Court File No.

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPLICANT/MOVING PARTY

-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/RESPONDING PARTIES

WRITTEN REPRESENTATIONS OF THE APPLICANT/MOVING PARTY ON MOTION TO STAY

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PART I – OVERVIEW OF FACTS AND PROCEDURAL HISTORY

1. Canada is committed to compensating First Nations people for past discriminatory policies. Canada acknowledges the Canadian Human Rights Tribunal's earlier finding of systemic discrimination and does not oppose the general principle that compensation to First Nations individuals affected by a discriminatory funding model can be made in appropriate circumstances. The Tribunal's recent ruling awarding compensation to individuals in this claim, however, was inconsistent with the nature of the complaint, the evidence, binding jurisprudence and the *Canadian Human Rights Act.* Canada therefore seeks to have the Tribunal's ruling on compensation reviewed by this Court.

2. Concurrent with the application for judicial review, the Attorney General of Canada brings this motion for a stay of enforcement and execution of the Canadian Human Rights Tribunal's orders contained in 2019 CHRT 39 (the "Orders") for the duration of the judicial review proceedings.

3. Requiring Canada to comply with the Orders prior to the disposition of the judicial review would result in competing jurisdiction between the Canadian Human Rights Tribunal and the Federal Court, the possibility of conflicting judgments, the payment of potentially $5 to $6 billion dollars that may not be recoverable, and the outlay of significant human and financial resources, all to implement Orders that exceeded the Tribunal's authority.

4. Staying the enforcement and execution of the Orders is the only way to avoid irreparable harm to Canada.

A. Procedural History and Facts

5. This matter originated in 2007 when a complaint was filed by two public interest organizations, the First Nations Child and Family Caring Society ("Caring Society") and the Assembly of First Nations ("AFN"), who claimed that Canada's funding for child and family services on reserve and in the Yukon was discriminatory against First

Nations children on reserve and in the Yukon.[1] There were no individual complainants. The complainants sought approximately $112 million in compensation, to be paid into a trust fund administered by the Caring Society.[2] The Chiefs of Ontario, the Nishnawbe Aski First Nation, the Canadian Human Rights Commission and Amnesty International later joined the litigation as parties (collectively, with AFN and the Caring Society, the "Respondents"). The Tribunal found the complaint was largely substantiated.[3] On January 26, 2016, the Tribunal released its decision on the merits of the complaint and found that Canada's funding model was discriminatory.[4] Canada did not dispute this decision and has worked assiduously to implement the Tribunal's orders, expending billions in the process.[5]

6. Since the initial findings in 2016, the Tribunal has retained jurisdiction over this matter[6] and issued several rulings, many of which contain multiple remedial orders.[7] There are four more rulings currently under reserve: (i) the definition of First Nations child for the purposes of eligibility under Jordan's Principle; (ii) eligible expenses for major capital funding; (iii) eligible claims for small agencies' expenditures; and (iv) whether Canada can impose a deadline for the submission of claims for reimbursement of First Nations Child and Family Services Band Representative Services' actual costs. All

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[1] Complaint filed at Tribunal, Affidavit of Deborah Mayo dated October 1, 2019 ("Mayo Affidavit"), Exhibit A, Applicant's record ("AR") Tab 2.
[2] Preliminary Disclosure Brief of the complainants, subparagraph 21(3), Mayo Affidavit, Exhibit C, AR Tab 2.
[3] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 2 at para 456, Applicant's Book of Authorities ("ABOA") Tab 16. Neutral citations will be used hereafter to refer to this ruling and subsequent rulings by the Tribunal on this complaint.
[4] *Ibid*.
[5] Affidavit of Sony Perron dated October 3, 2019 ("Perron Affidavit"), paras 11, 18-19, 21, AR Tab 3.
[6] 2016 CHRT 10 at paras 3, 22, and 37, ABOA Tab 17; 2016 CHRT 16 at para 161, ABOA Tab 18; 2017 CHRT 14 at para 132, ABOA Tab 19; 2018 CHRT 4 at para 367, ABOA Tab 20.
[7] *See e.g.* 2016 CHRT 10, at paras 11-37, ABOA Tab 17; 2016 CHRT 16 at paras 157-161, ABOA Tab 18; 2017 CHRT 14 at paras 133-135, ABOA Tab 19; 2018 CHRT 4 at paras 407-444, ABOA Tab 20.

four are related to disagreements between the parties about the scope of the Tribunal's earlier remedial orders.

7. On September 6, 2019, the Tribunal issued its ruling on the Respondents' request for compensation for individuals affected by the discrimination. This ruling (the "Compensation Ruling") contains the Orders that are the subject of this judicial review application. This motion seeks to stay the Tribunal's Orders pending disposition of the underlying judicial review.

B. <u>The September 6, 2019 Compensation Ruling and Orders</u>

8. The Compensation Ruling concluded that while systemic remedies are required to address systemic issues, individual compensation is also required.[8] Despite the fact that no individual had representation in these proceedings, the Tribunal determined it could nonetheless compensate victims and that the statutory requirements for compensation for pain and suffering and for willful and reckless discrimination were met.[9]

9. The Compensation Ruling further concluded the unnecessary removal of children from their homes, families and communities qualifies as a "worst case scenario" breach of the fundamental rights of the children and their caregiving parents and grandparents. No caregivers were represented before the Tribunal. It found that non-discriminatory funding for on-reserve child and family services would have allowed children to remain in their homes and awarded the maximum $40,000 in statutory compensation ($20,000 for pain and suffering and $20,000 for willful and reckless discrimination) to every child removed from their home, temporarily or long-term, and every caregiving parent or grandparent to that child, unless they abused the child or children.[10]

10. The Tribunal also found that while reconsideration (a process that Canada has already implemented) is necessary for persons whose claims had been rejected under Jordan's Principle, this remedy was not sufficient. Every child who was denied access to a

[8] 2019 CHRT 39 ("*Compensation Ruling*") at paras 13, 14, ABOA Tab 21.
[9] *Compensation Ruling* at paras 112-115, 234, 242, and 245-248, ABOA Tab 21.
[10] *Ibid* at paras 234, 242, and 245-248.

service, experienced an unreasonable delay in accessing a service, or was taken into care to receive services due to Canada's discriminatory approach to Jordan's Principle was also granted the maximum compensation under the Act, along with the caregiving parents or grandparents.[11]

11. Finally, the Tribunal ordered Canada to engage in discussions with any interested Respondents about how the compensation process would work, and return to the Tribunal with "propositions" no later than December 10, 2019. As discussed below, propositions could include applications to increase the categories of those entitled to compensation. The Tribunal noted that it would consider such propositions and then determine "the appropriate process to locate victims/survivors and to distribute compensation". The Tribunal retained jurisdiction until this time, but noted it would "revisit" whether continued jurisdiction was necessary on the compensation issue.[12]

12. The Notice of Judicial Review (the "Notice") of the Tribunal's Compensation Ruling and the Orders alleges several errors, including that the Tribunal erred in:

    a. Ordering monetary compensation to First Nations children, their parents or grandparents under ss. 53(2)(e) and 53(3) of the *Canadian Human Rights Act* for the necessary or unnecessary removal of children in the child welfare system in light of the nature of the complaint before the Tribunal and the evidence presented;

    b. Ordering monetary compensation to First Nations children, their parents or grandparents under s. 53(3) of the *Canadian Human Rights Act* for the unnecessary removal of children to obtain essential services and/or for children who experienced gaps, delays and denials of services that would have been available under Jordan's Principle, in light of the nature of the complaint before the Tribunal and the evidence presented;

[11] *Ibid* at paras 214, 250-251.
[12] *Ibid* at paras 269, 271 and 277.

c. Determining that discrimination is ongoing with respect to Canada's funding for child and family services on reserve and in the Yukon and;

d. Establishing a process for the payment of compensation that requires the retention of jurisdiction by the Tribunal and permits the establishment of new categories of persons who may receive compensation.

13. The Notice also alleges these errors "were made without jurisdiction or beyond the Tribunal's jurisdiction, denied procedural fairness to the Applicant, erroneously relied on factual material, erroneously interpreted provisions of the *Canadian Human Rights Act* or were otherwise unreasonable, and thus there are permissible grounds for review under s. 18.1 of the *Federal Courts Act*."[13]

PART II – QUESTION IN ISSUE

14. The only question before this Court is whether the Attorney General has satisfied the test for a stay of enforcement and execution of the Tribunal's Orders pending the disposition of the judicial review.

PART III – ARGUMENT

A. <u>The test to stay an order under Rule 398</u>

15. The Attorney General may seek a stay of enforcement and execution of the Tribunal's Order pending disposition of the judicial review under Rule 398 of the *Federal Court Rules*.[14] Stays are appropriate when necessary to save the parties from devoting time, expense, effort, and other scarce resources to complying with court orders that may ultimately be set aside on judicial review.

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[13] Notice of Judicial Review, at paras 1-5 ("JR Notice").

[14] *See e.g., Canada (Attorney General) v Thwaites,* 1993 CarswellNat 645, 68 FTR 193 at para 1 [*Thwaites*], ABOA Tab 3.

16. The granting of a motion to stay the enforcement of a judgment pending an application for judicial review requires that the moving party meet the three part test set out by the Supreme Court of Canada in *RJR-MacDonald*[15]:

    a. whether there is a serious question to be tried;

    b. whether the moving party would suffer irreparable harm if the stay was refused; and

    c. whether the balance of convenience lies in favour of the moving party.[16]

17. Where, as here, the moving party is a government authority, the public interest will be considered at both the second and third stage of the test.[17]

B. <u>Canada's judicial review raises serious questions to be tried</u>

18. The first step of the *RJR-MacDonald* test involves a preliminary assessment of the merits of the case to determine whether there is a serious question to be tried. This is a low threshold, and to meet it, the Attorney General need only show that the judicial review raises issues that are neither vexatious nor frivolous.[18] This threshold is easily met given the extensive errors in the decision under review.

19. The Compensation Ruling raises several serious issues for consideration by this Court. Two are particularly important.

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[15] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 [*RJR-MacDonald*], ABOA Tab 36.
[16] *Canada (Prime Minister) v Khadr*, 2010 FCA 199 at paras 4 [*Khadr*], ABOA Tab 8; *Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 212 at para 14 [*Ishaq*], ABOA 5, citing *RJR-MacDonald* at 334, ABOA Tab 36.
[17] *Canada v Canadian Council for Refugees*, 2008 FCA 40 at para 18 [*Canadian Council for Refugees*], ABOA Tab 11; *Sawridge Band v. R.*, 2004 FCA 16 at para 48, ABOA Tab 37.
[18] *Gateway City Church v. Minister of National Revenue*, 2013 FCA 126 at para 11 [*Gateway City Church*], ABOA Tab 22, citing RJR Macdonald at 337, ABOA Tab 36; *see also Canada (Attorney General) v. United States Steel Corp.*, 2010 FCA 200 at para 5, ABOA Tab 4.

20. First, individual compensation was not an appropriate remedy for this complaint. Second, even if this Court finds the Tribunal had the authority to order individual compensation, the compensation ordered was disproportionate as between individuals and in light of Canada's prior remedial actions.

1. The individual compensation ordered is not responsive to or permitted by the claim or the evidence before the Tribunal

a. <u>The remedy is not responsive to the complaint</u>

21. The Notice alleges in part that the Tribunal erred in ordering compensation to First Nations children and their caregivers under sub-sections 53(2)(e) and 53(3) in light of the nature of the complaint before the Tribunal and the evidence requested.[19] None of the recipients of the compensation ordered under section 53 of the *Canadian Human Rights Act* ("*CHRA*") were named nor are identifiable in the underlying complaint before the Tribunal or in the complainants' respective notices of particulars. The Tribunal itself acknowledged that the identification of who should take advantage of the Orders is complex and will require considerable work.[20] The Tribunal's Compensation Ruling awards compensation to an unknown number of unidentified individuals who were not party to the complaint.

22. In doing so, the Tribunal erred by awarding individual compensation in a complaint that the Respondents both framed and argued as one of systemic discrimination. It is a fundamental tenet that the remedy awarded must be responsive to the claim as drafted by the complainants.[21] The Tribunal's Orders providing compensation to unnamed First Nations children and their caregivers fails because individual compensation was not available as a remedy to this complaint; the remedy ordered is inconsistent with the Tribunal's prior recognition that this is a systemic claim; and the Tribunal improperly relied on expert evidence to ground its remedy.

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[19] JR Notice at paras 1-2.
[20] *Compensation Ruling* at para 208, ABOA Tab 21.
[21] *Hughes v. Elections Canada*, 2010 CHRT 4 at para 50, ABOA Tab 24, cited in *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10 at para 115, ABOA 23.

23. The Tribunal has consistently recognized that the underlying matter was a complaint of systemic discrimination[22] and the Supreme Court of Canada's jurisprudence in *Moore*[23] is unequivocal that the remedy must flow from the complaint. The Federal Court of Appeal has recognized that structural and systemic remedies are required in complaints of systemic discrimination, and has determined compensation for individuals is not an appropriate remedy in such complaints.[24] Specifically, in *CNR*, it found compensation is limited to individual victims which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, as here "by the nature of things individual victims are not always readily identifiable".[25] The Tribunal itself has applied these decisions in other cases, declining compensation in claims where it would have been impractical to have thousands of victims testify, acknowledging it could not award compensation en masse.[26]

24. This Court's jurisprudence confirms non-complainants should not be awarded specific relief in human rights complaints. In *Menghani*, [27] this Court concluded the Tribunal could not award permanent residency to an individual who was not a complainant, even though it determined he would have received it but for the discriminatory practice identified. The Court's conclusion was based on two findings: first, that the remedy was barred by statute and second, that there is a general objection to award specific relief to non-complainants. [28]

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[22] *See e.g.* 2016 CHRT 10 at paras 18, 23, ABOA Tab 17; 2017 CHRT 14 at para 23, ABOA Tab 19, and 2018 CHRT 4 at paras 93, 165, ABOA Tab 20.
[23] *Moore v. British Columbia (Education),* 2012 SCC 61 at paras 64 and 68-70, ABOA Tab 30.
[24] *Re: C.N.R. and Canadian Human Rights Commission*, 1985 CanLII 3179 (FCA), 20 DLR (4th) 668 at para 10, ABOA Tab 2.
[25] *Ibid* (overturned on other grounds but this issue was not appealed).
[26] *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para. 991, ABOA Tab 33; see also *Public Service Alliance of Canada v. Canada (Treasury Board)*, 1998 CanLII 3995 (CHRT) at paras 496-498, ABOA Tab 34.
[27] *Canada (Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102, [1993] FCJ No 1287 at para 61, ABOA Tab 9.
[28] *Ibid*.

25. In departing from *Moore, CNR* and *Menghani* by awarding compensation to individuals in response to a systemic discrimination complaint filed by public organizations, the Tribunal's Compensation Ruling effectively transformed the underlying complaint of systemic discrimination into a class action without the procedural safeguards for class actions in court, and without a representative plaintiff. Courts that are empowered to rule on class action proceedings – such as this Court – do so pursuant to legislative authority.[29] In the absence of such a provision in the *CHRA*, the Tribunal does not have the authority to address class complaints or to treat complaints that purport to be on behalf of unidentified individuals like a class claim. The Tribunal's Ruling effectively creates an additional forum for class plaintiffs to try their case first without having to follow the rules established in other forums and, potentially, without having to set off the compensation paid against subsequent orders of damages.

26. As noted above, there is no provision in the *CHRA* that allows the Tribunal to adjudicate class actions. Where, as here, there is a class action pending in this Court on behalf of an overlapping set of individuals, the Tribunal is not the proper forum to compensate unrepresented individuals not party to the complaint.

27. Class action legislation is an important procedural mechanism to ensure claimants and defendants can adjudicate or settle their claims in a fair and orderly way. Class proceedings are designed to ensure that claimants have an opportunity to opt in or out, the court determines common issues, and the certification of these common issues is binding on subsequent steps in the litigation. In class actions, courts have rejected attempts by plaintiffs to transform proposed systemic claims into a proceeding focusing on the individual experience.[30]

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[29] *See e.g. Federal Court Rules*, SOR/98-106, Rule 334, ABOA Tab 44.

[30] For example, in *Anderson v. Canada (Attorney General)*, 2015 NLTD (G) 146 at paras 28-32 [*Anderson*], ABOA Tab 1, the Court found that the Plaintiffs had, by their own actions, caused the common issues trial to be limited to systemic failures. As a result, they could not change the scope of the issues during the common issues trial and lead evidence on individual experiences, having conducted themselves in a manner that precluded it.

28. This is, however, what the Tribunal has done in its Compensation Ruling. The evidence of all parties was focused on a systemic claim. The Tribunal improperly allowed the hearing to evolve from a claim of systemic discrimination, and effectively imposed a *defacto* un-certified class action settlement outside its statutory authority.

b. The Tribunal erred in determining there was an evidentiary foundation to order individual compensation

29. The evidence before the Tribunal was insufficient for it to award the requested statutory maximum under the special compensation provisions of the *CHRA*.

30. The Tribunal's award of compensation for First Nations children who were removed from their homes (and their caregivers), depends on the unproven premise that all these children were removed from their homes because of the government's funding practices. To accept this premise requires a finding that had there been adequate funding, no child would have been removed from his or her home. This assertion is unsupported by the evidence and overlooks the complexity of factors that may lead to a child being removed from their home. The Respondents themselves have acknowledged that removal from the home is a valid approach in some cases to ensure the well-being of a child.[31]

31. There was insufficient evidence before the Tribunal to demonstrate that any particular children were improperly removed from their home. There was also insufficient evidence from any recipients of child welfare services on reserve with respect to a service or program they did not receive, or the adverse outcomes that flowed from this. As acknowledged by at least one of the complainants, the Tribunal did not receive evidence about the precise nature and extent of the harm suffered by each individual child.[32]

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[31] Closing Submissions of the Canadian Human Rights Commission dated August 25, 2014, para 456, Mayo Affidavit, Exhibit M, AR Tab 2.

[32] Memorandum of fact and law of the complainant First Nations Child and Family Caring Society dated August 29, 2014, para 513, Mayo Affidavit, Exhibit N, AR Tab 2.

32. The absence of individual claimants, and related individual evidence, made it impossible for the Tribunal to assess compensation on an individualized basis. Further, by proceeding as it did, the Tribunal prevented the Attorney General from mounting an effective response to such a claim, as it could not test this evidence. Courts in class actions have said there is no principled basis to infer that the consequences suffered by a few claimants are representative of the many.[33] The Tribunal made unwarranted assumptions and assumed causality in areas where evidence was required in order to ground the findings of individual causation that it made.

33. In an effort to overcome this absence of evidence, the Tribunal took notice of the history of Indian Residential Schools and the historical disadvantages of First Nations on reserve communities and applied it as evidence of damage. The Court in *Anderson* rejected such an approach, saying "there is no authority holding that such judicial notice would apply …to an assessment of damages in a civil litigation context."[34]

34. Although representative claims are permitted and groups of individual claimants need not provide specific evidence of expenses or effects on each member of the group, this is not such a representative claim. The Respondents did not establish that they have the authority to speak on behalf of and represent the interests of the children at issue. Even if it were a representative claim, there must still be some evidence of the impacts the discriminatory practice had on individuals that can be extrapolated to the other members of the group on a principled and defensible basis.[35] This type of factual basis is lacking.

35. The Attorney General does not dispute that expert and other reports were admissible and capable of making out a claim of systemic discrimination. However, it was erroneous and procedurally unfair to use them as an evidentiary basis to award individual compensation.

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[33] *Anderson* at para 23, ABOA Tab 1.
[34] *Ibid* at para 24.
[35] *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135 at para 73, ABOA Tab 13.

2. The Ordered Compensation is disproportionate

36. The Compensation Ruling awarded the maximum $40,000 in statutory compensation ($20,000 for pain and suffering and $20,000 for willful and reckless discrimination) to every child removed from their home, temporarily or long-term, and every caregiving parent or grandparent to that child, unless they abused that child.[36] Caregivers are entitled to compensation for each child removed and each child whose request for services was denied or unreasonably delayed as a result of Canada's narrow definition of Jordan's Principle. Awarding the same compensation to everyone – regardless of circumstances that led to that compensation – creates disproportionate awards amongst the individuals covered by the Orders. The Orders provide, for example, that a First Nations child on reserve who suffered domestic abuse, was necessarily removed, and spent two days in care would receive the same compensation as a First Nations child who was not at risk, was unnecessarily removed from their home and spent two years in care.

37. This error is compounded by the Tribunal's finding that the discrimination is ongoing. The scope of the Tribunal's compensation is disproportionate in light of Canada's compliance with the Tribunal's numerous previous remedial orders. Canada estimates the ordered compensation amounts to between $5 and $6 billion to satisfy the removals aspect of the Orders alone, assuming the ordered compensation was fully paid out by the end of 2020.[37]

38. The Tribunal does not address Canada's compliance with these orders, nor take account of the serious measures taken to address their findings, including the budgeting of more than two billion dollars since 2016 to implement the Tribunal's orders.[38] Nor did it put Canada on notice that it should address this issue.

[36] *Compensation Ruling* at paras 234, 242, and 245-248, ABOA Tab 21. Caregivers who were abusive were not entitled to compensation.
[37] Perron Affidavit, para 39, AR Tab 3.
[38] *Ibid* at paras 21-22, 24.

39. As part of this investment in the program's budget, and as detailed in Canada's affidavits previously filed before the Tribunal,[39] Canada has made extensive efforts to identify and fill the gaps First Nations children face in accessing mental health services in collaboration with experts and the Parties.[40] Operational efficiencies for the evaluation and determination of requests have been made together with the Parties. Canada has also engaged in outreach and consultative work, funding First Nations for service coordination and case navigation, processing and tracking of cases, compliance reporting, publicity, and improving the appeals process to ensure compliance with Jordan's Principle.[41] As one example, from July 2016 until March 30, 2018, 99% of all Jordan's Principle requests were approved.[42] A compliance report for February 2019 shows that over 82% of urgent individual requests were determined within 12 hours, and approximately 75% of non-urgent individual requests were determined within 48 hours.[43]

40. Canada continues to provide services in compliance with its legal obligations. Over a recent five month period, between April 1, 2019, and August 31, 2019, approximately $309.66 million was expended or committed to Jordan's Principle and there were an estimated 136,003 products and services approved by Jordan's Principle. Of the total number of products and services approved during this 5 month period, 9,746 products and services were administered directly by ISC. The remaining 126,257 products and services were approved for administration by partner organizations and communities.[44]

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[39] Dr. Valerie Gideon filed two affidavits on May 24, 2018 regarding Canada's efforts to address the mental health and Jordan's Principle orders. *See* Affidavits of Valerie Gideon, May 24, 2018, Mayo Affidavit, Exhibits H and I, AR Tab 2; *See also*: Reply Affidavits of Paula Isaak and Valerie Gideon, Mayo Affidavit, Exhibits K and L, AR Tab 2.

[40] Affidavit of Valerie Gideon dated May 24, 2018 concerning mental health ("Gideon Mental Health Affidavit, May 2018"), paras 18-19, Mayo Affidavit, Exhibit H, AR Tab 2.

[41] Affidavit of Valerie Gideon dated May 24, 2018 concerning Jordan's Principle, Mayo Affidavit, Exhibit I, AR Tab 2.

[42] *Ibid* at para 42.

[43] Affidavit of Valerie Gideon dated April 15, 2019, para 48, Mayo Affidavit, Exhibit E, AR Tab 2.

[44] Perron Affidavit, para 26, AR Tab 3.

41. Canada also took action in response to the Tribunal's February 1, 2018 ruling by conducting cost analysis research, developing and implementing an alternative funding system, communicating with agencies, providing actual cost funding for band representatives in Ontario, assessing agency deficits, working on remoteness quotient research and the Ontario Special Study, stopping the practice of reallocating funds in the manner proscribed by the Tribunal's orders, and developing the consultation protocol.[45] Canada continues to provide reimbursement based on actual costs pursuant to the Tribunal's orders until another agreement is in place.[46]

42. The Tribunal's previous orders were all focused on the systemic nature of the claim, addressing how best to fix a discriminatory funding model. However, using that same information to award individual compensation to victims who are not complainants transforms the nature of the claim into something akin to a class action proceeding and is procedurally unfair.

43. The Compensation Ruling also does not take into account *An Act respecting First Nations, Inuit and Métis children, youth and families* (the "Act"), co-developed with Indigenous partners as part of Canada's response to the Tribunal's 2016 findings. [47] The Act affirms the inherent right of Indigenous Peoples to self-governance, which includes jurisdiction in relation to child and family services; establishes national principles such as the best interests of the child, cultural continuity, and substantive equality applicable to the provision of child and family services in relation to Indigenous children; and contributes to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.[48]

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[45] Affidavit of Paula Isaak dated May 24, 2018 concerning funding systems and Canada's funding of the actual cost of prevention and least disruptive measures, Mayo Affidavit, Exhibit J, AR Tab 2.
[46] *Ibid* at paras 9-10.
[47] Affidavit of Joanne Wilkinson dated April 16, 2019 ("Wilkinson Affidavit, April 2019"), para 53, Mayo Affidavit, Exhibit F, AR Tab 2.
[48] Perron Affidavit, para 29, AR Tab 3; Wilkinson Affidavit, April 2019, para 53, Mayo Affidavit, Exhibit F, AR Tab 2.

44. The Tribunal's failure to consider any of this evidence before determining that discrimination is on-going makes its decision unintelligible, unjustifiable and therefore unreasonable.

45. Beyond the inequities between individuals receiving compensation under this Ruling and the Tribunal's failure to consider Canada's remedial actions since 2016, the Tribunal's award is further disproportionate because the compensation related to child and family services has no specified end date, the amount ordered will continue to increase daily as services are provided, the categories of victims are not restricted to those named in the Compensation Ruling, and the Tribunal has retained jurisdiction on this matter.[49]

46. Whether the Tribunal exceeded the scope of authority established by their home statute and relied on an improper evidentiary foundation, and in doing so, went contrary to established jurisprudence, are serious issues that are neither vexatious nor frivolous. They are serious questions to be tried as they raise important legal and jurisdictional questions.[50] The first threshold of the test is easily satisfied.

C. <u>Canada will suffer irreparable harm absent a stay</u>

47. "Irreparable harm" is harm that cannot be quantified in monetary terms or which cannot be cured or remedied following the disposition of the order under review. [51] Where, as here, the party seeking the stay is a public body or authority, irreparable harm to the public interest if the stay is not granted must also be considered. The burden on Canada to demonstrate irreparable harm is less onerous than that on a private litigant.[52] As a

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[49] *Compensation Ruling* at paras 245, 270, and 277, ABOA Tab 21.
[50] *Khadr* at para 11, ABOA Tab 8.
[51] *Ibid* at para 15, citing *RJR-MacDonald* at 341, ABOA Tab 36; *I.L.W.U. v. Canada (Attorney General)*, 2008 FCA 3 at para 21, ABOA Tab 26.
[52] *D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research)*, 1994 CarswellNat 1844, [1994] F.C.J. No. 1504 at para 9, ABOA Tab 15; see also *Khadr* at para 22, ABOA Tab 8, citing *RJR-MacDonald* at 346, ABOA Tab 36.

general rule, the motion judge should not "attempt to ascertain whether actual harm would result" to a moving government party if the motion for a stay is dismissed.[53]

48. Canada will suffer irreparable harm if the Tribunal's Compensation Ruling is not stayed pending judicial review.

49. There are three main demonstrable categories of irreparable harm that will occur if the stay is not granted: (1) conflicting decisions as a result of the Tribunal's retained jurisdiction over the Compensation Ruling and the Federal Court's review of this ruling; (2) an unwarranted devotion of resources to setting up and implementing the compensation process; and (3) the unrecoverable loss of compensation paid out to certain individuals during the course of the judicial review. These harms, on their own and cumulatively, are demonstrably[54] "irreparable" as they are not compensable by money or Canada cannot be made whole if successful on judicial review.[55]

50. To deny the requested stay would effectively render the application for judicial review meaningless by forcing Canada to set up and to implement the compensation process, including the potential payment of billions of dollars it may be precluded from recovering, to comply with the Orders pending judicial review. If this Honourable Court were to find the judgment was incorrect in law or unreasonable, significant financial and human resources will be devoted to matters the Tribunal had no power to order as they were outside its statutory jurisdiction, incorrect in law, or unreasonable.

51. In addition, compliance with the Orders while they are subject to judicial review places Canada and the First Nations claimants in a situation of uncertainty, requiring them to begin negotiations on the expectation that compensation would be awarded, only to have that expectation frustrated should Canada succeed on its judicial review. Canada should not begin a compensation process it seeks to set aside, and engaging in

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[53] *RJR-MacDonald* at 346, ABOA Tab 36.
[54] *Gateway City Church* at para 18, ABOA Tab 22.
[55] *RJR-MacDonald* at 348, ABOA Tab 36.

negotiations given the lack of stability will harm Canada's relationship with the First Nations.[56]

1. The potential for conflict due to simultaneous proceedings before the Tribunal and the Federal Court

52. The Tribunal's Compensation Ruling included an Order requiring Canada to enter into discussions with the two original complainants and return to the Tribunal for further orders:

> [269] […] Therefore, Canada shall enter into discussions with the AFN and the Caring Society on this issue [the compensation process]. The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to. The Panel is not making a final determination on the process here rather, it will allow parties to discuss possible options and return to the Tribunal with propositions if any, no later than **December 10, 2019**. The Panel will then consider those propositions and make a determination on the appropriate process to locate victims/survivors and to distribute compensation. [underlined emphasis added]

53. The Tribunal also noted that it welcomed suggestions to change the wording and the content of the Orders in the Compensation Ruling, including the addition of new categories of victims:

> [270] As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added.

54. Thus, unless the Order is stayed, Canada is required to return to the Tribunal in just 67 days[57] so the Tribunal can issue additional orders stemming from the Compensation Ruling. The Tribunal has indicated it is willing to change the Orders under judicial

[56] Perron Affidavit, paras 42-45, AR Tab 3.
[57] As of October 4, 2019.

review, including expanding the scope of the order to include further categories of victims.

55. The process for the compensation order is not the only matter currently under reserve by the Tribunal. There are four other matters also under reserve, including the definition of "First Nations child" for the purpose of eligibility under Jordan's Principle.[58] This further ruling on the definition of First Nations child will necessarily impact the Orders in the Compensation Ruling, with respect to compensation awarded pursuant to the Tribunal's Compensation Ruling regarding "gaps, delays and denials of services that would have been available under Jordan's Principle".[59] This makes the current Tribunal Orders incomplete and therefore difficult to comply with as the definition of who receives compensation is currently under reserve by the Tribunal.[60]

56. This means that absent a stay – and before the disposition of the judicial review – the Tribunal will have issued additional orders affecting the Compensation Ruling. The Tribunal has invited proposals for changes to the Orders under review, with a view to expanding their already large scope. This will create instability in the grounds for review, potentially result in additional judicial reviews on litigation over the same Orders, and potentially result in conflicting judgments once the Federal Court issues its decision in judicial review. There is a non-speculative risk of findings being made in respect of one or more of these decisions that could be inconsistent or difficult to reconcile.[61] As just one possibility, if the Tribunal imposes a detailed compensation process in December that Canada must follow, and the Federal Court subsequently finds the Tribunal erred in awarding compensation to non-complainants, such findings are irreconcilable.

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[58] Perron Affidavit, para 46, AR Tab 3.
[59] *See e.g. Compensation Ruling* at subheading preceding para 50 and paras 250-257, ABOA Tab 21.
[60] Perron Affidavit, para 46, AR Tab 3.
[61] *Rakuten Kobo Inc. v Canada (Commissioner of Competition)*, 2017 FC 382 at para 36 [*Rakuten Kobo*], ABOA Tab 35.

57. This would cause irreparable harm to Canada. The Federal Court has found irreparable harm where there is a substantial possibility of conflicting decisions in two forums with respect to common issues and where, like here, there is the potential for duplicative litigation.[62]

58. For clarity, the Attorney General does not seek to stay the proceedings before the Tribunal pursuant to Rule 373. As noted above, one of the decisions under reserve by the Tribunal is necessary to determine the scope of the Compensation Ruling. The Attorney General seeks only to the stay the Orders in the Compensation Ruling, which under the terms of that Ruling, effectively stays further changes to these Orders.[63] This is not only the just result, it is also the least expensive and most expeditious use of resources to determine the issue on its merits.[64]

2. The improper devotion of resources

59. The Tribunal's Orders must be stayed in their entirety because requiring Canada to begin consultation and implementation of the compensation process will cause irreparable harm to Canada if it succeeds in the underlying judicial review.

60. The Federal Court of Appeal Court has found that that irreparable harm may accrue to a public authority required to devote resources to "to commence a process" the public authority had "no power to undertake".[65] In *Lazareva*, this Court had ordered the Minister of Citizenship and Immigration to assess an application for permanent residency or stay the individual's removal from Canada. The Minister appealed this decision and argued that the Federal Court had no jurisdiction to make this order. The

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[62] *Poitras v Sawridge Band*, [1999] FCJ No 375, 1999 CarswellNat 536 at para 5, ABOA Tab 32; *Stoney Band v Band Council of the Stoney Band*, [1996] FCJ No 948, 118 F.T.R. 118 at para 16, ABOA Tab 38; *see also Tessma v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 600, 2003 FCT 427 at paras 16-17, and 22, ABOA Tab 39.
[63] See the unnumbered paragraph at the bottom of page 81 of the *Compensation Ruling*, ABOA Tab 21, noting that the orders requiring compensation be awarded will only find application once the Tribunal rules on the compensation process.
[64] *Rakuten Kobo* at para 33, ABOA Tab 35, referring to *Federal Courts Rules*, Rule 3.
[65] *Canada (Minister of Citizenship & Immigration) v. Lazareva*, 2005 FCA 39 at para 10 [*Lazareva*], ABOA Tab 6.

Federal Court of Appeal, in granting the stay, found that irreparable harm would occur if the Minster was required to comply with the court's order noting:

> 10 Moreover, I am persuaded that, if the appeal were successful, the Minister would have suffered irreparable harm if she had been required to devote the resources necessary to process the respondent's application for landing, and to commence a process that she had no power to undertake.[66]

61. While not an exact parallel, a similar irreparable harm would occur here if Indigenous Services Canada were required to devote the resources necessary to comply with the Compensation Ruling, and this Court later determines the Tribunal erred in ordering such compensation or compensation process.

62. Administrative inconvenience is not irreparable harm.[67] The resources required to implement the Tribunal's Orders are significant and beyond administrative inconvenience. The Child and Family Services ("CFS") program has approximately 49 employees implementing the Tribunal's prior orders,[68] and will continue to provide essential services to First Nations children on reserve and in the Yukon.[69] However, the consultation, set up and implementation of the Compensation Ruling is estimated to require an additional 50-100 employees and would require a significant increase in CFS' program budget, exclusive of any compensation awarded.[70] Dedicating resources now may result in them being wasted if the Tribunal's orders are amended or set aside. Further, in light of the election, Canada will not be able to receive instructions from Cabinet to pursue meaningful discussions with the Respondents or commit to any proposed compensation process before the Tribunal's deadline of December 10, 2019.[71]

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[66] *Ibid.*
[67] *Canada (Superintendent of Bankruptcy) v. MacLeod*, 2010 FCA 84 at paras 20-21, ABOA Tab 10.
[68] Perron Affidavit, para 40, AR Tab 3.
[69] *Ibid* at para 50.
[70] *Ibid* at para 41.
[71] *Ibid* at para 7.

63. The Applicant has put forward specific, particular information that the Attorney General respectfully submits is sufficient for the Court to find that irreparable harm will occur.[72]

3. Canada is precluded from recovering money paid out to First Nations children and their caregivers on reserve

64. The Compensation Ruling requires Canada to pay compensation to every First Nations child and their caregivers covered by the Orders. For a couple with two children affected by the Orders, the order could be interpreted to mean that this family would receive a possible payment of $240,000.[73] Canada's rough estimates to date place the potential compensation required by the Compensation Ruling at approximately $5 - $6 billion dollars for removals alone assuming the ordered compensation is fully awarded by the end of 2020. Since the Tribunal has found discrimination is on-going, the amount owed by Canada will continue to increase daily unless the Orders are stayed.

65. Currently, the Orders require payment to First Nations children on-reserve for necessary and unnecessary removals, and payment to First Nations children on and off-reserve for "gaps, delays and denials of services that would have been available under Jordan's Principle".[74]

66. To be in compliance with the Orders without a stay, Canada is required to make certain of the payments to individuals on reserve. If those individuals deposit their awards into bank accounts on reserve, or retain the money on reserve in some other way, Canada is precluded from recovering this money under subsection 89(1) of the Indian Act. Subsection 89(1) states:

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[72] *Gateway City Church* at para 18, ABOA Tab 22.
[73] $40,000 for each child, and each parent receives $40,000 per child affected. Therefore, Child 1 would receive $40,000, Child 2 would receive $40,000, Parent 1 would receive $80,000 and Parent 2 would receive $80,000, for a total of $240,000.
[74] *See e.g. Compensation Ruling* at subheading proceeding para 250 and paras 250-257, ABOA Tab 21.

89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.	**89 (1)** Sous réserve des autres dispositions de la présente loi, les biens d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien ou une bande.

67. The jurisprudence is consistent in its interpretation that this subsection protects property situated on reserve, including bank accounts, from seizure by the Crown.[75] Thus, even if successful on the judicial review, Canada will be precluded from taking any steps to recover any amounts paid to individuals who are status Indians and who keep the awards on reserve.[76] This represents a loss of potentially billions of dollars of public funds if the Orders are not stayed.

68. Canada is similarly precluded from recovering this money from the complainants. The awards are paid to individuals, not parties represented by counsel. Opposing counsel cannot therefore assist in recovering any amounts paid to these individuals. Given the high quantum, the Respondents cannot provide an undertaking that Canada will be indemnified for any payments awarded during the pendency of the judicial review, which would normally be required to address this concern.[77]

[75] See e.g. *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, ABOA Tab 29; *Joyes v. Louis Bull Tribe #439*, 2009 ABCA 49, ABOA Tab 28.
[76] *See e.g. Young v. Wolf Lake Band*, 164 FTR 123, 1999 CanLII 7563 (FC), ABOA Tab 42; *Tobique Indian Band v. Canada*, 2010 FC 67 at para 60, ABOA Tab 40; and *Canadian Imperial Bank v. E&S Liquidators Ltd.,* [1995] 1 CNLR 23*,* 1994 CanLII 2050 (BC SC), ABOA Tab 14.
[77] *Canada v. Gilbert*, 2007 FCA 254 at paras 3-4 [*Gilbert*], ABOA Tab 12, holding that an undertaking for the amount at issue provided an answer to the question of irreparable harm.

69. Courts have declined to issue stays where the money was recoverable.[78] Courts have also found that the public interest militates in favour of collecting debts owed to the Crown.[79] By statute, Canada will not be able to recover any funds paid that are kept as property on reserve, nor recover this money from the complainants, the harm to Canada and the public interest is irreparable if Canada complies with the Orders in full before the disposition of the judicial review.

70. The only way for Canada to avoid this harm is if it deliberately does not comply with the Orders, which is simply not an option. This Court has acknowledged that as a "practical matter", complainants cannot enforce payment from the Crown of a judgment.[80] This places Canada in an impossible position between two harms to the public interest during the judicial review process: it must comply with the Orders and disburse taxpayer dollars it may not be able to recover or be in non-compliance with the Orders to protect these funds. No matter the path taken, there is significant harm to the public interest.

D. The balance of convenience lies in Canada's favour

71. The balance of convenience inquiry involves a comparative assessment to determine which party to the motion would suffer the greatest harm or inconvenience if the stay is granted or refused. [81] Given the evidence of irreparable harm submitted by Canada, the Attorney General submits that the balance of convenience inquiry weighs heavily in favour of granting the stay.

72. While delays in obtaining compensation will not be welcomed by the claimants, they will not suffer irreparable harm if the Tribunal's Orders are stayed pending judicial review. They are also not parties to this motion. If the judicial review is dismissed, that

[78] *Thwaites* at 5, ABOA Tab 3.
[79] *Gilbert* at para 6, ABOA Tab 12.
[80] *Hughes v Transport Canada*, 2019 FC 53 at paras 54, 59, ABOA Tab 25.
[81] *Khadr* at para 23, ABOA Tab 8, citing *Toth v Canada (Minister of Citizenship and Immigration)* (1988), 86 NR 302 (FCA), ABOA Tab 41, and *Canada (Minister of Citizenship and Immigration) v Fox*, 2009 FCA 346 at para 19, ABOA Tab 7.

judgment will be legally enforceable and binding on Canada unless a further appeal is sought to the Federal Court of Appeal, and the Federal Court of Appeal grants a stay.

73. If no such appeal is brought, Canada is bound to implement and execute the Tribunal's order. A stay pending judicial review would not affect the availability of the relief ordered by the Tribunal in the judgment on judicial review.

74. The Respondents therefore will not be prejudiced if the implementation of the Orders are delayed. The recipients of the compensation awards will similarly be compensated for the delay. The Tribunal's Orders – if upheld on judicial review – include the interest applicable to the awarded amount.[82] In addition, there is no evidence that Canada will not comply with the Tribunal's orders. Rather, the evidence filed in this record demonstrates Canada has complied with the Tribunal's orders to date and will continue to do so.[83] This means that First Nations children will continue to receive the services they need.

75. In contrast, the irreparable harm that would accrue to Canada if it complies with the Orders in the absence of the stay includes the potential for conflicting judgments, the devotion of resources to commence and implement a process that may be set aside, and the potential loss of billions of dollars overwhelmingly exceeds any harm to the Respondents if the stay is granted. The hardship caused to Canada and the public interest significantly outweighs any harm caused by a delay in implementing the Tribunal's Orders on compensation.[84] Finally, as noted above, the Respondents cannot provide an undertaking of several billion dollars, nor would Canada ask that they do so. The balance of convenience weighs in favour of Canada.[85]

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[82] *Compensation Ruling* at paras 275, 276, ABOA Tab 21.
[83] Perron Affidavit, paras 9-31, 47, AR Tab 3. *See also* Wilkinson Affidavit, April 2019, para 62, Mayo Affidavit, Exhibit F, AR Tab 2; Gideon Mental Health Affidavit, May 2018, para 19, Mayo Affidavit, Exhibit H, AR Tab 2.
[84] *Lazareva* at para 10, ABOA Tab 6.
[85] *Musqueam Indian Band v. Canada*, 2008 FCA 214 at paras 66-67 [*Musqueam Indian Band*], ABOA Tab 31.

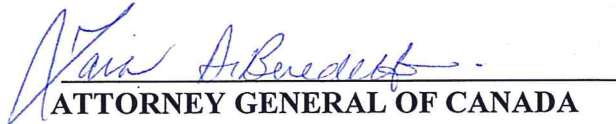
PART IV – ORDER SOUGHT

76. The Attorney General respectfully requests this Court issue an order:

a. staying the execution and enforcement of the Compensation Order for the duration of the judicial review proceedings before this Honourable Court;

b. granting the Applicant the costs of this motion if opposed.

DATED AT OTTAWA, ONTARIO, this 4th day of October, 2019.



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