementing remedies directed by the Tribunal.

57. The Wapekeka example demonstrates a systemic gap that caused individual harm of the most egregious kind: the loss of life. Indeed, Canada agreed to NAN's request for Choose Life and this represents some recognition by Canada that that there was a systemic problem that could be addressed through the funding of Jordan's Principle applications from NAN communities aimed at addressing youth at risk of suicide.

58. Given the totality of evidence before the Tribunal, and the steps the Tribunal took to satisfy itself that Canada had an opportunity to demonstrate its implementation efforts, it would

have been unreasonable for the Tribunal to find that there was no evidence of wilful and reckless conduct. Canada claiming that no such evidence existed amounts to whitewashing particularly poignant cases of tragic harm: the loss of children's lives.

C. The reasonableness of the Compensation Framework decision regarding the definition of the term "service gap"

59. NAN agrees with the Caring Society's analysis of Canada's position on the issue of "service gaps".[59] Canada appears to take issue with the fact that the Compensation Framework permits compensation for unmet services absent a "request" being communicated to Canada.

60. As stated in the facts section of this factum, NAN made detailed submissions on the definition of "service gap" from NAN's perspective of representing remote northern First Nations who routinely face systemic service gaps for essential services.

61. In NAN's view, the Applicant's raising of this issue demonstrates that Canada still does not appreciate the service gaps that plague certain regions, in particular Ontario's remote north, and the type of systemic service gaps that led to the tragic losses of life in Wapekeka. The Tribunal, on the other hand, clearly appreciated the impact of these service gaps.

62. In an ideal world, the process of applying for Jordan's Principle-related compensation would be simple because in every instance of a need for a service/support there would be both (i) a documented referral for the service/support and (ii) a documented request for the service/support. First Nations children who require services would have access to a professional who can recommend the required service to them. The reality for many children

[59] Caring Society Factum, at para. 119.

in NAN First Nations, however, has been that they have not had access to professionals and the Tribunal's order is responsive to that reality. It is eminently reasonable.

63. It is a firmly established principle of equity that a wrongdoer should not benefit from their wrongdoing.[60] This is a relevant principle for decision-makers to consider when applying the *Canadian Human Rights Act* ("*CHRA*").[61] NAN believes it is important to ensure that Canada does not benefit from its own discriminatory conduct by setting compensation eligibility requirements when its own discriminatory conduct prevented some individuals from meeting such requirements. NAN submits that for the compensation remedy to be effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination,[62] the principle that Canada should not benefit from its discrimination needs to infuse the compensation process.

64. Requiring a claimant to prove that a request was made to the federal government for a required service would allow Canada to benefit from its own discriminatory conduct. Canada's discriminatory implementation of Jordan's Principle likely discouraged individuals from making direct requests for services that should have been available to them under proper implementation of Jordan's Principle. As a result, the process for determining eligibility must not require proof of a request for a service from Canada. While proof of a request can help establish a successful claim, the absence of a request should not automatically disentitle a claimant.

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[60] *Lac Minerals Ltd.v International Corona Resources Ltd*, [1989] 2 SCR 574, at para 92.
[61] *Kirby v Treasury Board (Correctional Service of Canada)* 2015 PSLREB 41, at para 95.
[62] E.g. 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 at para 14, citing to *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 25 and 55; and *Action Travail des Femmes* at p. 1134

65. It would be contrary to the intention of Jordan's Principle and the Tribunal's enabling statute to bar from compensation those First Nations children who experienced systemic barriers/gaps to accessing professionals. To exclude such individuals from compensation would further compound the discrimination they have experienced due to barriers/gaps in services that others may take for granted.

66. It is clear from the Compensation Framework that the Tribunal carefully considered NAN's perspective and incorporated these submissions as part of formulating the "service gap" definition. This is an example of the Tribunal making reasonable decisions, in accordance with the evidence and submissions made before it. In sum, the Tribunal ordered a Compensation Framework that would prevent Canada from benefiting from its own discrimination. This is an example of entirely reasonable and coherent decision-making that is justified, intelligible and transparent, in keeping with the hallmarks of reasonable decision-making identified in *Vavilov*.

D. The reasonableness of the Jordan's Principle eligibility orders with respect to the definition of a First Nations child for the purposes of Jordan's Principle

67. In November of 2020, the Tribunal issued a consent order containing criteria for determining who is a "First Nations child" for the purposes of Jordan's Principle eligibility. The criteria are as follows:

A. That the child is registered or eligible to be registered under the *Indian Act*;

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

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

D. The child is ordinarily resident on reserve.[63]

68. Canada states that this definition is unreasonable on the basis that it creates two new classes of eligibility: (1) children recognized by a First Nation as being a member of their community (for the purposes of Jordan's Principle); and (2) children of parents eligible for *Indian Act* status.[64] Canada states that the former category imposes a burden on First Nations to determine eligibility and the latter category involves a complex question of identity.[65]

69. What Canada fails to appreciate is that the parties and Tribunal were alive to the complexity of identity considerations behind this definitional issue; notwithstanding, the overarching objective was to prevent *further* discrimination through the implementation of remedial orders in a way that was permissive of First Nations exercising inherent authority over their own membership.

70. Alongside the other responding parties, in particular COO, NAN has consistently maintained that excluding First Nations children recognized by a First Nation is discriminatory and that there is no principled basis for Canada to use the *Indian Act* as exclusionary criterion for application of Jordan's Principle. NAN submits that to do so would be inconsistent with: Article 33 of the *United Nations Declaration on the Rights of Indigenous Peoples*; Canada's commitment to reconciliation; the Supreme Court of Canada's decision in *Daniels*,[66] and

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[63] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada*), 2020 CHRT 20 at para. 56.
[64] Canada's factum, at para.144-145.
[65] Canada's factum, at para. 145.
[66] Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12 (CanLII), [2016] 1 SCR 99, <https://canlii.ca/t/gpfth>

human rights principles that prohibit discrimination along the lines of race/national/ethnic origin and reserve residency.

71. Article 33 of the *United Nations Declaration on the Rights of Indigenous Peoples* guarantees the right of Indigenous people to "determine their own identity or membership in accordance with their customs and traditions."[67] The Tribunal was making remedial orders, consistent with recognition for First Nations inherent jurisdiction over identity and membership. Now Canada contends that the exercise of such inherent jurisdiction is a burden to First Nations and purports to use the same colonial discriminatory framework underlying the *Indian Act* to determine threshold eligibility for Jordan's Principle funding and compensation.

72. NAN is supportive of COO's submissions that allowing for First Nations to recognize members of their community is permissive, not obligatory, and therefore not burdensome on its face. NAN submits that to deny a Jordan's Principle claimant who is recognized by a First Nation would impose real burdens, not only on the claimant, but potentially on the First Nation who may feel compelled to assist the claimant, financially or otherwise.

73. Finally, NAN submits that the Tribunal's orders with respect to the definition of a First Nations child were made following the same deliberative and consultative process that has been a hallmark of this Tribunal panel's decision-making throughout the proceedings. NAN submits that this decision is further evidence of the Tribunal's careful approach to crafting remedies that address the facts and history of the proceedings before it; the Tribunal's

[67] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

approach shows it is careful not to cause unintended discriminatory effects in the implementation of remedial orders.

74. The Tribunal has grappled in a real and meaningful way about how it, as a creature of the Canadian political and legal system, can apply human rights law in a manner that upholds fundamental rights and dignity of First Nations who have been oppressed and colonized by that same political and legal system. This is all part and parcel of the institutional context and history of the proceedings. When this context and history are considered alongside the evidence before the Tribunal and the Tribunal's reasons, it is clear that the Tribunal's decision meets the standards of reasonableness: it is justified, intelligible and transparent.

PART IV: CONCLUSION AND ORDERS REQUESTED

75. Canada has caused harm and the harm continues. Such harm is being visited upon vulnerable First Nations children and their families and caregivers. Ultimately, Canada does not deny that it has caused harm: high-ranking officials have testified to that fact (i.e. Wapekeka) and political leaders have made public statements to the same effect.[68] It follows that from found harm, there ought to be compensation.

76. Despite NAN's late intervention, it was clear from reading the Tribunal's Merits Decision alone that Jordan's Principle and Canada's narrow application of it were part of the found discrimination. Indeed, the Tribunal made only two orders at the conclusion of its Merits Decision, one of which was that Canada cease applying its narrow definition of Jordan's

[68] Reference to opening quote in this factum by Prime Minister Trudeau: "*On the issue of child and family services, we recognize the tribunal's ruling that says that children need to be compensated, and we will be compensating them*." - The Right Honourable Justin Trudeau, October 7, 2019.

Principle and take measures to immediately implement the full meaning and scope of Jordan's Principle. [69]

77. Though the Tribunal declined to order further remedies at the time of its Merits Decision, it clearly communicated to the parties that the panel expected to address both systemic remedies and compensation.

78. Far from catching the parties by surprise, the Tribunal has been cautious, deliberative, and exceptionally consultative with all parties, including Canada, to say nothing of Canada's repeated evasive conduct that has forced the parties through rounds of evidence/submissions and compliance hearings when necessary, resulting in numerous additional findings and orders by the Tribunal since its 2016 finding of discrimination.

79. As NAN has consistently maintained, Canada cannot benefit from its discrimination, and it is attempting to do just that through these judicial review proceedings aimed at avoiding the payment of compensation. In effect Canada is saying that it will only address systemic policy and funding reform but will not compensate the individuals who have suffered harm from a system controlled by Canada. Such positions are in direct conflict with anything resembling reconciliation. When the Prime Minister publicly states, "*On the issue of child and family services, we recognize the tribunal's ruling that says that children need to be compensated, and we will be compensating them*,"[70] First Nations children and their families should be able to put stock in the Prime Minister's words if Canada is truly serious about reconciliation. Unfortunately, the herein proceedings commenced by Canada suggest it is not.

[69] Merits Decision, 2016 CHRT 2,, at para. 481.
[70] Exhibit 7 to the Affidavit of Cindy Blackstock affirmed October 24, 2019.

80. It is in these circumstances that NAN joins the other respondents in respectfully requesting that this Honourable Court dismiss Canada's applications with costs to the Respondents, including NAN.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

THIS 12th DAY OF MAY, 2021

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SCHEDULE "A" – LIST OF AUTHORITIES

1. Truth and Reconciliation Commission of Canada (2015). *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*.
2. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (CanLII)
3. *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 (CanLII)
4. *Canada (Attorney General) v. Johnstone*, 2014 FCA 110
5. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
6. *Canada (Attorney General) v. Johnstone*, 2013 FC 113
7. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 11
8. 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 11
9. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 SCR 574
10. *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41
11. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10
12. *Hughes v. Elections Canada*, 2010 CHRT 4
13. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 SCR 3
14. *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
15. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 16

16. *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (CanLII), [2016] 1 SCR 99

SCHEDULE "B" – STATUTES AND REGULATIONS

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

Purpose of Act

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

…

Special programs

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

…

Collection of information relating to prohibited grounds

16(3) It is not a discriminatory practice to collect information relating to a prohibited ground of discrimination if the information is intended to be used in adopting or carrying out a special program, plan or arrangement under subsection (1).

…

Complaint substantiated

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

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1).

United Nations Declaration on the Rights of Indigenous Peoples

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.