Court File 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

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, CANADIAN HUMAN RIGHTS COMMISSION

Dated May 12, 2021

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OVERVIEW

1. The mass removal of First Nations children from their homes and communities is a human rights tragedy. Whether under the residential school system, the Sixties Scoop, or an underfunded and discriminatory child welfare system, Canada's policies or funding regimes have operated to separate First Nations children from their families at alarming and disproportionate rates. They have also denied First Nations children substantively equal access to health, education, and other important services that other children and families take for granted.

2. In 2007, the First Nations Child and Family Caring Society ("Caring Society") and Assembly of First Nations ("AFN") filed a historic human rights complaint ("Complaint") that aimed to change these discriminatory practices, and provide redress. The Canadian Human Rights Commission ("Commission") sent the case to the Canadian Human Rights Tribunal ("Tribunal") for inquiry. The current Tribunal Panel was assigned in 2012. The Commission participated in the Tribunal proceedings, calling evidence and making arguments over 70 days of hearing in 2013 and 2014. That hearing led to a ground breaking series of decisions in which the Tribunal (i) found Canada had discriminated against First Nations children and families, contrary to the *Canadian Human Rights Act* ("*CHRA*")[1], and (ii) adopted a dialogic approach to remedies – providing guidance, ordering consultation and reporting, making findings of non-compliance where needed, and retaining jurisdiction to oversee progress until compliance is achieved.

3. These decisions have required that Canada make positive improvements. However, Canada now seeks to overturn two groupings of the Tribunal's remedial decisions (together, the "Decisions"). The first grouping consists of the Tribunal's decisions to award financial compensation to eligible First Nations children, and eligible caregiving parents and grandparents (the "Compensation Decisions"). The second grouping consists of the Tribunal's decisions clarifying the eligibility of First Nations children to be considered for services funded through Jordan's Principle (the "First Nations Child Decisions").

4. This Court should approach the Decisions from a position of judicial restraint. The Tribunal Panel has been seized with the Complaint for almost nine years and counting. During

[1] *Canadian Human Rights Act*, RSC 1985, c. H-6 ("*CHRA*").

this time, it has heard from numerous fact and expert witnesses, and received extensive documentary evidence. It has issued numerous rulings on systemic program reform that Canada has not challenged. Given its lengthy history with these matters, the Tribunal's exercise of remedial discretion should be afforded a particularly high degree of deference. Here, the Tribunal proceeded in a fair manner, applied the proper statutory provisions and legal principles, and gave lengthy and detailed reasons in support of its conclusions. While aspects of the Decisions may be bold, extraordinary violations of the *CHRA* appropriately call for extraordinary remedies. Overall, the Decisions are reasonable.

5. While the Commission considers the Decisions to be reasonable, it did not take positions below on whether or what financial remedies should be made in response to the harms caused by the federal government's discriminatory practices. Nor did the Commission take a position on the proper definition of "First Nations child" for purposes of Jordan's Principle. Instead, the Commission focused its participation on general principles it considered relevant – largely leaving it to the Caring Society and the AFN, as the parties with closer connections to the victims and communities, to identify the remedial orders they sought, and the supporting evidence.

6. The Commission takes a similar approach here. It will not engage with all aspects of the Tribunal's Decisions, or Canada's criticisms. Instead, the Commission will recap the context and procedural history. It will make a few remarks about standard of review, then invite the Court to take the following into account, in disposing of these matters:

a) The Tribunal has a broad discretion to fashion meaningful remedies. This includes the authority to provide guidance, order parties to consult on solutions, and retain jurisdiction to oversee implementation. This does not amount to an abandonment of adjudicative responsibilities. To the contrary, it is an accepted method of proceeding, both in complex cases about the delivery of government services, and cases where the parties' collaboration is needed to particularize financial remedies.

b) Financial awards under the *CHRA* serve particular purposes that are unique to the human rights context. The Tribunal has jurisdiction to award individual financial remedies in response to systemic discrimination, where the evidence warrants. The *CHRA* expressly allows complainants to seek remedies in respect of non-party victims. It gives the Tribunal

a broad discretion with respect to the admissibility of evidence. The Tribunal can award compensation without hearing testimony from individual victims, where other kinds of evidence can reasonably be used to assess the impacts of discriminatory practices. This can properly include awards of compensation to the estates of victims who died after suffering discrimination.

c) Jordan's Principle has always been at issue before the Tribunal. The scope of an inquiry is not strictly limited to the four corners of a complaint form. Instead, it is determined by the pleadings filed by all the parties, and by any rulings from the Tribunal that define the matters at play. Where the Tribunal has made unchallenged rulings about an issue, that issue properly forms part of the Tribunal's inquiry. For a party to later argue otherwise is tantamount to an impermissible collateral attack on the Tribunal's prior rulings.

d) To determine whether eligibility criteria for a benefit are under-inclusive, human rights decision makers begin by carefully identifying the nature of the benefit being sought. They then determine the purpose of the benefit, and ask whether persons who fall within that purpose are being arbitrarily excluded, for reasons linked to prohibited grounds of discrimination. In the First Nations Child Decisions, the benefit at issue is entitlement to be considered for the possible provision of services under Jordan's Principle. Principles of constitutional law, international human rights law, and Reconciliation were relevant in determining whether Canada could automatically deny this benefit to all off-reserve First Nations children without *Indian Act* status.

e) If this Court finds that any aspects of the Decisions were unreasonable, it should quash only those particular aspects, and leave other aspects of the Decisions undisturbed. If any aspects of the Decisions are quashed, they should generally be sent back to the same Panel, for redetermination in accordance with the Court's directions.

PART I ~ STATEMENT OF FACTS

A. Child and Family Services, and Jordan's Principle

7. In Canada, the provinces and territories generally deliver child and family services. Each has its own legislation, governing and regulating the delivery of services to children and families

in need of support.[2] The overarching purpose of any child and family services program is to keep children safely within their homes and communities, where possible.[3] There are two major streams of such services: prevention, and protection. Effective prevention services can help children and families stay safely together. Separating children from their families carries risks, and is required by law to be a last resort.[4]

8. Because of their unique status under s. 91(24) of the *Constitution Act, 1867*, First Nations children and families living on reserve and in the Yukon do not receive child and family services from their home provinces or territories. Instead, the federal government funds and guides the delivery of these services through the First Nations Child and Family Services Program ("FNCFS Program"). At the times material to the Complaint, the "essential nature" of the FNCFS Program was "…to ensure First Nations children and families on reserve and in the Yukon receive the 'assistance' or 'benefit' of culturally appropriate child and family services that are reasonably comparable to the services provided to other provincial residents in similar circumstances."[5]

9. As with child and family services, the provinces and territories are generally responsible for delivering other kinds of social services – including health and education. However, here too Canada funds and controls the delivery of some such services to First Nations children and families living on reserve and in the Yukon, by virtue of s. 91(24) of the *Constitution Act, 1867*. It also funds certain services and products for some First Nations children and families off reserve, for example pursuant to the Non-Insured Health Benefits Program.[6] Navigating the boundaries of jurisdiction between the federal and provincial/territorial governments can be complicated for First Nations children and families. This can result in detrimental delays or adverse differentiation when trying to access health, education or other social services that others take for granted.[7] It can also result in denials of such services.[8]

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[2] 2016 CHRT 2 at para 4.
[3] 2016 CHRT 2 at para 115.
[4] 2016 CHRT 2 at para 116.
[5] 2016 CHRT 2 at para 60.
[6] 2019 CHRT 7 at para 77.
[7] 2016 CHRT 2 at paras 366-382, 391, and 458.
[8] 2016 CHRT 2 at paras 391 and 458.

10. Jordan River Anderson was a First Nations child who was adversely affected by jurisdictional disputes over the cost of providing social services. He was born to a family from the Norway House Cree Nation in Manitoba. He had complex medical needs. His family surrendered him into provincial care so he could get the medical treatment he needed. After spending the first two years of his life in hospital, Jordan could have gone to live in a specialized foster home. However, Canada and Manitoba argued over who should pay the foster home costs. They were still arguing when Jordan passed away at the age of five, never having lived outside of the hospital.[9]

11. Jordan's circumstances led to the development of Jordan's Principle – a child first principle for resolving disputes involving the care and needs of First Nations children.[10] Given its centrality to the issues raised in these applications, Jordan's Principle will be discussed further, below.

B. The Complaint

12. In 2007, the Caring Society[11] and the AFN[12] filed a human rights complaint (the "Complaint"). They alleged Canada was violating the *CHRA* by discriminating on the basis of race and national or ethnic origin in the provision of services.[13] Among other things, the Complaint says that Canada discriminates against First Nations children and families on reserve by underfunding the delivery of child and family services. It notes the drastic overrepresentation of status First Nations children in care, and the need to address funding policies that favour removing children from their homes. It also calls for the implementation of Jordan's Principle, described as a child-first solution for ensuring needs are met, despite jurisdictional disputes between and within federal and provincial governments. The Complaint describes the discrimination as "systemic and ongoing."

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[9] 2016 CHRT 2 at para 352.
[10] 2016 CHRT 2 at para 353.
[11] The Tribunal described the Caring Society as "…a non-profit organization committed to research, policy development and advocacy on behalf of First Nations agencies that serve the well-being of children, youth and families": 2016 CHRT 2 at para 12.
[12] The Tribunal described the AFN as "…a national advocacy organization that works on behalf of over 600 First Nations on issues such as Treaty and Aboriginal rights, education, housing, health, child welfare and social development": 2016 CHRT 2 at para 12.
[13] Complaint of the Caring Society and Assembly of First Nations (Affidavit of Deborah Mayo affirmed March 10, 2021 ("Mayo Affidavit"), Exhibit 1).

13. As Dr. Blackstock later testified, the Complaint was filed as a last resort, based on a feeling there was no other alternative.[14] In this regard, the Complaint described past efforts by the Caring Society, the AFN and others to advocate for program reform and increased funding. It stated that Canada knew for years that First Nations children and families on reserve were receiving inequitable services, but refused to take action.[15]

14. The Commission exercised its discretion under the *CHRA* to refer the Complaint to the Tribunal for an inquiry. In November 2008, the Attorney General filed an application for judicial review, seeking to quash the Commission's decision, and thereby block the Tribunal from hearing the Complaint. In November 2009, Prothonotary Aronovitch stayed the application, in favour of allowing the specialized Tribunal to conduct a full and thorough examination of the issues.[16] This Court dismissed the Attorney General's appeal of that decision.[17]

C. Parties before the Tribunal

15. The parties to a complaint before the Tribunal are (i) the complainant (here, the Caring Society and the AFN, as co-complainants), (ii) the Commission (in its role as a representative of the public interest), and (iii) the respondent (here, the Attorney General of Canada).[18]

16. The Tribunal has the power to grant interested party status in appropriate circumstances.[19] In this case, the Tribunal has used that power over time to add various interested parties to the proceedings. It added Chiefs of Ontario ("COO") and Amnesty International as interested parties not long after the Complaint was referred for inquiry. It added the Nishnawbe Aski Nation ("NAN") and the Congress of Aboriginal Peoples ("CAP") after the decision on liability, at

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[14] Blackstock Transcript, Feb 28, 2013, p. 3, lines 17-25 (Mayo Affidavit, Exhibit 11).
[15] In alleging that Canada already knew about the discriminatory nature of the services, the Complaint cites, among other things, the Joint National Policy Review on First Nations Child and Family Services (the "NPR", 2000), and the three-part series of Wen:de reports (2005). These documents will be discussed later in this Memorandum.
[16] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (24 Nov. 2009), Ottawa T-1753-08 (F.C.) (Proth.) (unreported) at p 6.
[17] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2010 FC 343 at paras 6-8.
[18] *CHRA*, ss. 50(1) and 51.
[19] *Canadian Human Rights Tribunal Rules of Procedure*, Rule 8.

different points during the remedies implementation phase of the proceedings. The extent of each interested party's participatory rights is set out in the Tribunal ruling or direction that granted interested party status.

D. Canada Tries to Strike the Complaint, Without Success

17. In December 2009, Canada brought a preliminary motion at the Tribunal to strike the Complaint. It relied on two legal arguments. First, it argued it was not providing "services" within the meaning of s. 5 of the *CHRA* when funding and overseeing the FNCFS Program (the "Services Issue"). Second, it characterized the Complaint as inviting a "cross-jurisdictional comparison" of services provided at the federal and provincial/territorial levels, and argued that such comparisons cannot be used to establish discrimination (the "Comparator Issue").

18. In March 2011, the Tribunal granted Canada's motion to strike, based on the Comparator Issue.[20] However, this Court quashed that decision as unreasonable in April 2012, thus reinstating the Complaint, and clearing the path for a hearing on the merits.[21] The Federal Court of Appeal dismissed Canada's appeal from that decision in March 2013.[22]

E. The Panel, and the Retaliation Complaint

19. In July 2012, a Tribunal Panel composed of Members Marchildon, Lustig and Bélanger was appointed to conduct an inquiry into the Complaint.[23]

20. In October 2012, the Tribunal granted the Caring Society's motion to amend the Complaint to include allegations that Canada had retaliated against its Executive Director, Dr. Cindy Blackstock.[24] The Tribunal held a hearing into the retaliation allegations in 2013, and upheld them in part in 2015 (the "Retaliation Decision"). It found Canada had retaliated against Dr. Blackstock

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[20] 2011 CHRT 4 at paras 4-5.
[21] *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2012 FC 445 at paras 391-395.
[22] *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2013 FCA 75 at paras 16-17.
[23] 2012 CHRT 16 at para 30. Sadly, Member Bélanger passed away after the hearing was concluded, but before the Panel rendered its ruling on the merits of the Complaint.
[24] 2012 CHRT 24 at paras 13-18.

by ejecting her from a meeting with the Chiefs of Ontario at the office of the Minister of what was then the Department of Aboriginal Affairs and Northern Development.[25] The Tribunal ordered Canada to pay Dr. Blackstock (i) $10,000 for pain and suffering, and (ii) $10,000 as special compensation for wilful and reckless conduct. It held that, "when evidence establishes pain and suffering, an attempt to compensate for it must be made."[26] Canada did not seek judicial review of the Retaliation Decision.

F. The Tribunal Hearing on the Merits

(i) The Hearing Process

21. The Tribunal heard the Complaint over roughly 70 days, from February 2013 to October 2014. During this time it heard from 25 witnesses (including four experts) and received roughly 500 documentary exhibits.

22. Partway in, the hearing on the merits was delayed for three months after the Caring Society discovered through an *Access to Information Act* request that Canada had knowingly failed to disclose 90,000 documents. As the Tribunal later held, a number of these documents "…were prejudicial to Canada's case and highly relevant."[27] In January 2019, the Tribunal issued a consent order requiring Canada to compensate the Caring Society, the AFN and COO for costs unnecessarily incurred as a result of Canada's "lack of transparency and blatant disregard for [the Tribunal's] process," and the resulting impacts on the proceedings.[28]

23. During the hearing, the Tribunal heard from witnesses who indicated that Canada's funding and operation of the FNCFS Program caused harm to First Nations children and their families. It received various reports and studies, which separately and together showed Canada's awareness that its approach was causing harm to First Nations children and families.[29] It also heard about

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[25] 2015 CHRT 14 at paras 58-61.
[26] 2015 CHRT 14 at para 124.
[27] 2019 CHRT 1 at para 32.
[28] 2019 CHRT 1 at para 30.
[29] For examples, see: Dr. Rose-Alma J. McDonald, Dr. Peter Ladd et al, *First Nations Child and Family Services - Joint National Policy Review - Final Report* (Mayo Affidavit, Exhibit 72, Tab 3, pp 011378-011519); John Loxley, Fred Wien and Cindy Blackstock, *Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report, a summary of*

incidents where social services were not provided to or in respect of First Nations children, and that federal bureaucrats had not taken steps to recommend that Canada modify its approach to Jordan's Principle, despite having received numerous criticisms.

(ii) Parties' Positions on Compensation

24. Up to and during the hearing, the Commission's focus was on the eradication of discriminatory practices. The only remedies sought in its Amended Statement of Particulars dated January 29, 2013, were aimed at program reform.[30] The Commission did not request any financial remedies, either in its pleadings, or in its closing written or oral arguments in 2014 – nor did it take a position on the specifics of the financial remedies sought by others.[31] Instead, the Commission asked in its written reply submissions that the Tribunal consider certain remedial principles in making its eventual ruling.[32]

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research needed to explore three funding models for First Nations child welfare agencies (Vancouver: First Nations Child and Family Caring Society of Canada, 2004) (Mayo Affidavit, Exhibit 72, Tab 4, pp 011520-011533); Dr. Cindy Blackstock et al., *Wen:De We Are Coming to the Light of Day* (Ottawa: First Nations Child and Family Caring Society, 2005) (Mayo Affidavit, Exhibit 72, Tab 5, pp 011534-011759); John Loxley et al., *Wen:De The Journey Continues* (Ottawa: First Nations Child and Family Caring Society, 2005) (Mayo Affidavit, Exhibit 72, Tab 6, pp 011760-011952); Auditor General of Canada, *2008 Report to the House of Commons – Chapter 4, First Nations Child and Family Services Program (INAC)* (Mayo Affidavit, Exhibit 74, Tab 3, pp 013047-013061); Indian and Northern Affairs Canada, *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, attachment to an email sent by Bill Zaharoff, Director of Intergovernmental Affairs, British Columbia Region (June 3, 2009) (Mayo Affidavit, Exhibit 77, Tab 78, pp 015140-015143; and Auditor General of Canada, *2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, Programs for First Nations on Reserves* (Ottawa: Minister of Public Works and Government Services Canada, 2011) (Mayo Affidavit, Exhibit 76, Tab 53, pp 014503-014555).

[30] Amended Statement of Particulars of the Commission dated January 29, 2013, at para. 26 (Mayo Affidavit, Exhibit 4).

[31] Closing Submissions of the Canadian Human Rights Commission dated August 25, 2014, at para 628 (Joint Record, Tab 93).

[32] Reply Submissions of the Canadian Human Rights Commission dated October 14, 2014, at paras 59-69 (Joint Record, Tab 99).

25. The Caring Society and the AFN each made closing arguments to the Tribunal about the financial remedies they considered appropriate, on the evidence and the law.[33] At that time, Canada did not respond by arguing the Tribunal lacked jurisdiction to grant financial remedies, in light of the systemic nature of the alleged discrimination. Instead, it argued there was insufficient evidence in the record to support the requested financial awards.[34]

G. 2016 – The Merits Decision

(i) Findings of Liability

26. In January 2016, the Tribunal released its decision upholding the merits of the Complaint (the "Merits Decision").[35] It found Canada had violated s. 5 of the *CHRA* in two principal ways.

27. First, the Tribunal found Canada's First Nations Child and Family Services Program ("FNCFS Program") discriminated against First Nations children and families on reserve and in the Yukon. Among other things, it held that the FNCFS Program and related funding formulas (i) resulted in inadequate fixed funding for operation and prevention costs, thus hindering the delivery of child welfare services mandated by provincial or territorial law, let alone culturally appropriate services[36], (ii) created incentives for FNCFS Agencies to take First Nations children into care[37], and (iii) failed to adequately consider the distinct needs of First Nations children and families – including their cultural, historical and geographical circumstances.[38]

28. Second, the Tribunal found Canada discriminated by taking an overly narrow approach to Jordan's Principle, resulting in service gaps, delays and denials.[39]

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[33] Caring Society Written Submissions dated August 29, 2014, at paras 513-543 (Joint Record, Tab 91); AFN Written Submissions dated August 29, 2014, at paras 508-524 (Joint Record, Tab 92).
[34] AGC Written Submissions dated October 3, 2014, at paras 228 and 238-247 (Joint Record, Tab 96).
[35] 2016 CHRT 2.
[36] 2016 CHRT 2 at para 458.
[37] 2016 CHRT 2 at paras 384, 386 and 458.
[38] 2016 CHRT 2 at para 465.
[39] 2016 CHRT 2 at paras 381-382, 391, and 458.

29. In reaching these conclusions, the Tribunal found that Canada was aware of: inequalities in its FNCFS Program; the resulting harms being caused for First Nations children; the disparities that First Nations children face when accessing essential services; and the harms that can result from misapplying Jordan's Principle.[40] It further found that despite this awareness, and despite having had evidence-based solutions available (for example, in the form of the Wen:De Reports, and its own internal analysis and evaluations), Canada had failed to make any substantive changes to address the issues.[41]

(ii) Acknowledgment of Harm and Suffering

30. The Merits Decision recognizes that Canada's discriminatory practices, "…have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves."[42] It further finds that the adverse impacts experienced by these children and families, "…perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system."[43] Indeed, the Tribunal's final remarks, before setting out the terms of its order, are an acknowledgment of the suffering caused by Canada's discriminatory practices:

> The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves.[44]

(iii) Remedies

31. The Tribunal ordered the federal government to cease its discriminatory practices, and engage in any reforms needed to bring itself into compliance with the findings in the Merits Decision.[45] It ordered Canada to cease applying a narrow definition of Jordan's Principle, and to

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[40] 2016 CHRT 2 at para. 168, 362-372, 385-386, 389 and 458.
[41] 2016 CHRT 2 at paras 150-185, 270-275, 362-372, 385-386, 389, 458 and 481.
[42] 2016 CHRT 2 at para 458.
[43] 2016 CHRT 2 at para 459.
[44] 2016 CHRT 2 at para 467.
[45] 2016 CHRT 2 at para 481.

immediately implement its full meaning and scope.[46] After noting the "complexity and far-reaching effects of the relief sought" with respect to the FNCFS Program, the Tribunal stated its intent to seek clarification from the parties about "how the requested immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis."[47] It retained jurisdiction "pending the determination of the outstanding remedies."[48]

32. The Merits Decision notes the Caring Society and AFN had each requested financial remedies in respect of the victims of the discriminatory practices identified therein. The Tribunal did not rule on the requests at that time, instead indicating that it had questions for the parties about their submissions, and would return to the issue and make a ruling at a later date.[49]

33. Canada did not seek judicial review of the Merits Decision, and can thus be taken to have accepted all its findings.

H. Various Non-Compliance Rulings

(i) Implementation Generally

34. Consistent with the remedial methodology outlined in the Merits Decision, the Tribunal remained seized of the Complaint, in order to (i) oversee Canada's efforts to bring itself into compliance with the unchallenged findings and orders made in that decision, and (ii) resolve outstanding issues relating to financial compensation for victims of Canada's discriminatory practices.

35. The Tribunal has exercised its retained jurisdiction on numerous occasions since the Merits Decision was released. Among other things, it has made findings that Canada is not yet in full compliance with the Merits Decision, and provided further directions and guidance. A full review of all these rulings is beyond the scope of this Memorandum. However, a few are worthy of mention, based on their connections to issues raised in these Applications.

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[46] 2016 CHRT 2 at para 481.
[47] 2016 CHRT 2 at para 483.
[48] 2016 CHRT 2 at para 494.
[49] 2016 CHRT 2 at para. 490.

(ii) April 2016 – Remedial Principles

36. In April 2016, the Tribunal ordered Canada to take immediate action on certain findings from the Merits Decision, including Jordan's Principle, and to provide a comprehensive report on actions taken.[50] In making these orders, the Tribunal reiterated various legal principles regarding its remedial authority under the *CHRA*. It affirmed its obligation to ensure that remedial orders are effective in promoting the rights protected by the quasi-constitutional *CHRA*, and "…meaningful in vindicating any loss suffered by the victim of discrimination."[51] It further noted that remedial orders responding to systemic discrimination can be difficult to implement, and that retaining jurisdiction in such circumstances ensures that remedial orders are effectively implemented.[52] Canada did not seek judicial review of this Ruling.

(iii) September 2016 – Jordan's Principle off Reserve

37. In September 2016, the Tribunal clarified that Jordan's Principle extends not only to First Nations children living on reserve, but also to those living off reserve.[53] It was critical of Canada's insistence to the contrary, stating that, "this type of narrow analysis is to be discouraged moving forward as it can lead to discrimination as found in the [Merits Decision]. Rather, consistent with the motion unanimously adopted by the House of Commons, the Panel orders INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve."[54] Canada did not seek judicial review of this Ruling.

(iv) May 2017 – Scope and Purposes of Jordan's Principle

38. In May 2017, the Tribunal found that Canada still had not brought itself into compliance with previous rulings regarding Jordan's Principle. It discussed challenges that had been faced in obtaining timely services for First Nations children and families, including the following:

a) The Tribunal described a heartbreaking tragedy that might have been prevented, if Canada had moved more quickly to adopt a compliant approach to Jordan's Principle. In 2016,

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[50] 2016 CHRT 10 at paras 20-25 and 30-34.
[51] 2016 CHRT 10 at para 14.
[52] 2016 CHRT 10 at para 36.
[53] 2016 CHRT 16 at para 160(A)(7).
[54] 2016 CHRT 16 at para 118.

Wapekeka First Nation ("Wapekeka," a NAN community) sent Canada a detailed proposal, seeking funding for an in-community mental health team. The proposal explained that funding was sought as a preventive measure, in response to community concerns about a suicide pact amongst a group of young children and youth. Canada had received the proposal by September 2016, but did not take timely steps to respond, as it had come at an "awkward time in the federal funding cycle." Tragically, two twelve-year-old children died by suicide in Wapekeka in January 2017. It was only after these events that Canada provided assistance.[55]

b) The Tribunal noted evidence about a First Nations mother who wrote Canada, looking for assistance in busing her son with cerebral palsy to an off-reserve service centre with a program for special needs children. Two weeks after the request was made, Canada was still trying to navigate between its own services and programs. When asked about the case under cross-examination, Canada's witness admitted, "So I guess there's additional work to be done and, and I'm not sure that I have a better answer for it than that."[56]

39. Based on this and other evidence, and on its previous rulings, the Tribunal gave more precise directions on how Jordan's Principle claims were to be processed, including timelines.[57] In making these orders, the Tribunal described Jordan's Principle as serving at least two important purposes for all First Nations children:

a) First, Jordan's Principle ensures that First Nations children do not experience gaps in services due to jurisdictional disputes within and between governments.[58]

b) Second, Jordan's Principle can allow for the delivery of services that go beyond the normative standard of care that is otherwise available to persons in the province or territory. This aspect of Jordan's Principle is rooted in a recognition that First Nations children may have additional needs that stem from discrimination and other disadvantages, including

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[55] 2017 CHRT 14 at paras 88-92. See also: 2017 CHRT 7, at paras 8-10, which describe the events in Wapekeka, and also note that in February 2017, two other youths aged 11 and 21 tragically took their own lives in the NAN communities of Deer Lake and Kitchenuhmaykoosib Inninuwug.
[56] 2017 CHRT 14 at para 95.
[57] 2017 CHRT 14 at paras 82-107.
[58] 2017 CHRT 14 at para 2.

those relating to the intergenerational effects of colonialism, displacement, residential schooling, the 60s Scoop, and so on. Because of this unique history, First Nations children may require additional services that other children do not, and/or require that services be delivered in a different manner that is appropriate for their cultural, historical and geographical needs and circumstances.[59]

40. Canada did not seek judicial review of the Tribunal's May 2017 findings regarding the purposes or scope of Jordan's Principle. It did file an application for judicial review with respect to certain details of the May 2017 order regarding case conferencing and timelines.[60] However, that application was later withdrawn, after the Tribunal issued a consent order in November 2017, varying those aspects of its prior ruling.[61] In its later decisions on financial compensation (described below), the Tribunal found that as of the date of the November 2017 order, Canada had finally brought itself substantially into compliance with the Tribunal's rulings regarding Jordan's Principle.[62]

(v) February 2018 – Immediate Reform of the FNCFS Program

41. In February 2018, the Tribunal issued a substantial ruling, finding Canada had not brought itself into compliance with many aspects of the Tribunal's findings regarding the FNCFS Program. It took note of evidence indicating that discrimination in the FNCFS Program was continuing to occur on a national scale, and that a lack of prevention programs was leading to apprehension and placement of children into care.[63] The Tribunal made a series of additional orders. Among other things, it ordered Canada to pay the actual costs of FNCFS Agencies for certain matters, including prevention services, intake and investigations, eligible building repairs, legal costs, and (in Ontario) mental health and band representative services.[64] It also ordered the creation of a

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[59] 2017 CHRT 14 at paras 69-73. For additional passages from the Tribunal recognizing that the unique context may require going beyond normative standards of care in order to promote substantive equality, see: 2016 CHRT 2 at paras 402-427 and 464-465; 2019 CHRT 7 at para 74; and 2020 CHRT 20 at paras 89-101.
[60] Federal Court File No. T-918-17.
[61] 2017 CHRT 35 at para 10.
[62] 2019 CHRT 39 at paras 250-251 and 254.
[63] 2018 CHRT 4 at paras 178-179.
[64] 2018 CHRT 4 at paras 410 and 426-427.

Consultation Committee, at which Canada and the parties would meet to discuss implementation of the Tribunal's orders.[65]

42. At the hearing that led to the February 2018 ruling, Canada had raised concerns about the fairness of the Tribunal's approach to remedial interpretation. It argued the scope of the issues had expanded, and that the hearing was in danger of becoming "open-ended and indeterminate." The Tribunal found no unfairness, adding that, "It took years for First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file."[66] The Tribunal said it would next "move on to the issue of compensation and long term relief" – allowing parties to "make submissions on the process, <u>clarification of the relief sought, duration in time</u>, etc." (emphasis added).[67]

43. Canada did not seek judicial review of the February 2018 ruling.

I. 2019-20 - First Nations Child Decisions

(i) Caring Society Motion, and Interim Order

44. In its rulings from 2016 through 2018, the Tribunal described Jordan's Principle as existing for the benefit of "all First Nations children." Neither the Merits Decision nor other implementation rulings in this time period expressly defined what the Tribunal meant when using that term in connection with eligibility under Jordan's Principle.

45. During cross-examinations held in February 2017, one of Canada's witnesses said that *Indian Act* status was not a mandatory requirement for the receipt of services under Jordan's Principle, but instead was a "point of information" on which Canada was collecting information.[68] Fifteen months later, a then-Associate Deputy Minister gave different evidence, saying that "since the beginning," Canada had interpreted the Tribunal's orders as applying only to children

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[65] 2018 CHRT 4 at para 400.
[66] 2018 CHRT 4 at para 387.
[67] 2018 CHRT 4 at paras 385-86.
[68] Transcript of the February 6, 2017 cross-examination of Robyn Buckland, at Q 142, p. 48 (Joint Record, Tab 185).

registered or eligible to be registered under the *Indian Act*.[69] This led to discussions among the parties about whether Canada's approach complied with the Tribunal's rulings to date. Canada did broaden its approach to also include "non-status Indigenous children who are ordinarily resident on-reserve."[70] However, the Caring Society continued to have concerns about Canada's decision to automatically exclude all non-status First Nations children residing off-reserve. It brought a motion for clarification, and sought interim relief.

46. At an initial appearance, the Tribunal emphasized its desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance when crafting remedies – including their rights to determine citizenship.[71] Indeed, the Tribunal stressed that a final determination on the issue of "First Nations child" in the Jordan's Principle context would have to await a full hearing, at which the parties would be expected to address various relevant principles from constitutional law, as well as domestic and international human rights law (including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)).[72]

47. In February 2019, the Tribunal issued an interim ruling on the motion. It reviewed the circumstances of a young First Nations child who did not have *Indian Act* status, and who lived off reserve. The child required an essential medical diagnostic scan, to address a life-threatening condition. Canada refused to pay for the scan. It did not conduct a substantive equality analysis, and instead focused its reasoning on the child's lack of status.[73] The Caring Society paid for the scan, and argued before the Tribunal that Canada's handling of the case had been unreasonable. The Tribunal agreed, finding Canada had not adequately considered the child's best interests.[74] As a temporary measure, pending a full hearing on the issues, the Tribunal ordered Canada to consider requests for services under Jordan's Principle from non-status off-reserve First Nations

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[69] Transcript of the May 9, 2018 cross-examination of Sony Perron, at p. 47 (Mayo Affidavit, Exhibit 144, p. 027459).
[70] Affidavit of Valerie Gideon, sworn December 21, 2018, at paras 8, 10 and 17 and Exhibit "C" (Mayo Affidavit, Exhibit 144, pp. 027384-027386, 027655).
[71] 2019 CHRT 7 at para 23.
[72] 2019 CHRT 7 at para 22.
[73] 2019 CHRT 7 at para 73.
[74] 2019 CHRT 7 at para 79.

children who (i) have urgent and/or life-threatening needs, and (ii) are recognized as members by their First Nations.[75]

(ii) The First Nations Child Decision

48. In March 2019, the Tribunal held a hearing on the First Nations child issue. The Commission did not take a position on the proper disposition of the Caring Society's motion, and instead asked the Tribunal to consider certain human rights law principles when making its eventual ruling. In July 2020, the Tribunal granted the Caring Society's motion in part (the "First Nations Child Decision").[76]

49. Citing domestic and international human rights principles, the Tribunal found that Canada's approach placed undue emphasis on *Indian Act* status when determining who is eligible to receive Jordan's Principle services.[77] It held that Canada could not automatically exclude non-status First Nations children living off reserve who (i) are recognized by their First Nations for purposes of Jordan's Principle eligibility, or (ii) have one parent registered or eligible for registration under s. 6(2) of the *Indian Act*.[78] Instead, it said Canada should take a case-by-case approach, letting such children "through the door," then assessing whether the actual provision of services would be consistent with substantive equality principles.[79] The Tribunal declined to make orders that would have further extended eligibility to apply, finding the claims were outside the scope of the inquiry, and were not adequately supported by evidence.[80]

50. The Tribunal recognized concerns that requests for recognition would place administrative burdens on First Nations. It directed Canada to consult with the parties to generate eligibility

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[75] 2019 CHRT 7 at para 89.
[76] 2020 CHRT 20 at paras 321-323.
[77] 2020 CHRT 20 at para 145.
[78] 2020 CHRT 20 at paras 229 and 272.
[79] 2020 CHRT 20 at paras 214-15.
[80] 2020 CHRT 20 at paras 280-285. As described in para 274, these other categories consisted of: (i) "First Nations children without *Indian Act* status, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program"; and (ii) "First Nations children without *Indian Act* status, residing off reserve, who have lost their connection to their First Nations communities due to other reasons."

criteria, and operational procedures that would allow (but not require) First Nations to confirm recognition of children for purposes of Jordan's Principle. The parties were to include in their discussions the need for First Nations to receive funds for responding to recognition requests, and report back to the Tribunal by October 2020. The Tribunal stated that until a final order was made (on consent or otherwise), the February 2019 interim ruling would remain in effect.[81]

51. In making its ruling, the Tribunal emphasized there is a significant difference between determining who is a "First Nations child" for purposes of receiving services from Canada pursuant to Jordan's Principle, and determining who is a "First Nations child" for purposes of citizenship in a First Nation. Taking into account First Nations' human rights and inherent rights to self-determination and self-governance, the Tribunal stressed that its findings addressed only the former (Jordan's Principle eligibility), and not the latter (citizenship in a First Nation).[82]

52. Canada had argued that all the relief sought was outside the scope of the Tribunal's inquiry. The Tribunal dismissed this argument, finding that (among other things) (i) the pleadings were broad enough to encompass the relief granted, and (ii) it had already made numerous rulings dealing with the scope and meaning of Jordan's Principle, including its application to a broad range of services, both on and off reserve.[83] The Tribunal noted that Canada had not challenged any of those prior rulings on judicial review, and to the contrary, had previously signalled its acceptance of the Tribunal's past reasons and orders.[84]

(iii) The First Nations Child Consent Order

53. Further to the First Nations Child Decision, the parties consulted and reached agreement on eligibility criteria, recognition procedures, and associated funding for First Nations. In November 2020, the Tribunal issued a ruling that approved the proposal on consent ("First Nations Child Consent Order").[85] Canada then delivered a Notice of Application, asking this Court to set

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[81] 2020 CHRT 20 at paras 321-23.
[82] 2020 CHRT 20 at paras 129-130.
[83] 2020 CHRT 20 at paras 199-207.
[84] 2020 CHRT 20 at para 218.
[85] 2020 CHRT 36 at para 53.

aside the First Nations Child Decision, as modified and confirmed by the First Nations Child Consent Order.

J. 2019-21 - Compensation Decisions

(i) The Compensation Decision

54. As stated above, the Tribunal said in its February 2018 ruling that it would be moving on to issues including compensation, and would allow parties to "make submissions on the process, clarification of the relief sought, duration in time, etc."[86] On March 15, 2019, the Tribunal sent the parties written questions about compensation.[87] A staggered schedule was set for the exchange of fresh written submissions about compensation, leading towards a two-day hearing on the issue at the end of April 2019.

55. On April 3, 2019, the Caring Society delivered its written submissions. Among other things, it argued that Canada should pay compensation for every child affected by Canada's FNCFS Program who has been taken into out-of-home care "since 2006 through to the point in time when the Panel determines that Canada is in full compliance with the January 26, 2016 Decision."[88] Canada filed its responding written submissions on April 16, 2019. It opposed the claims made for financial compensation, arguing the Tribunal lacked jurisdiction to make such awards in cases about systemic discrimination. It did not say it would be procedurally unfair to entertain submissions about prospective financial awards, nor did it respond in substance to the Caring Society's request for ongoing compensation.[89]

56. In September 2019, the Tribunal issued a decision finding there are victims of Canada's discriminatory practices who are entitled to receive financial compensation (the "Compensation Decision").[90] Drawing on factual findings made in all its previous decisions, which in turn had been based on a review of thousands of pages of evidence, the Tribunal found that Canada's

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[86] 2018 CHRT 4 at para 386.
[87] Tribunal's questions on compensation dated March 15, 2019 (Mayo Affidavit, Exhibit 158).
[88] Written Submissions of the First Nations Child and Family Caring Society of Canada regarding Compensation, dated April 3, 2019, at para 22 (Mayo Affidavit, Exhibit 159).
[89] Written Submissions of the Attorney General of Canada regarding Compensation, dated April 16, 2019 (Mayo Affidavit, Exhibit 167).
[90] 2019 CHRT 39.

discrimination had caused "trauma and harm to the highest degree causing pain and suffering."[91] It said that Canada's conduct had been, "devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families."[92] Taking into account the "worst-case scenario" nature of the racial discrimination at issue, the Tribunal awarded $20,000 for pain and suffering (s. 53(2)(e) of the *CHRA*) and $20,000 as special compensation for wilful and reckless discrimination (s. 53(3) of the *CHRA*) to certain categories of individuals, all with interest (s. 53(4) of the *CHRA*). Analogizing to the common experience payments Canada paid out to survivors of Residential Schools, the Tribunal found it was justifiable to award this financial compensation to any child or adult falling within the identified categories.[93]

57. The Tribunal did not order Canada to immediately pay compensation. Instead, it (i) described categories of eligible victims[94], (ii) set out principles that would govern the distribution of compensation[95], and (iii) ordered Canada to consult with the Caring Society, the AFN, and other parties (if willing), to develop propositions regarding the appropriate methodology for identifying, locating and paying compensation to eligible victims.[96] The Tribunal invited comments, suggestions and requests for clarification from any party, including with respect to the wording or content of the orders.[97] It retained jurisdiction until the issue of the compensation process was resolved, whether by consent order or otherwise.[98]

58. Canada sought judicial review of the Compensation Decision, and asked this Court to stay the Tribunal's orders relating to compensation, pending a decision on the merits. In response, the Caring Society asked this Court to stay the judicial review, to allow the work ordered by the

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[91] 2019 CHRT 39 at para 193.
[92] 2019 CHRT 39 at para 231.
[93] 2019 CHRT 39 at para 258.
[94] 2019 CHRT 39 at paras 245-257.
[95] 2019 CHRT 39 at paras 260-269.
[96] 2019 CHRT 39 at para 269.
[97] 2019 CHRT 39 at para 270.
[98] 2019 CHRT 39 at para 277.

Tribunal to proceed. This Court dismissed both stay motions[99], with partial costs to the Caring Society.[100]

(ii) Additional Compensation Decisions

59. By February 2020, the Caring Society, the AFN and Canada had reached agreement on a number of matters that they included in a draft compensation framework ("Compensation Framework"), which was provided to the Tribunal and the parties. While the parties continued to work on the draft Compensation Framework after that date, they also began to ask the Tribunal for guidance and clarification on matters they could not agree upon. In each instance, the Tribunal invited written submissions from the parties, then made additional rulings, which were later incorporated into fresh drafts of the Compensation Framework:

a) In April 2020, the Tribunal answered three questions on which the parties had sought guidance (the "Eligibility Decision"). First, it agreed with Canada that child beneficiaries should gain unrestricted access to their compensation awards upon reaching the age of majority in their home province or territory.[101] Second, it agreed with the Caring Society and others that compensation should be paid in respect of eligible First Nations children who had entered into care before January 1, 2006, but who remained in care on or after that date.[102] Third, it agreed with the Caring Society and others (including the Commission) that compensation should be paid to the estates of deceased individuals who had been victims of Canada's discriminatory practices before their deaths, and who would have been eligible for compensation if still alive.[103] Canada has not directly challenged any of these conclusions in these Applications.

b) In May 2020, the Tribunal clarified three terms – "essential service," "service gap" and "unreasonable delay" – that had been used in the Compensation Decision, when describing

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[99] *Canada (Attorney General) v. First Nation Child and Family Caring Society of Canada*, 2019 FC 1529 at paras 34-35.
[100] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2020 FC 643 at para 50.
[101] 2020 CHRT 7 at para 36.
[102] 2020 CHRT 7 at paras 74-76.
[103] 2020 CHRT 7 at paras 151-152.

eligibility for compensation related to Jordan's Principle (the "Definitions Decision").[104] It also rejected requests from COO and NAN to expand the categories of family caregivers eligible to receive compensation, beyond parents and grandparents.

c) In February 2021, the Tribunal answered additional questions raised by the parties. Among other things, it held that compensation payable to minors and individuals lacking capacity should be paid into and managed under a trust (the "Trusts Decision").[105] It also agreed with the Commission that the Tribunal was empowered under the *CHRA* to retain jurisdiction, and to resolve any individual disputes over entitlements to compensation that cannot otherwise be resolved using the claims procedure set out in the Compensation Framework.[106] Canada has not directly challenged any of these conclusions in these Applications.

(iii) Compensation Payment Decision

60. Based on the guidance provided in the various Tribunal rulings, the parties submitted a final version of the Compensation Framework to the Tribunal on December 23, 2020, for approval. On February 12, 2021, the Tribunal approved the Compensation Framework and its accompanying schedules (the "Compensation Payment Decision").[107]

61. The approved Compensation Framework is said to be consistent with, and subordinate to, the Tribunal's orders.[108] It says the compensation process will be overseen by a Central Administrator, governed by a Guide to be developed by the parties.[109] The process is to aim for simplicity, consider the best interests of the child, and be conducted in a culturally safe manner.[110] Victims will have the opportunity to opt out of the compensation process.[111] Section 4 of the Compensation Framework explains which First Nations children and caregivers are eligible for

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[104] 2020 CHRT 15 at paras 106-120 on "service gap"; paras 146-152 on "essential service"; and paras 170-175 on "unreasonable delay."
[105] 2021 CHRT 6 at para 30.
[106] 2021 CHRT 6 at paras 124-135.
[107] 2021 CHRT 7 at para 40.
[108] Compensation Framework, at 1.2 (Mayo Affidavit, Exhibit 214).
[109] Compensation Framework, at 2.1 and 2.5 (Mayo Affidavit, Exhibit 214).
[110] Compensation Framework, at 2.2, 2.3, 2.5.1 and 2.6 (Mayo Affidavit, Exhibit 214).
[111] Compensation Framework, at 3.1 to 3.3 (Mayo Affidavit, Exhibit 214).

compensation, in part by defining several key terms – including "necessary or unnecessary removal," "essential service," "service gap," "unreasonable delay," and "First Nations child."[112] Other sections deal with locating and identifying eligible beneficiaries, the provision of supports, timelines for the filing of claims, the retention of records, and review and appeals procedures for individual claims.[113] Finally, the Compensation Framework appends two documents – a Notice Plan for contacting beneficiaries[114], and a taxonomy designed to assist in identifying beneficiaries based on existing records.[115]

62. After the Tribunal released the Compensation Payment Decision, Canada delivered an amended Notice of Application in these proceedings, asking the Court to set aside all the Tribunal rulings relating to financial compensation for the victims of Canada's discriminatory practices.

PART II ~ POINTS IN ISSUE

63. The Commission will address the following subjects in the balance of this Memorandum:

a) What is the applicable standard of review?

b) Are the Decisions reasonable?

c) Has the Tribunal's choice of remedial methodology been fair and reasonable?

d) Is Jordan's Principle properly at issue in the Tribunal's inquiry?

e) What remedial principles are properly taken into account when deciding whether to grant financial compensation in a case involving systemic discrimination?

f) What considerations are properly taken into account in deciding whether Canada's eligibility criteria for consideration under Jordan's Principle are under-inclusive?

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[112] Compensation Framework, at 4 (Mayo Affidavit, Exhibit 214).
[113] Compensation Framework, at 5, 6, 7, 8 and 9 (Mayo Affidavit, Exhibit 214).
[114] Compensation Framework, at Schedule A (Mayo Affidavit, Exhibit 214).
[115] Compensation Framework, at Schedule B (Mayo Affidavit, Exhibit 214).

g) If any aspects of the Decisions are found to be unreasonable, what remedies should be granted?

PART III ~ ARGUMENT

A. Standard of Review

64. The Commission agrees with the Attorney General that this Court (i) owes no deference to the Tribunal on questions of procedural fairness, and (ii) should review the Tribunal's interpretation of the enabling *CHRA*, and its application of the *CHRA* to the facts, on the deferential standard of reasonableness.[116]

65. The latter proposition is consistent with pre-*Vavilov* jurisprudence, which applied reasonableness to the Tribunal's interpretation and application of the *CHRA*.[117] It is also consistent with *Vavilov* itself, in which the Supreme Court of Canada maintained the presumption of reasonableness review, and held that correctness is only required for certain kinds of issues[118] – none of which arise in this case. Indeed, this Court has continued to assess the Tribunal's substantive decisions for reasonableness after *Vavilov*, echoing the Supreme Court's admonition that reviewing courts should intervene "only when it is truly necessary to do so."[119]

66. Reasonableness review starts from a place of judicial restraint, and respect for the distinct role of administrative decision makers.[120] Reviewing courts are not to ask themselves what decisions they would have made, if seized of the matter. Instead, they should consider only whether the party challenging the decision has met its burden of showing that an impugned decision – including both its rationale and the outcome – was unreasonable.[121]

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[116] Applicant's Memorandum of Fact and Law, at para 46.
[117] *Keith v Canada (Human Rights Commission)*, 2019 FCA 251 at para 6.
[118] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 53 ("*Vavilov*").
[119] For a recent example, see: *Nedelec v Rogers*, 2021 FC 191 at paras 16-19.
[120] *Vavilov* at paras 13, 75.
[121] *Vavilov* at paras 83, 100.

67. In this regard, courts should refrain from reweighing and reassessing the evidence, and leave the decision maker's factual findings undisturbed, absent exceptional circumstances.[122] With respect to the interpretation and application of legislation, courts are to pay "respectful attention" and seek to understand the reasoning process followed by the decision maker.[123] They should defer to any decision based on an internally coherent and rational chain of analysis, and justified in relation to the facts and law that constrain the decision maker.[124]

68. In conducting this review, courts bear in mind the institutional context, and the history of the proceedings in which the administrative decision maker rendered the impugned decision.[125] Among other things, courts engaged in reasonableness review may consider the evidence, the parties' submissions, and past decisions of the administrative decision maker.[126]

69. When a court reviews for reasonableness, it does not assess the tribunal's written reasons against a standard of perfection. It should not set aside a decision, simply because the administrative decision maker has not included all the arguments, authorities or analysis the reviewing judge would have preferred. To the contrary, courts are to remain acutely aware of the fact that "…'administrative justice' will not always look like 'judicial justice'…"[127] For example, it may be reasonable for a decision maker to adapt common law or equitable doctrines to its administrative context, in appropriate circumstances.[128]

70. In the end, superficial flaws and minor missteps will not be enough to establish a reversible lack of justification, intelligibility and transparency. Instead, a decision should only be set aside

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[122] *Vavilov* at para 125.
[123] *Vavilov* at para 84.
[124] *Vavilov* at para 85.
[125] *Vavilov* at para 91.
[126] *Vavilov* at para 94. As the Federal Court of Appeal recently put it, the process of justification required post-*Vavilov*, "…does not necessarily require exhaustive or lengthy reasons and any reasons are to be reviewed in light of the record and submissions made by the parties": *Canada (Attorney General) v. Kattenburg*, 2021 FCA 86 at para 15 ("*Kattenburg*").
[127] *Vavilov* at paras 91-92.
[128] *Vavilov* at para 113.

if it contains "sufficiently serious shortcomings" that are "sufficiently central or significant" to render the decision unreasonable.[129]

71. As a final note, it is important to remember that Canada is attacking remedy decisions the Tribunal has rendered under s. 53 of the *CHRA*. Standard of review cases decided pre-*Vavilov* stressed that specialized administrative bodies like the Tribunal are "…owed a particularly high degree of deference in their exercise of a broad statutory discretion to fashion an appropriate remedy."[130]

B. The Decisions are Reasonable

72. As outlined above, the Panel has been seized of these matters for nearly nine years. It held a lengthy hearing in 2013-14, during which it heard the voices of First Nations peoples, expert witnesses, and federal government officials. In 2016, the Tribunal found Canada had committed discriminatory practices against First Nations children and families, that the discrimination had caused suffering, and that Canada had known about the issues but failed to take action. It has generally opted since for a dialogic approach to remedies, making directions, giving further guidance to Canada as needed, and remaining seized to oversee implementation. None of these earlier rulings have been overturned. The Tribunal continued with its established approach for the hearings of the compensation and First Nations child issues in 2019, and the subsequent related rulings. At each stage, Canada has been given a fair opportunity to make submissions, and the Tribunal has written detailed reasons that apply the proper statutory provisions and legal principles, and set out its lines of analysis. Given its lengthy history with respect to these important matters, the Tribunal's exercise of remedial discretion in this case should be afforded a particularly high degree of deference. On that deferential standard, the Compensation Decisions, and the First Nations Child Decisions, are reasonable.

73. Some aspects of the Tribunal's Decisions may be bold, in the sense they are breaking new ground, and have few if any analogous precedents. However, in this case, that is not a sign of any

[129] *Vavilov* at para 100.
[130] *Public Service Alliance of Canada v Canada Post Corporation*, 2010 FCA 56 at para 301 (per Evans JA, in dissent) (affirmed by a unanimous Supreme Court of Canada in *Public Service Alliance of Canada v Canada Post Corp*., 2011 SCC 57 at para 1).

unreasonableness in the Tribunal's process or reasoning. Instead, it is a reflection of the magnitude of Canada's discriminatory practices. Extraordinary infringements of the *CHRA* reasonably call for extraordinary remedies.

74. While the Commission supports the reasonableness of the Decisions, it did not take positions below on the relief sought by the Caring Society or the AFN with respect to financial compensation, or the proper meaning of "First Nations child" for purposes of Jordan's Principle. Instead, the Commission focused its participation on general principles it considered relevant to the issues. While the Commission acts as a representative of the public interest when appearing before the Tribunal, in this case it left it to the Caring Society and the AFN – as the parties having closer connections to the victims and communities – to identify the specific remedies to be sought, and the evidence in support of those remedies.

75. The Commission takes a similar approach in the balance of this Memorandum. It will not engage in detail with all aspects of the Tribunal's Decisions, or Canada's criticisms thereof. Instead, the Commission will respond to some aspects of Canada's arguments with which it disagrees, and set out some legal principles that it will ask this Court to consider, as it disposes of the Applications.

C. The Tribunal's Remedial Methodology has been Fair and Reasonable

76. Canada complains in its Memorandum about the Tribunal's established practice of making decisions, directing parties to consult to see if they can reach agreement on how to end discriminatory impacts, and remaining seized to oversee implementation. According to Canada, by taking this approach, the Tribunal has effectively abdicated its adjudicative responsibilities.[131]

77. If Canada is suggesting the Tribunal's choice of remedial methodology was itself unreasonable, the Commission disagrees, for several reasons.

78. First, the Tribunal's approach is consistent with the purpose and wording of the *CHRA*, and related case law. The *CHRA* is remedial legislation that aims to eradicate discrimination. It is to be given a broad and liberal interpretation that best facilitates this objective. With this in

[131] Applicant's Memorandum of Fact and Law, at paras. 159-160.

mind, this Court has held that the Tribunal can properly use the wide powers in s. 53(2)(a) of the *CHRA* to award effective remedies, and to retain a broad jurisdiction to return to specified matters to ensure that the ordered remedies are forthcoming. Underlying this conclusion is a recognition that it will often be desirable for a Tribunal decision to simply set guidelines, and leave it to the parties to work out the details of a remedy, in accordance with those guidelines. In such circumstances, to deny the Tribunal's power to reserve jurisdiction and oversee implementation would be overly formalistic, and would defeat the remedial purpose of the legislation.[132]

79. Second, there is ample precedent for the Tribunal's approach. For example, in *Hughes*, the Tribunal found Elections Canada had engaged in a discriminatory practice by failing to provide a barrier-free polling location. It ordered broad public interest remedies that included consultation, the adoption of extensive new procedures, the provision of training, and regular reporting obligations. The Tribunal remained seized until its orders (including any future implementation orders) were fully carried out.[133]

80. The Tribunal has also retained jurisdiction from time to time to oversee the implementation of financial remedies. For example, the Tribunal may find that a respondent is liable to pay compensation, direct the parties to consult together to work out the details, and retain jurisdiction to decide the matter if the parties are unable to agree. Indeed, the Tribunal has taken this approach

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[132] *Canada (Attorney General) v Grover*, 1994 CanLII 18487 (FC), at paras 31-33; *Canada (Attorney General) v Moore*, 1998 CanLII 9085 (FC) at paras 48-50.

[133] *Hughes v Elections Canada*, 2010 CHRT 4 at para 100. Human rights bodies in other jurisdictions have taken similar approaches in appropriate circumstances. For example, in a case about stop announcements on public transit, the Human Rights Tribunal of Ontario ordered the provision of training, amendments to job descriptions and performance review procedures, the convening of annual public consultation forums, the appointment of a monitor, and regular reporting obligations. It also remained seized "…in order to receive reports and follow the progress in carrying out the awards." See: *Lepofsky v. Toronto Transit Commission*, 2007 HRTO 41 at paras 2 and 12.

both in cases featuring financial remedies for a single victim of discrimination[134], and in systemic pay equity cases where financial remedies would be rolled out to large groups of victims.[135]

81. Third, leading commentators in this area support the use of a dialogic approach in cases of systemic discrimination involving government respondents. After noting that declaratory relief will not necessarily be effective in challenging bureaucratic inertia, authors Gwen Brodsky, Shelagh Day and Frances Kelly observe the following:

> Where a declaratory order is insufficient, a dialogic approach, like the one that has developed in the *FNCF Caring Society* case, may be helpful . . .
>
> There are distinct advantages to a dialogic approach. The parties may be in an ongoing relationship. Implementation may be complex and additional information may be required. Dialogue allows the parties to participate in finding a solution by providing further information. This allows both sides to be better informed and 'own' the process. This increases the likelihood of a more effective remedy that will work for everyone in the long term . . .
>
> Detailed supervisory orders can be part of a dialogic process. Requiring government respondents to come back within a certain time frame and demonstrate how they propose to implement an order can help to finetune it, allowing government room to fashion the specifics of a reform plan and to identify problems and realistic timeframes.[136]

82. Fourth, this is a case about systemic racial discrimination that caused very real harms to First Nations children, families and communities. The Tribunal proceedings thus afford an opportunity to promote Reconciliation between the Crown and First Nations peoples. The Tribunal's dialogic approach contributes to this goal. Among other things, it gives the First Nations organizations that brought the claim (the Caring Society and the AFN), and those that were later added as interested parties (COO and NAN), meaningful opportunities to (i) receive

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[134] For just one example, see: *Grant v Manitoba Telecom Services Inc*, 2012 CHRT 20 at paras. 15 and 23 (retaining jurisdiction to oversee implementation of a pension remedy, if the parties could not agree); and *Grant v. Manitoba Telecom Services Inc.*, 2014 CHRT 14 (exercising the retained jurisdiction).

[135] For examples, see: *Public Service Alliance of Canada v. Canada (Treasury Board)*, 1998 CanLII 3995 (CHRT) at Order #9; and *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at paras. 1005-1006 and 1023(13), affirmed 2011 SCC 57.

[136] Gwen Brodsky, Shelagh Day and Frances M Kelly, The Authority of Human Rights Tribunals to Grant Systemic Remedies, 2017 6-1 *Canadian Journal of Human Rights* 1, 2017 CanLIIDocs 45, <https://canlii.ca/t/6w5>, retrieved on 2021-05-12.

information about Canada's efforts to bring itself into compliance with the Tribunal's findings, (ii) provide inputs and have their voices heard about those efforts, and (iii) seek further directions from the Tribunal, if efforts to reach agreement on remedies stall or fall short. This approach is supported by the *Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples*, the core theme of which is, "…to advance an approach to litigation that promotes resolution and settlement, and seeks opportunities to narrow or avoid potential litigation."[137]

83. Fifth, it must be remembered that the Tribunal first adopted its dialogic approach to remedies all the way back in the Merits Decision in 2016. It has reaffirmed that approach many times over, in numerous rulings over the last five years. Canada has not sought judicial review of any of those rulings. Canada's acceptance of those prior rulings is a relevant consideration when weighing the reasonableness of the Tribunal having continued with this methodology, for purposes of the Compensation and First Nations Child Decisions.

D. Legal Principles regarding Financial Remedies

84. Canada appears to acknowledge that its discriminatory practices caused harm and suffering to First Nations children and families. Nevertheless, it maintains its view that the Tribunal had no power to award corresponding financial remedies to those victims of discrimination. The Commission disagrees, and submits the Tribunal properly rejected Canada's approach, based on a reasonable interpretation of the *CHRA* and related case law, as discussed below.

85. For clarity, the Commission does not respond here to each and every argument Canada has made about financial compensation. Instead, the Commission will focus its response on showing the Tribunal was reasonable in finding that (i) financial awards under the *CHRA* serve particular purposes that are unique to the human rights context, (ii) "individual" remedies can be awarded in "systemic" cases, (iii) individual remedies can be awarded to non-complainants, (iv) compensation can be awarded without hearing testimony from individual or representative victims, where other kinds of evidence can reasonably be used to assess the impacts of discriminatory practices, and (v) compensation can be paid to the estates of victims who died after suffering discrimination.

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[137] Department of Justice, *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples* (2018).

(i) Unique Statutory Purposes of Human Rights Compensation

86. In seeking to overturn the Compensation Decisions, Canada relies in part on cases decided in the civil law context, including cases relating to class actions. With respect, these cases are of little value when talking about awards for compensation made under human rights laws. Claims for pain and suffering under s. 53(2)(e), and for special compensation for wilful and reckless discrimination under s. 53(3), are statutory claims that serve unique purposes within the broader structure of the quasi-constitutional *CHRA*. As these purposes and objectives may be relevant to the Court's analysis of the reasonableness of the compensation Decisions, it is worthwhile to review the relevant principles.

87. The starting point is the wording of the enabling *CHRA*. For purposes of these Applications, the relevant aspects of the Tribunal's remedial authority are set out in ss. 53(2)(a), 53(2)(e) and 53(3) of the *CHRA*, the relevant portions of which read as follows (all emphasis added):

> **Complaint Substantiated**
>
> **53. (2)** If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, <u>the member or panel may</u>, subject to section 54, <u>make an order</u> against the person found to be engaging or to have engaged in the discriminatory practice <u>and include in the order any of the following terms that the member or panel considers appropriate</u>:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;
>
> . . .
>
> (e) that the person <u>compensate the victim</u>, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Special Compensation

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

88. Awards for pain and suffering under s. 53(2)(e) of the *CHRA* are compensation for the loss of one's right to be free from discrimination, and for the experience of victimization.[138] The award rightly includes compensation for harm to a victim's dignity interests.[139] The specific amounts to be ordered turn in large part on the seriousness of the psychological impacts that the discriminatory practices have had upon the victim.[140] Medical evidence is not needed in order to claim compensation for pain and suffering[141], although such evidence may be helpful in determining the amount, where it exists.

89. The Tribunal has held that a complainant's young age and vulnerability are relevant considerations when deciding the quantum of an award for pain and suffering, at least in the context of sexual harassment.[142] The Commission agrees, and submits that vulnerability of the victim should be a relevant consideration in any context, especially where children are involved. Such a finding would be consistent with (i) approaches taken by human rights decision-makers interpreting analogous remedial provisions in other jurisdictions[143], and (ii) Supreme Court of

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[138] *Panacci v Attorney General of Canada*, 2014 FC 368 at para 34.
[139] *Jane Doe v Canada (Attorney General)*, 2018 FCA 183 at paras 13 and 28.
[140] *Jane Doe* at para 12.
[141] *Hicks v Human Resources and Skills Development Canada*, 2013 CHRT 20 at paras 92-96 and 98, aff'd *Attorney General of Canada v Hicks*, 2015 FC 599 at para 80.
[142] *Opheim v Gagan Gill & Gillco Inc.*, 2016 CHRT 12 at para 43.
[143] See, for example: *Strudwick v Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 at paras 59-62 (finding that relevant factors when awarding damages under the Ontario *Human Rights Code* can include: the immediate and ongoing impacts of discrimination on a complainant's emotional and/or physical health; the complainant's vulnerability; objections to the offensive conduct; the respondent's knowledge that conduct was not only unwelcome but viewed as discriminatory; the degree of anxiety the conduct caused; and the frequency and intensity of the conduct).

Canada case law recognizing that children are a highly vulnerable group.[144]

90. Consistent with the general principles discussed earlier in these Submissions, the Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA*.[145]

91. Like all remedies under the *CHRA*, awards for pain and suffering must be tied to the evidence, be proportionate to the nature of the infringement, and respect the wording of the statute. Among other things, this requires that awards for pain and suffering fit within the $20,000 cap set out in s. 53(2)(e) of the *CHRA*. At the same time, as the Ontario Court of Appeal has cautioned in the context of equivalent head of compensation under the Ontario *Human Rights Code*, "… Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the [*Code*] by effectively setting a 'licence fee' to discriminate."[146]

92. Turning to special compensation for wilful and reckless conduct under s. 53(3), the Tribunal has held, "A finding of wilfulness requires that the discriminatory act and the infringement of the person's rights under the Act is intentional. A finding of recklessness generally denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly."[147]

93. The Federal Court has described s. 53(3) as "…a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate."[148] The Commission agrees the

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[144] For example, see: *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 per McLachlin CJ. (for the majority, at para 56: "Children are a highly vulnerable group"), Arbour J. (dissenting, at para 185: "This Court has recognized that children are a particularly vulnerable group in society…"), and Deschamps J. (dissenting, at para 225: "Children as a group face pre-existing disadvantage in our society. They have been recognized as a vulnerable group time and again by legislatures and courts").

[145] *Jane Doe* at para 29, citing (among others): *Grant v Manitoba Telecom Services Inc.,* 2012 CHRT 10 at para 115; and *Alizadeh-Ebadi v Manitoba Telecom Services Inc.,* 2017 CHRT 36 at para 213.

[146] *Strudwick* at para. 59.

[147] *Alizadeh-Ebadi v Manitoba Telecom Services Inc.* at para. 214.

[148] *Canada (Attorney General) v Johnstone,* 2013 FC 113 at para. 155 (affirmed 2014 FCA 110, but without comment on this point).

provision is designed to secure compliance with the *CHRA*, but submits that the label "punitive" must be read in light of subsequent guidance provided by the Federal Court of Appeal in *Lemire v. Canadian Human Rights Commission*. In that case, the Court of Appeal held that wilful and reckless damages under the *CHRA* are not penal in nature, and are not intended to convey society's moral opprobrium for the wilful or reckless discriminatory conduct of a respondent.[149] Indeed, even the financial penalties that could formerly be imposed in hate speech cases were intended not to punish, but rather to ensure compliance with the statutory scheme, and deter future infringements.[150] That purpose was entirely consistent with the statutory objectives set out in s. 2 of the *CHRA*, which include giving effect to the principle that individuals should have opportunities equal to those of others to lead the lives that they are able and wish to have, without being hindered by discriminatory practices based on prohibited grounds.[151]

94. As the Court of Appeal noted in *Lemire*, the wording of s. 53(3) does not require proof of loss by a victim.[152] In the context of the former hate speech prohibition under the *CHRA*, awards of special compensation for wilful or reckless conduct were said to compensate individuals identified in the hate speech for the damage "presumptively caused" to their sense of human dignity and belonging to the community at large.[153]

(ii) Individual Remedies Can be Awarded in Systemic Cases

95. Throughout its Memorandum, Canada argues that (i) the parties defined the case as being systemic in nature, (ii) systemic discrimination calls for systemic remedies, aimed at program reform, and (iii) the Tribunal cannot or should not award individual compensation in complaints of systemic discrimination.[154] The Commission agrees with the first two propositions, but vigorously rejects the third. The mere fact that a case is rooted in systemic practices that affect a large number of victims does not deprive the Tribunal of authority to grant individual remedies. If there is evidence to show that systemic discrimination caused compensable injuries or losses to

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[149] *Lemire v Canadian Human Rights Commission,* 2014 FCA 18 at para. 90 ("*Lemire*").
[150] *Lemire* at para. 91.
[151] *Lemire* at para. 91.
[152] *Lemire* at para. 85.
[153] *Lemire* at para. 85.
[154] Applicant's Memorandum of Fact and Law, at paras 52-65.

an individual victim, nothing in the *CHRA* or the case law would bar the Tribunal from exercising its authority under s. 53 to make the individual whole. To hold otherwise would undermine the remedial purposes of the quasi-constitutional *CHRA*.

96. In the Compensation Decisions, the Tribunal cited and applied appropriate statutory and legal principles, and rejected the rigid "individual vs. systemic" dichotomy now urged by Canada. There are many reasons why this was a reasonable approach.

97. First, nothing in the text of the *CHRA* supports Canada's position. As already seen above, the applicable remedial provisions are s. 53(2)(a) (allowing orders designed to prevent the same or similar discriminatory practices from recurring), s. 53(2)(e) (allowing orders to pay compensation for pain and suffering) and s. 53(3) (allowing orders to pay special compensation, where a respondent's discriminatory conduct was wilful or reckless). Nothing in these provisions suggests that granting a systemic remedy (under s. 53(2)(a)) would bar claims for individual remedies. To the contrary, the wording of the *CHRA* specifically contemplates that systemic and financial remedies can and will coexist in the same file.[155]

98. Second, Canada suggests the terms "individual" and "systemic" have accepted meanings, and are mutually exclusive in ways that are relevant in deciding whether individual victims should get personal financial remedies.[156] This is not so. In fact, the key Supreme Court of Canada case upon which Canada relies – *Moore v British Columbia (Education)* -- actually says precisely the opposite. In *Moore*, the Court found it, "…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 several … The only difference is quantitative, that is, the number of people disadvantaged by the practice."[157] With this in mind, it

[155] The opening passages of s. 53(2) make clear that where the Tribunal finds discrimination, it can include in its order "…any of the following terms that the member or panel considers appropriate" (emphasis added) – referring to a list that includes both systemic remedies (s. 53(2)(a)) and individual remedies (s. 53(2)(e)). Similarly, the *CHRA* expressly says in s. 53(3) that orders for special compensation may be made, "(i)n addition to any order under subsection (2)…" – again showing that system and financial remedies can both be granted.
[156] Applicant's Memorandum at para 60.
[157] *Moore v British Columbia (Education)*, 2012 SCC 361 at para 58 ("*Moore*").

was reasonable for the Tribunal to find that both individual and systemic remedies are possible in cases of systemic discrimination.

99. In addition, a more careful examination of what was actually decided in *Moore* is important for this case. At issue was whether the needs of a young student with a disability had been accommodated to the point of undue hardship. The claimant argued this failure was attributable to decisions made by the School District, and to funding formulas and other policies at the Provincial level. The Supreme Court eventually agreed the District had infringed the B.C. *Human Rights Code*. It upheld individual financial remedies for the claimant and his family. However, it set aside systemic remedies the B.C. Tribunal had directed towards the District and Province, finding on the evidence they were too remote from the individual claimant's experience of discrimination.[158] Viewed in this light, the case is simply one where the evidence was not sufficient to make out a claim for systemic remedies. Contrary to what Canada has suggested, it does not establish any broader general principles that individual claims can never give rise to systemic remedies, or vice versa.

100. Third, much of Canada's argument appears to be based around a passing remark from a Federal Court of Appeal judgment that was later overturned by the Supreme Court of Canada. At issue in *Re C.N.R. and Canadian Human Rights Commission* was whether the Tribunal had the authority to order certain kinds of systemic remedies under the predecessor to what is now s. 53(2)(a) of the *CHRA*. In the course of discussing that matter, Hugessen J.A. noted that while compensation could also be available under the *CHRA*, it would be "…impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination where, by the nature of things, individual victims are not always readily identifiable."[159] With the greatest of respect, this passage does not call into question the reasonableness of the Tribunal's approach in the present case. This is because (i) the passage in question is in *obiter*, and therefore is not strictly binding, (ii) the Federal Court of Appeal judgment in question was later overturned by the Supreme Court of Canada[160], and (iii) Hugessen J.A. does not acknowledge or contend with case law stating that

[158] *Moore* at para 65.
[159] *Re C.N.R. Co. and Canadian Human Rights Commission*, 1985 CanLII 3179 (FCA) at para 10 (per Hugesson JA).
[160] *CN v Canada (Human Rights Commission)*, [1987] 1 SCR 1114.

where harms exist, remedies should follow. In any event, and as the Tribunal reasonable held, the passage is distinguishable in any event. As the Compensation Framework shows, the individual victims in the present context are in fact identifiable (albeit with some work).

(iii) Individual Remedies are for "Victims," not "Complainants"

101. In the Compensation Decision, the Tribunal concludes that the *CHRA* allows it to award financial relief to non-complainants who were victims of discriminatory practices. Canada says this unreasonably ignores this Court's 1994 decision in *Menghani*, which includes a passing line expressing "... a general objection to an award of specific relief to one who is not a complainant under the Act."[161] The Commission disagrees, and submits the Tribunal adequately explained its reasons for not applying any such objection in the specific context of this case.

102. The Tribunal properly began its analysis with an examination of the *CHRA*. In that regard, ss. 53(2)(e) and 53(3) of the *CHRA* each allow the Tribunal to order that a respondent pay financial compensation to the "victim of the discriminatory practice."

103. In most human rights proceedings, there is one complainant who is also the alleged victim. However, this is not always the case. The *CHRA* anticipates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. This can be seen from s. 40(2) of the *CHRA*, which gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents:

> **40 (2)**: If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto. (emphasis added)

104. The Tribunal looked at this language, and reasonably found it to confirm Parliament's understanding that "victims" and "complainants" can be different people.[162]

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[161] Applicant's Memorandum at paras 104 and 133, citing *Canada (Secretary of State for External Affairs) v Menghani*, [1994] 2 FC 102 at para 61.
[162] 2019 CHRT 39 at paras 112-115.

105. After this review of the enabling statute, the Tribunal went on to address *Menghani*. It distinguished the case, finding that the analysis, the factual matrix and the findings were different from the case at hand.[163] It was reasonable for the Tribunal to take this approach, for several reasons:

a) *Menghani* dealt with a situation where a complainant alleged discrimination by government officials in processing his brother's application for permanent residency, which was premised on an offer of employment the complainant had made to his brother. The Court found the non-complainant brother would not have had standing under the *CHRA* to file a complaint on his own behalf, asking that his application for permanent residency be granted. As a result, it found the *CHRA* also did not allow the Tribunal to grant that remedy indirectly, through the complainant. This was the primary basis for denying the relief sought for the non-complainant (i.e., permanent residency for the non-complainant brother). Other comments in *Menghani* in support of that outcome are *obiter* in nature.

b) The broad proposition alleged by Canada – that compensation can only be awarded to complainants – is contrary to the express wording of ss. 40(2), 53(2)(e) and 53(3) of the *CHRA*. As discussed above, those sections clearly state that compensation may be awarded to "the victim" of a discriminatory practice, who can be different from the "complainant." If Parliament had truly intended that relief instead be limited to "complainants," it would have said so. *Menghani* does not address this crucial point.

c) There are in fact examples where the Tribunal has awarded financial remedies to non-complainants. For example, pay equity cases tend to be filed by unions, on behalf of their individual members, who are the victims of the discriminatory practices. Where such cases are upheld, awards of financial compensation (lost wages) are made in favour of the non-complainant victims.[164] Similarly, as the Tribunal reasonably noted in the Compensation Decision, the Tribunal issued a Consent Order in the *Walden* case that incorporated the

[163] 2019 CHRT 39 at paras 121-122.
[164] For example, see: *Public Service Alliance of Canada v Canada Post Corporation*, 2005 CHRT 39 at para. 1023.1.

terms of a settlement agreement providing for payments of lost wages, and compensation for pain and suffering, to non-complainant individuals.[165]

(iv) Various Types of Evidence can Properly Support Compensation Awards

106. The Commission agrees with Canada that remedies awarded by the Tribunal must be supported by evidence. However, Canada suggests that in order to reasonably award financial remedies to individuals, the Tribunal needs to hear testimony from those individuals about their experiences – or at a minimum, from representative witnesses who were similarly situated.[166] As discussed below, the Commission does not believe this will always be necessary. Human rights compensation will be reasonable as long as it is based on logic, common sense, and reliable evidence -- whether hearsay or otherwise.

107. The Tribunal has on occasion declined to award compensation for pain and suffering (under s. 53(2)(e) of the *CHRA* or its predecessors) in cases where no victims had testified about the personal impacts of the discriminatory practices found by the Tribunal. For example, such conclusions were reached in pay equity cases decided in 1998 and 2005, in which Tribunals noted the impracticality of potentially requiring thousands of individual complainants to testify, but held that it was nonetheless unable to award compensation for hurt feelings en masse.[167]

108. However, it is important to remember that s. 50(3)(c) of the *CHRA* expressly gives the Tribunal a very broad discretion to "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member of panel sees fit, whether or not that

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[165] 2019 CHRT 39 at paras 117-120, making reference to *Walden et al. v. Attorney General of Canada*, Consent Order dated July 21, 2012, at para. 2 (incorporating the attached Memorandum of Agreement, which provides for payments to "Non-Complainant Individuals").
[166] Applicant's Memorandum of Fact and Law, at paras 64, 77, 94, 96.
[167] *Public Service Alliance of Canada v Canada Post Corporation*, 2005 CHRT 39 at para. 991 (although other aspects of this decision were judicially reviewed, the Tribunal's refusals to award compensation for pain and suffering, or special compensation for willful and reckless discrimination, were not). In making its findings, the Tribunal reproduced passages from another pay equity case that had reached similar conclusions: *Public Service Alliance of Canada v Canada (Treasury Board)*, 1998 CanLII 3995 (C.H.R.T.) at paras 496-498. The Canada Post case involved roughly 2,800 victims. The Treasury Board case involved roughly 50,000 victims.

evidence or information is or would be available in a court of law."[168] As a result, in making decisions under the *CHRA*, it is open to the Tribunal to rely on hearsay or other information, alongside any direct testimony from the parties, victims or other witnesses.

109. Receiving evidence from a small number of representative victims could be one way to approach the matter. This possibility was contemplated in *Walden et al. v. Attorney General of Canada* (2010), where the Federal Court (i) took note of the Tribunal's broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering.[169] Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.[170]

110. At issue in *Walden* was a Tribunal decision finding that 413 victims had been subjected to discrimination, but that compensation for pain and suffering could only be paid to two victims who had actually testified about their subjective experiences.[171] The Federal Court set aside the decision on pain and suffering, for procedural fairness reasons.[172] It sent that issue back to a different panel of the Tribunal, which was "…to indicate to the applicants the type of evidence that it requires in order to properly determine pain and suffering damages, bearing in mind issues such as fairness and allocation of court time and resources."[173] The question was eventually resolved through a settlement agreement that included compensation for pain and suffering, and

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[168] The only qualification put on this broad discretion is set out in s. 53(4), which clarifies that the member or Panel may not accept as evidence anything that would be inadmissible in a court by reason of privilege.
[169] *Canadian Human Rights Commission v Attorney General of Canada*, 2010 FC 1135 at para 73 ("*Walden FC*"). Although some aspects of this decision were appealed (without success), the Court's findings with respect to compensation for pain and suffering were not appealed.
[170] *Walden FC* at para 73.
[171] *Walden et al. v Social Development Canada, Treasury Board of Canada and Public Service Human Resources Management Agency of Canada*, 2009 CHRT 16 at paras 155-166.
[172] *Walden FC* at para 71.
[173] *Walden FC* at para 75.

was incorporated into a consent Order of the Tribunal.[174] The consent order allows for compensation to non-complainants and non-witnesses alike.

111. However, while testimony from a small number of representative victims might thus be one method of proceeding, nothing in the *CHRA* requires even that. To the contrary, as stated above, the *CHRA* expressly gives the Tribunal a very broad discretion to rely on such evidence as it sees fit, and to make all the findings of fact necessary to resolve a matter before it. There are no automatic or universal requirements that any particular kinds of evidence be led to allow the Tribunal to find that victims suffered harm worthy of individual compensation. So long as there is a rational line of analysis from the record (whether documents or witness testimony), to the findings of discriminatory practices and resulting harm, the Tribunal can reasonably award compensation.

(v) The CHRA Allows for Payments to Estates

112. The Compensation Eligibility Decision held that financial remedies should be paid to the estates of victims who died after experiencing discrimination, and who would have been eligible if still alive. Canada says in its Memorandum that it is "not contesting compensation for estates," and that it does not "challenge the specific results."[175] Despite these assurances, Canada argues the Tribunal's award of compensation to estates was contrary to binding case law – and suggests this should somehow influence the Court's overall assessment of other aspects of the Decisions. This Court should reject this unusual suggestion, for several reasons.

113. First, the Tribunal's findings regarding payment to estates are justified and reasonable. It started its analysis with a review of its enabling statute, and related federal case law. It noted the broad remedial purposes of the quasi-constitutional *CHRA*, found that its wording does not bar claims in respect of estates, and discussed *Stevenson*.[176] In that case – the only relevant federal human rights case identified by the parties – the Tribunal allowed an inquiry to continue after the death of the complainant, partly in reliance on an older Ontario human rights decision that had

[174] *Walden et al. v. Attorney General of Canada*, 2016 CHRT 19 at paras 6-9.
[175] Applicant's Memorandum of Fact and Law, at paras 105 and 109.
[176] 2020 CHRT 7 at paras 105-117, citing *Stevenson v. Canadian National Railway Company*, 2001 CanLII 38288 (CHRT) ("*Stevenson*").

resulted in financial remedies to an estate.[177] The Tribunal reasonably found that the *CHRA* and *Stevenson* supported the conclusions reached in the Compensation Eligibility Decision.

114. Second, while Canada accuses the Tribunal of ignoring "binding precedent," it has not actually pointed to any contrary decisions made by a federal court interpreting the *CHRA*. It thus appears there is no actual binding precedent capable of being ignored.

115. Third, the Tribunal reasonably distinguished cases decided in other contexts and jurisdictions. For example, Canada points to the Supreme Court of Canada decision in *Hislop*, which held that certain estates had no standing to commence a *Charter* claim.[178] Paying careful attention to the context, the Tribunal noted that the deceased individuals whose estates sought to pursue equality claims in *Hislop* had died before the passage of an allegedly discriminatory law. In other words, the individuals had not experienced discrimination during their lifetimes. The Tribunal reasonably found this to be a basis for distinguishing *Hislop* from the present case, where compensation was awarded to the estates of victims who had suffered discrimination before their deaths, and who would have been eligible for compensation if still alive.[179] In reaching this conclusion, the Tribunal properly took note of appellate case law emphasizing that *Hislop* had not created a general rule that *Charter* claims always end upon death, and that context was important.[180]

116. The Tribunal also addressed the B.C. Court of Appeal decision in *Gregoire*. There, the Court of Appeal found that an estate was not a "person" capable of making a claim under the B.C. *Human Rights Code*.[181] The Tribunal distinguished the case, in part by noting that the current

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[177] *Stevenson* at para 34, citing *Barber v. Sears Inc. (No. 2)*, (1993) 22 CHRR 409 (Ont. Bd. Inq.) ("*Barber No. 2*"). In this preliminary ruling, the Ontario Board of Inquiry found that it (i) had jurisdiction to proceed with the complaint despite the death of the complainant and (ii) that it was in the public interest to proceed. The case advanced to a hearing on the merits, after which the Board of Inquiry made a finding of discrimination and ordered the respondent to pay $1,000 in damages for loss of dignity to the complainant's estate: *Barber v. Sears Inc. (No. 3)*, (1994) 22 CHRR 416 at para 96 ("*Barber No. 3*").
[178] *Canada (Attorney General) v Hislop*, 2007 SCC 10 ("*Hislop*").
[179] 2020 CHRT 7 at paras 118-132.
[180] 2020 CHRT 7 at paras 123-124 (citing *Grant v Winnipeg Regional Health Authority et al.*, 2015 MBCA 44 at para 66).
[181] *British Columbia v. Gregoire*, 2005 BCCA 585, at para 14 ("*Gregoire*").

claim was being pursued by representative organizations on behalf of "victims" – a term that does not appear in the B.C. *Code*.[182] It is also worth noting that in *Gregoire*, the B.C. Court of Appeal expressly found that its reasoning could not be reconciled with the Tribunal's previous decision in *Stevenson*.[183] As a result, to the extent the Tribunal here adopted the rationale from *Stevenson*, it impliedly declined to follow the non-binding approach set out in *Gregoire*.

117. Fourth, the Tribunal identified compelling public interest considerations in support of its conclusions. It noted that awards of compensation under the *CHRA* serve the dual purposes of (i) providing compensation for pain and suffering experienced due to discrimination, and (ii) dissuading respondents from discriminating in the future. The Tribunal reasonably found that paying compensation to estates would further both these purposes.[184] It also noted that refusing compensation could create problematic incentives for respondents to delay the resolution of complaints.[185] These considerations are consistent with the enabling *CHRA*, and support the Tribunal's conclusions.

118. Fifth, and finally, a different member of the Tribunal has recently released two rulings in unrelated cases, similarly accepting that financial remedies may be awarded to the estates of complainants who died after experiencing discrimination during their lifetimes.[186] In both cases, the member referred to the Compensation Eligibility Decision with approval.[187] Contrary to what Canada suggests, the Tribunal's findings here thus do not paint a picture of a rogue Panel, prone to ignoring the law and reaching unreasonable conclusions. To the contrary, the fact the Compensation Eligibility Decision appears to be part of a growing consensus in the Tribunal's jurisprudence underscores its reasonableness.

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[182] 2020 CHRT 7 at paras 133-136.
[183] *Gregoire* at para 13.
[184] 2020 CHRT 7 at paras 128-130.
[185] 2020 CHRT 7 at paras 138-139.
[186] *Oleson v Wagmatcook First Nation*, 2020 CHRT 29, at paras 12-14 ("*Oleson*") (per Member Harrington); and *Estate of Jones and Edwards v Saddle Lake Cree Nation*, 2020 CHRT 32, at paras 31-32 ("*Estate of Jones and Edwards*") (per Member Harrington).
[187] *Oleson* at para 28; *Estate of Jones and Edwards* at para 32.

E. Jordan's Principle is Properly Part of the Tribunal's Inquiry

119. From time to time in its Memorandum, Canada says the Complaint as written was focused on the FNCFS Program on reserve and in the Yukon. It appears to suggest the Tribunal therefore erred in the Compensation Decisions and First Nations Child Decisions by considering matters relating to Jordan's Principle, and its application to non-status First Nations children off reserve.[188] This Court should reject any such suggestion, for several reasons.

120. First, as the Tribunal properly recognized, human rights complaints are to be read in a flexible and non-formalistic manner. They do not serve the purposes of pleadings in the adjudicative process before the Tribunal. Instead, the terms of a hearing are set not only by the complaint, but also by the parties' Statements of Particulars.[189] The Tribunal also has the power to issue rulings clarifying the scope of the issues and relief that may be raised.[190]

121. Here, the Statement of Particulars of the Caring Society and the AFN sought very broad relief to redress discriminatory practices in "…the application of Jordan's Principle to federal government programs affecting children…"[191] The prayer for relief was thus not limited to the FNCFS Program, or tied to *Indian Act* status or reserve residency. In its responding particulars, Canada did not argue that the relief claimed would be beyond the scope of the Tribunal proceeding. To the contrary, it acknowledged that Jordan's Principle, "engages various health and social services and not solely child and family services," and responded to the substance of the issues,

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[188] Applicant's Memorandum of Fact and Law, at paras 144-157.
[189] 2019 CHRT 39 at paras 100-103, citing to various cases including: *Canada (Procureur général) c Robinson*, [1994] 3 CF 228 (CA); *Lindor c Travaux publics et Services gouvernementaux Canada*, 2012 TCDP 14 at para 22; *Casler v Canadian National Railway*, 2017 CHRT 6 at para 9; and *Gaucher v Canadian Armed Forces*, 2005 CHRT 1 at para 10.
[190] The Tribunal controls its own process. It can define the scope of the issues before it in any given case. In this regard, the *CHRA* authorizes it to decide any questions of law, fact, procedure or evidence that may come before it: *CHRA*, ss. 50(2) and 50(3)(a). Rule 9(3)(a) of the *Canadian Human Rights Tribunal Rules of Procedure* further clarifies the Tribunal can grant leave to a party to file evidence, raise issues or seek remedies, even if they were not included in the party`s pleadings.
[191] Statement of Particulars of the Complainants delivered June 5, 2009 at paras 13 and 21(2)(a) (Mayo Affidavit, Exhibit 3).

asking that the allegations relating to Jordan's Principle be dismissed on their merits.[192] The issues pleaded are thus broad enough to encompass matters including the proper scope, meaning and application of Jordan's Principle.

122. Second, and as previously described, the Tribunal made rulings in 2016 and 2017 that deal with Jordan's Principle, including its application to First Nations children off reserve. These Rulings reasonably and conclusively established that questions relating to Jordan's Principle were within the scope of the Tribunal's inquiry. Indeed, in the first of these rulings (the Merits Decision), the Tribunal expressly rejected Canada's argument that Jordan's Principle was "beyond the scope of this complaint" – finding instead that it was sufficiently linked to the FNCFS Program so as to be at play.[193]

123. If Canada truly remains of the view that matters relating to the scope and application of Jordan's Principle are outside the scope of the Tribunal proceedings, it should have pursued applications for judicial review of these initial rulings at the material times. It did not take such steps, and the time for doing so has long since expired. In the circumstances, Canada should not now be allowed, in 2021, to question the reasonableness of the Tribunal's 2016 and 2017 rulings. To allow it do so would be tantamount to allowing an improper collateral attack on the earlier rulings.[194]

124. Canada now suggests it accepted those earlier rulings because they, "…reflected progressive policy choices that Canada could implement to benefit children."[195] With respect, the reasons why Canada chose not to judicially review the earlier rulings is not relevant. Given the undisputed fact of Canada's past acceptance, it was reasonable for the Tribunal to consider all

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[192] Updated Statement of Particulars of the Respondent dated Feb. 15, 2013, at paras. 42-44 and 69 (Mayo Affidavit, Exhibit 11).
[193] 2016 CHRT 2 at para 362.
[194] The rule against collateral attack aims to protect the fairness and integrity of the justice system by preventing a party from attacking the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 28.
[195] Applicant's Memorandum of Fact and Law, at para 112.

aspects of Jordan's Principle to be at issue, when delivering the Compensation and First Nations Child Orders.

F. Eligibility to be Considered under Jordan's Principle

125. After earlier indications to the contrary, the parties eventually learned in 2018 that Canada would only consider applications for Jordan's Principle services from First Nations children off reserve if they had *Indian Act* status. The Caring Society was concerned about Canada's use of the colonial *Indian Act* structure to determine eligibility for consideration under Jordan's Principle, and brought its motion for clarification. The Commission did not take a position below as to whether Canada's approach was or was not compliant with the Tribunal's past rulings or the *CHRA*. Instead, it urged the Tribunal to apply a human rights framework to the question, taking into account principles of First Nations self-government and self-determination, as recognized in domestic and international law. As explained in the following paragraphs, the Tribunal took that approach, applied the proper legal principles, explained its rationale, and reached a reasonable and workable outcome.

126. Human rights decision makers have an established framework for determining whether eligibility criteria used to control access to a benefit are under-inclusive and discriminatory. In essence, they begin by carefully identifying the nature of the benefit being sought. They then examine the purposes for which the benefit is provided. If persons who would fall within those purposes are being excluded from receiving the benefit for arbitrary reasons linked to prohibited grounds of discrimination, use of the eligibility criteria may be prohibited.[196]

127. A careful review of the First Nations Child Decisions shows the Tribunal reasonably applied this approach.[197] It clarified the nature of the benefit said to be at issue. In this regard, the Tribunal stressed that the issues related solely to determining who is a "First Nations child" for purposes of Jordan's Principle, and not for any other purpose, such as First Nations membership or citizenship.[198] It further clarified that was being sought was an entitlement <u>to be considered</u> for

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[196] See, for example, *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20 at para. 53 (affirmed *Canada (Attorney General) v. Hicks*, 2015 FC 599 at para. 76).
[197] 2020 CHRT 20 at paras 231-235.
[198] 2020 CHRT 20 at paras 84 and 129.

the possible provision of services under Jordan's Principle. In other words, the benefit being sought was not the actual delivery of specific services. Rather, it was the benefit of being able to apply for services, and have those requests considered on a case-by-case basis, in accordance with existing substantive equality principles.[199] All together, this was a reasonable and balanced approach. Among other things, it is consistent with that taken by the Supreme Court of Canada in the recent case of *R v Desautel*. There, the Supreme Court found that a group of people resident outside Canada could qualify as an "Aboriginal people of Canada." It treated that finding as separate from the question of whether the group actually held any particular Aboriginal rights under s. 35 of the *Constitution Act, 1982* – something that would have to be determined on a case-by-case basis.[200]

128. Having identified the nature of the benefit in issue, the Tribunal went on in the First Nations Child Decision to identify the purposes for which Jordan's Principle services are provided. Drawing on its past rulings, the Tribunal affirmed that Jordan's Principle is a substantive equality mechanism that serves at least two purposes: (i) it ensures First Nations children can access needed government services without experiencing gaps, denials and delays; and (ii) it enables First Nations children "…to access services that are culturally appropriate and safe and account for intergenerational trauma and other relevant specific needs that may only be addressed in providing services that could be considered above normative standards."[201] These findings about the purposes of Jordan's Principle were reasonable, based as they were on past rulings in these proceedings that were not challenged.

129. Having identified the benefit and the purpose for which it was provided, the Tribunal went on to consider whether the use of *Indian Act* status as a necessary eligibility criterion for off reserve First Nations children was consistent with its earlier rulings in the proceedings. It conducted a thorough contextual analysis, properly taking into account the unique circumstances of First Nations peoples in Canada, and relevant considerations of constitutional and international law.[202] Among other things, it cited authorities that recognize First Nations' rights of self-governance and

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[199] 2020 CHRT 20 at paras 213-215.
[200] *R v Desautel*, 2021 SCC 17 at para 19.
[201] 2020 CHRT 20 at paras 89, 94, 99-100, 236 and 238.
[202] 2020 CHRT 20 at paras 130-198.

self-determination[203], or recognize the *Indian Act* registration provisions do not necessarily correspond with First Nations' own traditions, and have had discriminatory impacts.[204]

130. In the end, the Tribunal found that continuing to rely on *Indian Act* status as a necessary condition in all circumstances off reserve would further discrimination, and be inconsistent with past rulings. It said that when Canada interprets the term "First Nations child" for purposes of Jordan's Principle, it shall include non-status First Nations children who live off reserve, where they are (i) recognized by their Nations for purpose of Jordan's Principle, or (ii) have at least one parent with *Indian Act* status.[205]

131. The practical consequence of this ruling is that these categories of non-status First Nations children off reserve will now have the opportunity to apply for services pursuant to Jordan's Principle. This does not guarantee that any child's particular service request will actually be fulfilled. However, it will ensure the child has an opportunity to have their substantive equality needs assessed, on a case-by-case basis. Taking into account the nature and scope of the discrimination found by the Tribunal, and the unchallenged past rulings that defined the meaning of Jordan's Principle, these conclusions are reasonable and should not be disturbed.

G. Remedies on Judicial Review

132. For all the reasons described above, the Decisions are fair and reasonable. The Tribunal interpreted its home statute, applied the proper legal principles, made factual findings supported by the record, and explained its conclusions. Recognizing that Parliament tasked the Tribunal with the primary responsibility for finding and remedying discrimination, this Court should show deference and uphold the Decisions.

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[203] Among other things, the Tribunal made reference to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007).

[204] Among other things, the Tribunal made reference to: *Canada (Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31; *Descheneaux v Canada (Attorney General)*, 2015 QCCS 3555; and Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/2010*, UN Doc CCPR/C/124/D/2020/2010 (11 January 2019) (re McIvor).

[205] 2020 CHRT 20 at paras 211-212 and 272.

133. In the alternative, if the Court finds some or all aspects of the Decisions were unreasonable, the Commission asks that it consider the following, when deciding what remedies to grant.

134. First, where a court quashes a decision on reasonableness review, it will "most often be appropriate" to send the matter back for reconsideration by the original decision maker, with the benefit of the court's reasons.[206] Where the court remits a matter, the administrative decision maker may reach the same or a different outcome, so long as it respects any directions given.[207]

135. There may be limited circumstances where a court might decide not to remit a matter, and instead direct a substantive outcome. For example, this might be appropriate where the court concludes during its review that a question has only one inevitable answer.[208] However, such limited scenarios would be an exception to the general rule. In the absence of such circumstances, courts should respect Parliament's choice to entrust substantive matters to administrative bodies, and send unreasonable decisions back for reconsideration with directions.[209]

136. Here the Attorney General asks the Court to quash the Decisions, and dismiss the underlying claims for relief. Whether that is appropriate will depend on the nature of any findings this Court may make with respect to the numerous issues decided by the Tribunal. At this time, the Commission simply urges the Court to consider the foregoing, and limit any directed findings to those rare situations where only one answer is possible. Where there is any room for manoeuvre, the better course of action will be to remit.

137. Second, it is open to a reviewing court to find that some aspects of an impugned decision are reasonable, while others are unreasonable. In such circumstances, the appropriate remedy is to send back to the tribunal only those aspects of the decision that are unreasonable, while leaving the other aspects intact.

138. Applying this principle in the present case could lead to any number of different scenarios, depending on the Court's findings. For example, the Court might uphold the Tribunal's findings about one category of Jordan's Principle eligibility, but remit the other for reconsideration. It

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[206] *Vavilov* at para 141; *Kattenburg* at para 17.
[207] *Vavilov* at para 141; *Kattenburg* at para 19.
[208] *Vavilov* at para 142; *Kattenburg* at para 18.
[209] *Vavilov* at para 140; *Kattenburg* at para 17.

might find it was reasonable to award compensation, but send the question of quantum back for reassessment and further justification. It could uphold compensation for removals, but set aside the finding of ongoing discrimination, and remit the question of an end date to the Tribunal with directions.[210] These or many other permutations could be possible, if the Court properly limits any findings of unreasonableness only to those aspects of the impugned Decisions that fail to meet the deferential standard of review.

139. Third, if this Court sends any matters back to the Tribunal for redetermination, it should send them back to the same Panel that rendered the Decisions.

140. As the Federal Court of Appeal has held, the same persons who decided a matter at first occasion "may normally also rehear it," unless they were earlier disqualified for bias, or there is a reasonable apprehension they are unlikely to make an objective decision.[211] In the absence of evidence to the contrary, a reviewing court should presume the original decision-makers would decide the matter with integrity and impartiality.[212] Indeed, the mere fact a tribunal has considered a matter before will not typically suffice to warrant a recusal. To the contrary, "something much more fundamental" is required – a circumstance that should be "exceedingly rare."[213]

141. Here the Attorney General asks this Court to order that any redeterminations be done by a different panel of the Tribunal.[214] The Commission does not agree this would be necessary or appropriate in this case. The Attorney General has not alleged bias, or a reasonable apprehension of bias, on the part of the Panel. There is no evidence to rebut the presumption of integrity and impartiality. Even if the Court agrees there was procedural unfairness (which is denied), reconsideration by a different decision maker is not required in such circumstances.[215]

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[210] In *Tahmourpour v Attorney General of Canada*, 2010 FCA 192, the Federal Court of Appeal upheld nearly all aspects of a Tribunal decision as reasonable. However, a single issue regarding the end date for certain compensation was referred back to the Tribunal for reconsideration (at paras 47-49).
[211] *Gale v Canada (Solicitor General)*, 2004 FCA 13 at para 18 ("*Gale*").
[212] *Gale* at para 18.
[213] *Janssen-Ortho Inc. v Apotex Inc.*, 2011 FCA 58 at para 10.
[214] Applicant's Memorandum of Fact and Law, at para 161.
[215] *Balazuntharam v Canada (Citizenship and Immigration)*, 2015 FC 607 at para 20.

142. In the circumstances, if this Court finds any matters must be remitted, they should go back to the same Panel that has heard all the voluminous evidence and argument in these proceedings over the last nine years. Indeed, to remit these matters to a differently constituted panel at this stage would not be an efficient use of adjudicative resources. It must also be remembered that the Panel continues to be seized with numerous related matters outside the scope of these Applications, including long-term reform of the FNCFS Program. To now send any aspects of these Decisions to a different panel would create real risks of confusion and inconsistent decision making.

PART IV ~ ORDERS SOUGHT

143. This Court should dismiss the Applications. The Tribunal considered the proper legal principles, and fairly and reasonably granted remedies that respond to the extraordinary circumstances of this historic case.

144. In the alternative, if the Court finds any aspects of the Decisions are unreasonable, it should set aside only those aspects, and remit them back to the same panel of the Tribunal for redetermination, with directions.

145. The Commission does not seek costs, and submits the Court should not award costs against it, since it has appeared in its capacity as a representative of the public interest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May, 2021.

Brian Smith / Jessica Walsh

Counsel for the Respondent,
Canadian Human Rights Commission

PART V ~ LIST OF AUTHORITIES

Legislative Authorities

Canadian Human Rights Act, RSC 1985, c. H-6, section 5, subsections 40(1) and 40(2), sections 50, 51 and 53

Canadian Human Rights Tribunal Rules of Procedure

Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3, subsection 91(24)

Indian Act, R.S.C. 1985, c. I-5, subsection 6(2)

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Alizadeh-Ebadi v Manitoba Telecom Services Inc., 2017 CHRT 36

Balazuntharam v Canada (Citizenship and Immigration), 2015 FC 607

Barber v Sears Inc. (No. 2), (1993) 22 CHRR 409 (Ont. Bd. Inq.)

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British Columbia v Gregoire, 2005 BCCA 585

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Canada (Attorney General) v Kattenburg, 2021 FCA 86

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Canada (Human Rights Commission) v Canada (Attorney General), 2010 FC 1135

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Casler v Canadian National Railway, 2017 CHRT 6

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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), 2011 CHRT 4

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), 2012 CHRT 16

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), 2012 CHRT 24

First Nations Child and Family Caring Society of Canada v Canada (Attorney General), 2012 FC 445

First Nations Child and Family Caring Society of Canada v Canada (Attorney General), 2013 FCA 75

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), 2015 CHRT 14

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2

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

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 16

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada), 2017 CHRT 7

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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), 2017 CHRT 35

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), 2018 CHRT 4

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Gale v Canada (Solicitor General), 2004 FCA 13

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Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/2010*, UN Doc CCPR/C/124/D/2020/2010 (11 January 2019) (re McIvor)

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