Court File No. T-1621-19

FEDERAL COURT

B E T W E E N:

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

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT/RESPONDING PARTY ASSEMBLY OF FIRST NATIONS

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Overview

1. The Assembly of First Nations ("AFN") is responding to two motions now before this Honourable Court. First, these submissions will address the Applicant/Moving Party's, Attorney General of Canada (representing the Minister of Indian and Northern Development Canada)("Canada"), motion to stay the enforcement and execution of the Canadian Human Rights Tribunal's ("CHRT") Orders contained in 2019 CHRT 39 (the "Compensation Decision").[1] Secondly, the AFN will address the Respondent/Moving Party's, First Nations Child and Family Caring Society of Canada ("Caring Society"), motion to put the judicial review in abeyance until the CHRT has issued a final Order on compensation.

2. The AFN opposes Canada's motion for stay. The AFN agrees with Canada that it is legally obligated to comply with the Orders in the Compensation Decision, but disagrees that Canada or the public interest will suffer any irreparable harm if the Orders are not stayed by this Honourable Court. The AFN submits Canada's motion should be dismissed.

3. It is important to add the AFN will be opposing Canada's application for judicial review on the bases that include the Tribunal had authority to order as it did with respect to monetary compensation, the process for compensation, in finding that discrimination is ongoing, and retaining jurisdiction over the matter, in consideration of the context, evidence, and nature of the claim.

4. The AFN supports the Caring Society's motion for abeyance.

[1] *First Nations Child and Family Caring Society of Canada et a. v. Attorney General of Canada (Minister of Indian and Norther Affairs*, 2019 CHRT 39 dated September 6, 2019 (the "Compensation Decision").

2. Statement of Facts

A. Panel's Decision on the Merits

5. In a landmark ruling, 2016 CHRT 2,[2] the Tribunal made extensive findings and providing very detailed reasons against Canada and ruled that Canada was found to have engaged in a discriminatory practice contrary to section 5 of the *Canadian Human Rights Act* ("CHRA").[3]

6. Specifically, Canada was found to discriminate in the provision of child and family services, on the basis of race and/or national or ethnic origin, by denying equal child and family services and/or differentiating adversely in the provision of child and family services, against First Nations children and families living on reserve and in the Yukon.[4] Where a complaint is substantiated, such as in this case, the Tribunal has considerable statutory discretion[5] and broad remedial powers[6] in fashioning an appropriate remedy, which includes compensation for any pain and suffering the victims experience as a result of the discriminatory practice pursuant to s. 53(2)(e) and 53(3).

7. The Tribunal adopted a phased approach to remedies. The relief ordered against Canada in the Main Decision was categorized as immediate, mid- and long-term relief. Compensation was categorized as long-term relief as it involved further consideration on the part of the parties and Tribunal. In the Main Decision, compensation formed part of the Panel's remedial order at paragraph 485-490.[7]

8. Later, in the Compensation Decision (2019 CHRT 39), the CHRT relied on its findings in the Main Decision and carefully considered and found that it had sufficient evidence to find that Canada's conduct was wilful and reckless resulting in what they "have referred to as the

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[2] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (hereinafter the "*Main Decision*").
[3] Affidavit of Jon Thompson (affirmed November 8, 2019), paras 1-12.
[4] *Main Decision*, paras 456-467.
[5] *Canada Post Corp. v. Public Service Alliance of Canada*, 2008 FC 223, para 44. See also, *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56, para 301.
[6] *Canada (AG) v. Mowat*, 2009 FCA 309, para 25.
[7] *Main Decision*, paras 485-490.

worst-case scenario under our Act."[8] The CHRT also held that Canada's racial discrimination was one of the worst possible cases warranting the maximum awards.[9] The CHRT awarded $40,000 to each child and their parents or grandparent (where they were the primary caregiver) where an apprehension or placement occurred for reasons other than sexual, physical or psychological abuse.

9. Based on uncontradicted evidence, the CHRT made clear findings of fact and ruled that, in creating a perverse incentive to encourage the removal of First Nations children from their homes, Canada placed lives at risk and purposefully targeted a vulnerable and disadvantaged group. Canada had intentionally set out to make their young lives even more difficult, perpetuating historic disadvantage and continue colonial policies to "kill the Indian in the child". Granting the applicant's stay motion would perpetuate this harm through a lengthy appeal process.

B. Subsequent Rulings of the CHRT with respect to Remedies

10. Following up to the Main Decision above, the Tribunal issued another decision (*FNCFCSC, et al. v. AGC*, 2016 CHRT 10) on April 26, 2016 wherein the Panel reiterated and emphasized certain findings and adverse impacts from the Main Decision and ordered Canada to take measures to address those findings and adverse impacts immediately.[10]

11. It is important to acknowledge that Canada accepted the Main Decision and did not seek judicial review of the Tribunal's findings or general orders.[11]

12. In this decision, the Tribunal reiterated some of the remedial principles in order to foster a common understanding on the Panel's goals and authorities in crafting a remedy in response

[8] 2019 CHRT 39 (hereinafter the "*Compensation Decision*"), para 243.
[9] *Compensation Decision*, paras 13, 225, 242, 245, 247, 249, 250, 251, and 253.
[10] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10, para 3. ("2016 CHRT 10")
[11] 2016 CHRT 10, para 6.

to its findings in the Main Decision.[12] Particularly, to ensure Canada complied with and implemented the Panel's orders effectively and meaningfully.[13]

13. The main thrust of the Panel's continuation of the remedial order is the beginning of the reporting requirement placed on Canada to ensure the Panel's orders were effectively and immediately implemented, and so as to ensure Canada avoided repeating historical and discriminatory patterns of the past and its "old mindset" with respect to child and family services to First Nations children and families.

14. Canada had been found to essentially be in non-compliance with the Panel's immediate relief orders. By imposing the reporting requirement, the Panel chose to play a supervisory role over Canada with respect to the implementation of its orders. The parties were provided the opportunity to provide submissions on Canada's reports if they choose to do so,[14] which included the opportunity to cross-examine on any affidavits that formed part of Canada's reports.

15. The Panel chose to retain jurisdiction over the implementation of its remedial orders given that constructive and meaningful remedies to resolve a complex dispute, such as the one in this case, is an intricate task that may require ongoing supervision, and because the Panel still needed to rule on outstanding remedial requests, such as compensation.[15]

16. With respect to making progress in the immediate and long-term remedial orders, such as compensation, the Panel believed at this early stage in the relief proceedings that dissemination of relevant and timely information was of utmost importance in rebuilding trust between the parties and avoiding conflicts and delays going forward.[16]

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[12] 2016 CHRT 10, para 3.
[13] 2016 CHRT 10, paras 10-19.
[14] 2016 CHRT 10, paras 22-25, 34, 35, 37.
[15] 2016 CHRT 10, paras 13-15, 36-37.
[16] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 16, para 8. ("2016 CHRT 16")

17. Later that same year in 2016, the Tribunal issued a third decision (*FNCFCSC, et al. v. AGC*, 2016 CHRT 16) on September 14, 2016 wherein the Panel updated its orders addressing the findings in the Main Decision, particularly those orders with respect to immediate relief.[17]

18. In this decision, it is important to acknowledge a preliminary remark by the Panel regarding Canada consulting with Indigenous peoples across Canada as a priority:

> [10] INAC has also recognized the CCI Parties ['Complainants, Commission and Interested Parties' or 'CCI Parties'] as partners in the reform process and identified a need to consult Indigenous peoples across Canada to obtain their input on reforms. While this is necessary and consistent with the federal government's duty to consult Indigenous peoples, again, improved communication surrounding such endeavours would greatly assist the Panel in understanding INAC's strategy to address the [Main] *Decision* and would help build the trust necessary to establish a partnership between the parties. It is also unclear if or who has been consulted among the Indigenous community at this point, including if any social workers or other experts in the field of child welfare have been consulted. On this last point, INAC has previously acknowledged that it does not have expertise in the provision of child and family services to First Nations. Therefore, the need to consult with experts in the field, including the Caring Society, should be a priority.[18]

19. The above is important because the Panel returns to the significance of consultation in a subsequent decision, namely with respect to the correct definition and processes surrounding Jordan's Principle[19], and with respect to the eliminating the discrimination substantiated in the Main Decision.[20] Canada's consultation with the parties has been identified by the Tribunal as an appropriate method to ensure compliance of its Orders, and to ensure its Orders are meaningfully and effectively carried out.

20. With respect to compensation, an in-person case management meeting was scheduled on November 8, 2016 following the release of this decision. At this meeting, the parties were requested to prepare to begin discussions on mid to long-term relief orders, including

[17] 2016 CHRT 16, para 160.
[18] 2016 CHRT 16, para 10.
[19] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2017 CHRT 14, paras 113-120.
[20] 2018 CHRT 4, paras 395-400.

compensation.[21] Thus, Compensation has been a topic of relief since the Main Decision and a topic of discussion among the parties, including Canada, since at least the Fall of 2016.

C. Compensation Decision

21. The Compensation Decision concluded that while systemic remedies are required to address systemic issues, individual compensation is also required given the nature of harms on First Nation families.[22] The CHRT determined it had the jurisdiction to Order compensation to the victims of Canada's discriminatory action based on its home statute, the *CHRA*.

22. The CHRT Ordered compensation for pain and suffering and for willful and reckless discrimination as follows:

    a) $40,000 to each First Nations child unnecessarily apprehended after January 1, 2006;

    b) $40,000 to each First Nations parent or grandparent of children unnecessarily apprehended after January 1, 2006;

    c) $40,000 to each First Nation child necessarily apprehended but placed outside of their families and/or communities after January 1, 2006;

    d) $40,000 to each First Nations child that was unnecessarily removed to obtain essential services or wasn't apprehended but experienced gaps or delays of services that would have been available under Jordan's Principle between December 1, 2007, and November 2, 2017;

    e) $40,000 to each First Nations parent or grandparent who had their child removed and placed in care to access services or wasn't apprehended but experienced gaps or delays of services that would have been available under Jordan's Principle between December 1, 2007, and November 2, 2017.[23]

23. The CHRT found the unnecessary removal of children from their homes, families and communities qualifies as a "worst case scenario"[24] and amounted to a breach of the

[21] 2016 CHRT 16, para 163.
[22] *Compensation Decision*, paras 13, 14. Also, Affidavit of Mary-Ellen Turpel-Lafond (Volume 1 & 2)(affirmed November 7, 2019), paras 7-42.
[23] See also, Affidavit of Jon Thompson (affirmed November 8, 2019), paras 27-31.
[24] *Compensation Decision*, paras 13, 225, 242, 245, 247, 249, 250, 251, and 253.

fundamental rights of the children and their caregiving parents and/or grandparents.[25] An unnecessary apprehension is due to symptoms of poverty, lack of housing, neglect, or substance abuse, where a child is placed in care outside of their home, family or First Nation, and did not benefit from prevention services or least disruptive measures to allow them to stay in their home safely.[26]

24. A necessary apprehension is a result of abuse or harm to a child, where a child is placed in care outside of their home, family or First Nation, and did not benefit from prevention services or least disruptive measures to allow them to stay in their home safely.[27] Had funding been non-discriminatory for on-reserve child and family services, child welfare agencies would have been able to provide programs and services to allowed children to remain in their homes.[28]

25. The Tribunal also found that every child who was denied access to a medical and other 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 entitled to the maximum amount of compensation under the CHRA, along with the caregiving parents or grandparents.[29]

26. The CHRT ordered a global compensation model after full and careful consideration of all options put before it. Much like the Indian Residential Schools Settlement Agreement, the CHRT held that the full range of harms are to be redressed irrespective of whether a child suffered separate harms generated by acts of sexual, physical or severe emotional abuse. The FNCFS Programs was based on federal policy that was based on racial identity. The policy created a perverse incentive and created conditions to require child welfare agencies to removed children from their families and communities. The FNCFS program was extensively

[25] *Compensation Decision*, para 13.
[26] *Compensation Decision*, para 245.
[27] *Compensation Decision*, para 249.
[28] Affidavit of Rachelle Metatawabin (affirmed October 30, 2019), paras 1-11. Also, Affidavit of Erickson Owen (affirmed October 25, 2019), paras 1-11.
[29] *Compensation Decision*, paras 214, 250-251.

criticized. The consequences of this policy were devastating to individuals and communities alike, and they have been well documented.

27. Rather than opting for a civil sliding scale model of compensation that requires a case-by-case assessment of degrees of pain and suffering for each child, parent or grand-parent, the CHRT opted to Order a global award of sufficient significance to each person who fell victim to Canada's discrimination.[30] Such a global award will provide a small modicum of relief for the victims losses and would signify and compensate for the seriousness of the injuries inflicted and the life-long harms caused. The trigger for compensation in regard to this matter is the apprehension of a First Nation child. That is the harm the CHRT is providing compensation for.

28. The CHRT did not make a final order on compensation. The CHRT noted that there are a number of outstanding administrative requirements, including the eligibility of potential claimants, that need to be addressed. The CHRT ordered Canada to engage in discussions with any interested Respondents about how the compensation process would work, and return to the Tribunal with "propositions".[31]

29. The CHRT stated the following in the Compensation Decision:

> [269] Additionally, the Panel recognizes the need for a culturally safe process to locate the victims/survivors identified above namely, First Nations children and their parents or grand-parents. The process needs to respect their rights and their privacy. The Indian registry and Jordan's Principle process and record are tools amongst other possible tools to assist in locating victims/survivors. There is also a need to establish an independent process for distributing the compensation to the victims/survivors. The AFN and the Caring Society have both expressed an interest to assist in that regard. Therefore, Canada shall enter into discussions with the AFN and the Caring Society on this issue. The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to. <u>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</u>, no later than **December 10, 2019**.

[30] *Compensation Decision*, paras 258 and 259.
[31] Affidavit of Jon Thompson (affirmed November 8, 2019), paras 32-35.

> [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.[32] [emphasis added]

30. To date, Canada has not approached the AFN or Caring Society to discuss the joint development of a compensation scheme.

D. Panel's Earlier Decision on Canada's Non-Compliance with Orders

31. In 2018 CHRT 4,[33] the Panel considered this ruling to be essentially the continuation of immediate relief while dealing with some compliance to previous orders made by the Panel.[34] In this ruling, the Panel dealt with the remaining issues and allegations of non-compliance and related requests for further orders with respect to immediate relief. This decision is of particular importance because it bears weight with respect to Canada's motion for stay of proceedings and it satisfying the three-stage test in *RJR-MacDonald* under Rule 398. As well, this decision lead to the Consultation Protocol wherein compensation continues to be discussed with the intent of coming to a final determination on the matter as between Canada and the Parties.

32. As mentioned above, the Panel makes a number of statements throughout the decision that bear weight with respect to Canada's motion at issue. Summarized below are a few of these important points.

33. Firstly, the Panel stated that the direction of this case must always proceed in the best interests of the children impacted by Canada's discrimination, which ought to guide the determination of Canada's motion by this Honourable Court. As well, the Panel emphasizes the importance of this particular case because it concerns the mass removal of children:

> [46] It is also important to reiterate that this case is about Indigenous children, families and communities who have been recognized by this Panel and the Courts,

[32] *Compensation Decision*, paras 269 and 270 [emphasis added].
[33] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2018 CHRT 4. (hereinafter "2018 CHRT 4").
[34] 2018 CHT 4, para 10.

> including the Supreme Court, as a historically disadvantaged group. The best interest of children is not advanced by legalistic positions such as Canada's. It is also sending a message that the Tribunal has no power and human rights can be violated and are remedied only if Canada finds money in their budget. This is in our view, a misapplication of the *CHRA* ….
>
> [47] **More importantly, this case is vital because it deals with mass removal of children. There is urgency to act and prioritize the elimination of the removal of children from their families and communities.**[35] [Panel's emphasis]

34. Secondly, the children impacted are First Nations children which has significance with respect to the principle of the best interests of the child:

> [131] The Panel understands this to be the usual and reasonable process for any financial request. It is to be expected and followed in normal circumstances. This is not the case here. Canada was found liable under the *CHRA* for having discriminated against First Nations children and their families. Canada has international and domestic obligations towards upholding the best interests of children. Canada has additional obligations towards Indigenous children under UNDRIP, the honor of the Crown, Section 35 of the Constitution and its fiduciary relationship, to name a few. All this was discussed in the *Decision*.[36]

35. And, thirdly, the long-standing nature of the context surrounding all matters of relief and the prejudice than can result to First Nations children and families if the Tribunal's order are not carried out, as well as the option available to Canada to end the relief process at any time with a settlement on compensation:

> [385] There is no unfairness to Canada here. The Panel reminds Canada that it can end the process at any time with a settlement on compensation, immediate relief and long-term relief that will address the discrimination identified and explained at length in the *Decision*. Otherwise, the Panel considers this ruling to close the immediate relief phase unless its orders are not implemented. The Panel can now move on to the issue of compensation and long-term relief.
>
> …
>
> [387] It took years for the 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. The Panel determined that

[35] 2018 CHRT 4, 46-47.
[36] 2018 CHRT 4, para 131. See, *Main Decision*, paras 87-110.

> a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now.
>
> [388] Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here.
>
> [389] In any event, any potential procedural unfairness to Canada is outweighed by the prejudice borne by the First Nations' children and their families who suffered and, continue to suffer, unfairness and discrimination.[37]

E. Consultation Protocol

36. The AFN submitted to the Tribunal in 2018 CHRT 4 that it requested Canada establish a protocol, in consultation with the AFN, Caring Society, NAN and the Commission, grounded in the honour of the Crown, for engaging in consultations with First Nations and FNCFS Agencies that are affected by the Panel's Main Decision and remedial orders.[38]

37. Using a protocol, the concern to be addressed with the protocol was to ensure Canada was not using consultation with its partners and FNCFS Agencies as a delay tactic to avoid complying with the Tribunal's orders.[39]

38. The Panel ordered Canada to enter into a protocol with the AFN, Caring Society, Chiefs of Ontario (COO), Nishnawbe Aski Nation (NAN) and the Canadian Human Rights Commission (Commission) on consultations to ensure that consultations are carried out in a manner consistent with the honor of the Crown and toward eliminating the discrimination substantiated in the Main Decision.

39. On March 2, 2018, a *Consultation Protocol* was entered into between Canada and the parties above that included compensation be addressed as a subject area of consultation and

[37] 2018 CHRT 4, paras 385-389.
[38] 2018 CHRT 4, 85.
[39] 2018 CHRT 4, para 395.

collaboration (para 4 of Protocol), and as part of the consultations on mid to long-term relief (para 18 and 20 of Protocol).[40]

F. Class Proceeding in Federal Court: Xavier Moushoom vs. AGC

40. The claim for this class proceeding (Court File No. T-402-19) was filed on March 4, 2019. It is important to acknowledge that at this time this class proceeding remains in its initial stages and is uncertified.

PART II – POINTS IN ISSUE

41. The AFN submits the issues to be determined are:

    i. Has 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?

    ii. Should the judicial review be put in abeyance until the CHRT makes a final ruling on compensation?

PART III – STATEMENT OF SUBMISSIONS

42. For the following reasons below, the AFN respectfully submits that Canada has not meet the test for a stay of enforcement. Subject to any further motions, the Caring Society's request for an abeyance should be endorsed.

1. Canada has not met the test for a stay of enforcement

43. At the outset, it is important to acknowledge that no decision from this Honourable Court has been made with respect to the merits of Canada's application for judicial review. Accordingly, the fact a judicial review has been filed should not be factored into the legal analysis regarding the stay of proceedings.[41] The likelihood of success in the judicial review is speculative, and

[40] Affidavit of Jon Thompson (affirmed November 8, 2019), paras 22-26, and 36-45.
[41] *Canada (AG) v. Northrop Grumman Overseas Services Corporation*, 2007 FCA 336, para 21.

it should be acknowledged that the AFN (and we understand all respondent parties to Canada's motion) will be opposing Canada's application for judicial review.

44. Section 50[42] of the *Federal Courts Act*s permits this Honourable Court to grant a stay of proceedings, which is a discretionary remedy and an extraordinary form or relief[43], and a Court's discretion should be exercised sparingly and only in the clearest of cases.[44]

45. Stays are an interim order this Honourable Court may grant on an application pending the final disposition judicial review proceedings under section 18.2 of the *Federal Courts Act*. Rule 398 of the *Federal Courts Rules* establishes the procedure to be followed for stay applications.[45]

46. Compelling circumstances are required to justify the intervention of the CHRT's Order and its exercise of discretion. Canada solely bears the burden to demonstrate that the conditions of this extraordinary remedy are met. In *Janssen*[46], Mr. Justice Stratas emphasized that the *RJR-MacDonald* test "is aimed at recognizing that the suspension of a legally binding and effective matter – be it a court judgment, legislation, or a subordinate body's statutory right to exercise its jurisdiction – is a most significant thing".[47] The CHRT's Order is legally binding, is an aspect of the rule of law.

47. The test used in deciding whether or not to grant a stay of proceedings is set out in RJR-MacDonald Inc.[48] The three-stage test reads as follows:

    i. The applicant must demonstrate a serious question to be tried;

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[42] *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 50 (Stays of Proceedings Authorized).
[43] *Apotex Inc. v. Merck & Co.*, [2006] F.C.J. 786, para 5. Also, *Pearson v. Canada*, 1999 CanLII 8631 (FC), para 19, and *Aic Limited v. Infinity Investment Counsel Ltd.*, 1998 CanLII 8433 (FC), para 20, both referring to *Canada (Ministry of Citizenships & immigration) v. Tobiass*, [1997] 3 SCR 391 (SCC).
[44] *Kent v. Universal Studios Canada Inc.*, [2008] FCJ No. 1129, para 16, referring to *Mugesera v. Canada*, [2005] 2 SCR 91, para 12, *Safilo Canada Inc. v. Contour Optik Inc.*, (2005), 48 CPR (4th) 339, para 27, *Compulife Software Inc. v. Compuoffice Software Inc.*, (1997), 77 CPR (3d) 451 (FCTD), para 16.
[45] *Federal Courts Rules*, SOR/98-106, Rule 398 (Stay of Order).
[46] *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112. ("*Janssen*")
[47] *Janssen*, at para 20.
[48] *RJR-MacDonald Inc. v. Canada (AG)*, [1994] 1 SCR 311 ("*RJR-MacDonald*").

ii. The applicant must establish that it will suffer irreparable harm if the stay is not granted; and

iii. The balance of convenience favours granting the stay.

48. The public interest, as an aspect of irreparable harm to the interests of the government, is considered in the second stage of the test, but more so in the third stage when the harm to the applicant is balanced with the harm to the respondent.[49]

49. To succeed, the applicant must satisfy the Court that the facts submitted into evidence ensure that the three tests are met. All three questions must be answered in the affirmative.[50]

2. Serious Question

50. The test of a serious issue in a stay motion is whether there is an issue in the underlying application that is neither frivolous nor vexatious. This is a very low standard.

51. With regard to the first test, the Supreme Court states in *RJR-MacDonald* that:

> [55] Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.[51]

52. Canada sites two issues to justify the stay of execution, namely: (i) individual compensation was not an appropriate remedy for this complaint; and (ii) the compensation ordered was disproportionate as between individuals and in light of Canada's prior remedial actions.

53. While Canada purports to raise two genuine issues, the AFN submits that Canada's motion for a stay is both vexatious and frivolous based on the continued delay to implement the CHRT orders, continuous negotiations between the Parties, and furthers harm caused to First Nation' children who continue to be denied compensation.

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[49] *RJR-MacDonald*, pgs 342-347.
[50] *Janssen*, para 14.
[51] *RJR-MacDonald*, pgs 337-338.

54. Throughout the hearing of this complaint, Canada has a history of using procedural tactics to derail the merits of this case, frustrating the implementation of CHRT Orders and misapplying/misinterpreting rulings. The hearing on the merits of this case was delayed three years through Canada's procedural tactics. Canada challenged the CHRT's jurisdiction to hear this complaint which was heard by this Honourable Court and the Federal Court of Appeal. Since the CHRT's landmark decision in 2016, there have been twelve additional decisions of the CHRT. Five of these Orders dealt directly with Canada's non-compliance of the CHRT Orders (2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14, 2018 CHRT 4, and 2019 CHRT 7).

55. The AFN submits that Canada's assertion the Tribunal has no jurisdiction to order individual compensation has no merit. Section 53(2)(e) and (3) of the CHRA specifically allows for compensation to be paid to individuals. The section reads:

> (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.
>
> (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 or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

56. The CHRA specifically allows for a representative body to file a complaint alleging discrimination. Canada appears to confuse AFN's and the Caring Society's role in bringing forward this specific representative complaint of systemic discrimination against an identifiable group. In essence, Canada argues that those children who were apprehended and separated from their families, as well as the suffering inflicted on his/her parents are not entitled to compensation because the discrimination was systemic in nature.[52]

57. The CHRT was provided ample evidence that First Nations children were unnecessarily or necessarily apprehended or denied medical treatments and other services as a result of Canada's discriminatory policies and funding practices. Canada had knowledge of the

[52] Affidavit of Jon Thompson (affirmed November 8, 2019), paras 13-21.

vulnerabilities these First Nation children had and horrific abuse, including sexual abuse, they could suffer while under state care.

58. In *Canadian Human Rights Commission v. Canada (Attorney General)*, this Court held that CHRT has broad discretion with respect to the admissibility of evidence and it need not hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. The Court held:

> [72] The Attorney General argues that the Tribunal rightly concluded that awards of pain and suffering cannot be made *en masse* based on representative evidence, but, rather, must be made based on evidence of individual complainants.
>
> [73] I disagree. The Tribunal held that it could not award pain and suffering damages without evidence that spoke to the pain and suffering of individual claimants. This does not, however, mean that it necessarily required direct evidence from each individual. As the Commission noted, the Tribunal is empowered to accept evidence of various forms, including hearsay. Therefore the Tribunal could find that evidence from some individuals could be used to determine pain and suffering of a group. [53]

59. Canada's assertion that an award of $40,000 is disproportionate is without merit. The CHRT carefully considered all options presented before it. In its wisdom, the CHRT opted for a universal harm in which to compensate individuals for Canada's discriminatory practices, the apprehension or removal of children from their home and placed into state care, or the denial of medical treatments or other services.

60. The AFN submits that removing a vulnerable child from their home due to a discriminatory policy of the Federal Government is far worse than an adult being called degrading names at work. The CHRT has awarded $40,000 in cases where individuals called inappropriate names or was the recipient of negative comments at work.[54]

[53] *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135, para.73
[54] See, *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36.

3. Irreparable Harm

61. The second branch of the test in *RJR-MacDonald* requires evidence on a balance of probabilities that the applicant would suffer irreparable harm were the motion for a stay of enforcement be denied. This requires that harm flowing from a refusal to grant the stay cannot be remedied at a later date if the decision is overturned on appeal.[55] The onus rests on the applicant. The Supreme Court states that irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.[56]

62. The Federal Court of Appeal clarified elements of the second part test in *United States Steel Corp.*[57]

> [6] *RJR* described the central question regarding irreparable harm as "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": paragraph 63. Irreparable harm refers to the nature of the harm, not the magnitude. The nature of the harm must be such that it cannot be quantified in monetary terms or cannot be cured: paragraph 64.
>
> [7] The jurisprudence of this Court holds that the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied. It is not sufficient to demonstrate that irreparable harm is "likely" to be suffered. This alleged irreparable harm may not be amply based on assertions: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, 126 N.R. 114 (F.C.A.), leave to appeal refused 39 C.P.R. (3d) v, 137 N.R. 391n; *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d)-34 (F.C.A.); *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25.

[55] *RJR-MacDonald*, para 57-58.
[56] *RJR-MacDonald*, para 59.
[57] *United States Steel Corp. v. Canada (Attorney General)*, 2010 FCA 200.

63. In *Canada (Attorney General) v. Amnesty International Canada*, this Court held that the burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied."[58]

64. Canada asserts that it will suffer the following irreparable harms: (1) conflicting decisions as a result of the Tribunal's retained jurisdiction over the Compensation Decision 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.

65. The AFN submits that Canada has failed to adduce the required evidentiary burden required by the second branch of the *RJR-MacDonald* test. Canada has not put any evidence forward other than bald statements made by its affiant, who is in the employ of Canada, to support Canada's assertion of irreparable harm.

66. In this regard, the Mr. Sonny Perron states that "based on the department's interpretation of the Orders" implementation would require a significant investment of human and financial resources.[59] He states his belief that commencing the "compensation process before the Tribunal's decision can be judicially reviewed is unfair to the claimants, to ISC and the government more generally, and so is not in the public interest".[60] Mr. Perron also balks at the potential scale of what the Tribunal has ordered, the difficulty of identifying potential claimants and the amount of resources required to comply.[61]

67. Mr. Perron also takes issue with the fact that the CHRT has not made an Order on the process that will be used to pay the compensation or identify and classify claimants.[62] Again he states his belief that the payment process "would require a significant infrastructure investment

[58] *Canada (Attorney General) v. Amnesty International Canada*, 2009 FC 426, para 29.
[59] Affidavit of Sony Perron (sworn October 3, 2019), para 7.
[60] Affidavit of Sony Perron, para 8.
[61] Affidavit of Sony Perron, para 32.
[62] Affidavit of Sony Perron, para 33.

either inside or outside the federal government".[63] He notes that it would take more than three months to develop a compensation scheme and set up the necessary infrastructure.[64]

68. Despite these concerns, Mr. Perron acknowledges that no compensation is required to be paid to the victims at this time.[65] Mr. Perron also acknowledges that the development of the compensation scheme, the notice plan, development of the applications requires discussion and negotiations between Canada, the AFN and Caring Society. However, Canada has taken no steps to reach out with these parties to jointly develop a compensation scheme.[66] Mr. Perron also concedes that Canada had an option to seek an extension of the December 10th, 2019 deadline to report back to the CHRT by way of consent with the Parties, but chose not to avail itself to this option.[67]

69. Canada's speculation that it would suffer irreparable harm is not based on fact. Canada assumes that payments may start as early as December 10, 2019. However, this belief is not shared widely. In cross-examination, Mr. Perron stated the following:

> Q. All right, thank you. And has the department received any inquiries about the compensation at this time?
>
> A. I'm aware of some inquiries coming to the phone line for Jordan's Principle, but the number has not been very high. Initially we were concerned that staff that are supposed to answer calls from individual that needs services will be impacted by people calling to know how they can be compensated. But the number of them fairly low, according to the report I received a couple of weeks ago.

70. It is also important to note that many of the potential claimants are under the age of majority and a trust fund will need to be established to hold their funds until they become an adult. In *Thwaites*,[68] this Court dismissed an application for stay pending judicial review of an order of the CHRT requiring payment of money to a respondent. This court noted that irreparable harm is damage that cannot be repaired by money. There was no evidence that the damage

[63] Affidavit of Sony Perron, para 35.
[64] Affidavit of Sony Perron, para 38 and 40.
[65] Transcription of the cross-examination of Sony Perron, p. 16, lines 7-15.
[66] Transcription of the cross-examination of Sony Perron, p. 49 line 6 through p. 50, line 9; p. 56 lines 3-12.
[67] Transcription of the cross-examination of Sony Perron, p. 42, line 18 through p. 43 line 22.
[68] *Canada (Attorney General) v. Thwaites*, (1993) 68 F.T.R. 153 (TD).

award, if paid to the respondent, would be dissipated in the event the judicial review application was successful.[69]

71. The AFN adds Canada's irreparable harm is self-inflicted due to (i) Canada's unresponsiveness to calls for engagement from the parties with respect to the process for compensation, (ii) Canada not considering or requesting an extension of time with the parties or with the Tribunal regarding the December 10, 2019 reporting date, and (iii) Canada not considering or requesting an extension of time regarding its application for judicial review pursuant to Section 18.1(2) of the *Federal Courts Act* and Rule 8 in the *Federal Courts Rules* that authorizes the Federal Court to extend the time for filing an application for judicial review.[70]

72. Also, there is no order with respect to allocating any resources from Canada or implementing a compensation process at this time, and there is no order regarding any payment of any compensation at this time so there is no unrecoverable loss.

73. On the basis of hypothetical and/or general assertions of an imprecise harm, Canada cannot claim it will suffer harm as defined in the case law. According to the evidence as submitted by Canada, the applicant is asking the Court for a stay of the execution of the CHRT's Order because if it failed to engage in discussions with the AFN and Caring Society on a possible compensation scheme within the timeframe set by the CHRT. Canada is the sole architect of its failure to comply. This is not the type of harm contemplated by the second test. It is an attempt to change the course of the CHRT proceedings to suit Canada's preference to pay compensation akin to a sliding scale found in tort law.

74. In *Commissioner of Competition*,[71] the Competition Tribunal held that harm must be established on clear and not speculative evidence which demonstrates how such harm will occur if the relief is not granted. The Tribunal stated:

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[69] *Thwaites*, para 10.
[70] *Canada (Minister of Human Resources Development) v. Gattelero*, 2005 FC 883, para 8. See also, *King v. Canada (AG)*, 2000 CanLII 14974 (FC), para 2. Also, *Wenham v. Canada (AG)*, 2018 FCA 199, paras 41-42.
[71] *Commissioner of Competition v. HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 CACT 14.

[58] The FCA has also frequently insisted on the attributes and quality of the evidence needed to establish irreparable harm. The evidence must be more than a series of possibilities, speculations or general assertions (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 ("*Gateway City Church*") at paras 15-16). "Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 ("*Glooscap*") at para 31). It is not enough "for those seeking a stay […] to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable" (*Stoney First Nation v Shotclose*, 2011 FCA 232 ("*Stoney First Nation*") at para 48). Quite the contrary, there needs to "be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" (*Gateway City Church* at para 16, citing *Glooscap* at para 31).

[59] In *Janssen 1*, the FCA stated that a party seeking a suspension relief must demonstrate in a detailed and concrete way that it will suffer "real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later" (*Janssen 1* at para 24). In that decision, Mr. Justice Stratas added that "[i]t would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief […] [or] if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief" (*Janssen 1* at para 24). In that case, Janssen was seeking an order from the FCA suspending the remedy phase of proceedings before the Federal Court, pending its appeal of that Court's infringement finding. Janssen was arguing that it would suffer irreparable harm if the remedy phase of the proceedings went ahead prior to its appeal being determined and that the Federal Court's process should therefore be suspended. The FCA refused to suspend the Federal Court's proceedings as there was not sufficient probative evidence of irreparable harm.

4. Balance of Convenience

75. The balance of inconvenience is analyzed essentially on a case-by-case basis, depending on the parties. In general, the applicant's personal interests are weighed against the respondents. *RJR-MacDonald* provides some direction:

"The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable

harm in Charter cases, many interlocutory proceedings will be determined at this stage."[72]

76. Canada suggests that the issues of the irreparable harm that would accrue to Canada if it complies with the Orders in the absence of the stay, which 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.

77. Canada also argues that the public interest in this case favours interference by the courts in the CHRT's decision-making process. Canada refers the Federal Court of Appeal in *Canada v Canadian Council for Refugees*[73], which states that the issue of public interest will be considered at both the second stage as an aspect of irreparable harm to the government's interests and the third stage as part of the balance of convenience. Canada also argues that she will not be able to recover any funds paid to claimants who live one reserve or recover this money from the complainants. Thus, Canada asserts the harm to Canada and the public interest is irreparable.

78. The AFN submits that Canada assertions do not have merit. Mr. Sony Perron acknowledged that no compensation is required to be paid at this time[74]. Rather, the only obligation that is in enforce at this time is the requirement that Canada negotiate with the AFN and Caring Society in developing a viable compensation scheme for the CHRT's consideration.[75]

79. Unlike the harm proposed by Canada, there is nothing speculative about the harm that will be suffered by the Respondents if a stay is granted. After years of preparation, and much cost to the Respondents the Tribunal has determined that INAC's FNCFS Program is discriminatory and insufficient to support child welfare services at a level comparable to services provided off-reserve in provincial and territorial jurisdictions. To deprive the Respondents of the relief

[72] *RJR-MacDonald*, pg 342.
[73] *Canada v Canadian Council for Refugees*, 2008 FCA 40, para 18.
[74] Transcription of the cross-examination of Sony Perron, p. 16, lines 7-16
[75] Transcription of the cross-examination of Sony Perron, p. 41, lines 22-25 through p. 42, lines 1-7

granted by the Tribunal on the basis of a stay after years of advocacy, research and negotiation would irreparably prejudice the Respondents.

5. Caring Society's Motion for Abeyance

80. The AFN submits Canada's application for judicial review should be stayed pending the outcome of the Tribunal's complete determination of the compensation issue. The Courts jurisdiction to stay the application is founded in its plenary jurisdiction to manage and regulate its own proceedings[76] and Section 50(1)(b) of the *Federal Courts Act*, which provides the Court with the power and discretion to stay an application where the Court determines that "it is in the interests of justice that the proceeding be stayed."

81. The test for whether a whether a matter should be put into abeyance is found in the Federal Court of Appeal's decision in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc. ("Mylan")* Justice Stratas, J.A. reviewed the considerations that apply when the Court is evaluating whether to delay the exercise of its jurisdiction until a later time, comparing it to an exercise of jurisdiction that is not unlike scheduling or adjourning a matter. He noted that:

> Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example, where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.

82. Further to *Mylan*, we can distill that a Court has broad discretion in staying an application for judicial review. Although it will not lightly delay a matter, it can do so if the factual circumstances presented to the Court warrant same.

[76] *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143.

83. These principles were affirmed by the Federal Court of Appeal in *Coote v. Lawyers' Professional Indemnity Company*. As per the Court:

> Whether this Court will issue a stay to refrain from exercising its own jurisdiction over a pending appeal – *i.e.*, to suspend or delay it – depends on the factual circumstances presented to the Court, guided by certain principles. These principles include securing "the just, most expeditious and least expensive determination of every proceeding on its merits": *Federal Courts Rules*, SOR/98-106, Rule 3.
>
> Additional principles guide this Court in the exercise of its plenary jurisdiction to manage and regulate proceedings. As long as no party is unfairly prejudiced and it is in the interests of justice – vital considerations always to be kept front of mind – this Court should exercise its discretion against the wasteful use of judicial resources. The public purse and the taxpayers who fund it deserve respect. As well, cases are interconnected: one case sits alongside hundreds of other needy cases. Devoting resources to one case for no good reason deprives the others for no good reason.[77]

84. The AFN submits the circumstances of the case clearly demonstrate that Canada's application for judicial review ought to be held in abeyance pending the Tribunals final determination, namely: (1) the Tribunal process has not run its course giving rise to the potential for duplicity of proceedings; and (2) the prejudice and harm to First Nations Children, Youth and their Families awaiting the final determination from the Tribunal

A. The Tribunal process has not run its course and will likely give rise to duplicative proceedings

85. The AFN submits that Canada is attempting to circumvent the Tribunal process, which has yet to run its course. It is clear from the terms of the Tribunal's Compensation Order that it felt that there was a need to establish an independent process for distributing compensation to victims/survivors, and that the Orders as to compensation provided for therein were contingent on the establishment of a satisfactory compensation scheme. As per the Tribunal:

86. There is a need to establish an independent process for distributing the compensation to the victims/survivors. The AFN and the Caring Society have both expressed an interest to assist

[77] *Ibid* at paras 12-13.

in this regard. Therefore, Canada shall enter into discussions with the AFN and the Caring Society on this issue. 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."[78]

87. The Tribunal specifically stated within the preface of the Order section of its Decision that the orders as to monetary compensation would only take effect once the compensation scheme was finalized. As per the Tribunal:

> All the following orders will find application once the compensation process referred to below has been agreed to by the Parties or ordered by the Tribunal.[79]

88. It is clear that the administration of the complaint has not been finalized by the Tribunal as the compensation scheme has not been completed. The finalization of this scheme is a condition precedent to the Tribunals orders as to compensation becoming effective.

89. The AFN submits that judicial review is a remedy of last resort and allowing Canada to proceed with judicial review of the matter would be premature in light of the fact that there is no final Decision from the Tribunal and the fact that Canada can still addresses issues it has with the terms of the Decision within the scope of the Tribunal process. As per the Federal Court in Louie v. Ts'kw'aylaxw First Nation:

> "The general rule is that a judicial review brought in the face of adequate, effective recourse elsewhere or at another time cannot be entertained, subject to unusual or exceptional circumstances supportable in the case law. This principle is justified by the fact that judicial review remedies are remedies of last resort, and improper or premature recourse to judicial review can frustrate specialized statutory schemes enacted by Parliament and cause delay: *JP Morgan* at paras 84-85."

[78] *Compensation Decision,* para 269.
[79] *Compensation Decision,* para 244.

90. The specialized nature of the Tribunal was addressed within a 2008 application for judicial review and stay of proceedings by Canada in response to referral of the Complaint to the Tribunal. The Tribunal determined that the matter should not be determined in a summary way given the serious and complex subject matter of the proceedings as there was a special interest "in allowing a full and thorough examination in the specialized forum of the Tribunal, of issues which may have impact on the future ability of aboriginal peoples to make discrimination claims." This was upheld on appeal.

91. Canada's also still has the ability to raise concerns that it has with the Tribunal's decision both through discussions on the Compensation Process and by taking up the Tribunal's invitation to make "any comment/suggestion and request clarification […] in regards to moving forward with the compensation process and/or the wording and/or content of the orders."

92. The AFN therefore submits that allowing the Canada to proceed with its application would frustrate the specialized forum of the Tribunal, lead to undue delays with respect to the Tribunals final determination regarding financial compensation and would amount to a waste of value judicial resources.

93. There also remains the risk of duplicative/conflicting decisions by allowing Canada to proceed prior to completion of the Tribunal administration of the Complaint, as the Tribunal may make further orders in its administration of the compensation scheme. This may ultimately impact the existing orders as to compensation and the courts review of the reasonableness of same. Further, Canada could very well decide to proceed with an application for judicial review once the Tribunal issues a Decision with respect to the final compensation scheme, leading to potentially duplicate judicial reviews on substantially the same issues.

94. The AFN submits that Canada's proposed approach, being parallel proceedings (Tribunal/Federal Court) and the possibility of two separate judicial reviews, will result in greater cost, time and resources for the parties, while addressing the same issue, being the financial compensation for the victims of the Complaint. In the interest of avoiding the prejudice that would occur should these parallel proceedings take place and the duplicative

costs associated with same, the parties should await the Tribunal's final compensation order, incorporating a final compensation scheme prior to proceeding with judicial review.

B. Prejudice and Harm to First Nations Children, Youth and their Families Waiting for a Final Determination

95. The AFN submits that allowing the judicial review to proceed while the administration of the Complaint by the Tribunal is incomplete will cause confusion. Said confusion may include the following:

    i. The Tribunal may take a variety of steps while the judicial review is proceeding while it contemplates the final determination regarding the Compensation Process. These public steps taken by the Tribunal, in conjunction with the Federal Court's parallel proceeding, will almost certainly cause confusion and mixed message to the victims for whom the Complaint is intended to compensate and lead to harm; and

    ii. The uncertainty surrounding the Federal Court's review of the Tribunal's preliminary determinations in the Compensation Entitlement Order will almost certainly cause confusion to First Nations children, youth and families who have been waiting for nearly thirteen years for a resolution. It is in the best interests of the victims in this case that the process be transparent and clear.

96. The AFN ultimately submits that the confusion and prejudice to First Nations Children, Youth and families awaiting the final determination, as well as the waste of judicial resources associated with parallel and potentially duplicative proceedings, supports the Court placing Canada's application for judicial review in abeyance pending the final Compensation Order from the Tribunal, including a comprehensive compensation scheme. The exercise of the courts discretion is warranted as it is in the interests of justice and will not prejudice Canada.

PART IV – ORDER SOUGHT

97. The AFN requests that this Honourable Court dismiss Canada's stay motion with costs on a solicitor-client basis.

98. In the alternative, the AFN requests that the Court grant the Caring Society's abeyance motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 19, 2019

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PART V – LIST OF THE AUTHORITIES

1. **Appendix A – Statute or Regulation**

Federal Courts Act, R.S.C., 1985, c. F-7	ss. 50, 18.2
Federal Courts Rules, SOR/98-106	Rule 398

2. **Appendix B – Authorities**

First Nations Child and Family Caring Society of Canada et a. v. Attorney General of Canada (Minister of Indian and Norther Affairs, 2019 CHRT 39 (September 6, 2019) ("Compensation Decision")	13, 14, 214, 225, 242, 243, 245, 247, 249, 250, 251, 253, 258, 259, 269, 270
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 (January 26, 2016) ("*Main Decision*")	87-110, 456-467, 485-490
Canada Post Corp. v. Public Service Alliance of Canada, 2008 FC 223	44
Public Service Alliance of Canada v. Canada Post Corporation, 2010 FCA 56	301
Canada (AG) v. Mowat, 2009 FCA 309	25
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	3, 6, 10-19, 13-15 22-25, 34-37
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	8, 10, 160, 163
First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2017 CHRT 14	
First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2018 CHRT 4	10, 46-47, 85, 131, 385-389, 395-400
Canada (AG) v. Northrop Grumman Overseas Services Corporation, 2007 FCA 336	21
Apotex Inc. v. Merck & Co., [2006] F.C.J. 786	5

Pearson v. Canada, 1999 CanLII 8631 (FC)	19
Aic Limited v. Infinity Investment Counsel Ltd., 1998 CanLII 8433 (FC)	20
Canada (Ministry of Citizenships & immigration) v. Tobiass, [1997] 3 SCR 391 (SCC)	
Kent v. Universal Studios Canada Inc., [2008] FCJ No. 1129	16
Mugesera v. Canada, [2005] 2 SCR 91	12
Safilo Canada Inc. v. Contour Optik Inc., (2005), 48 CPR (4th) 339	27
Compulife Software Inc. v. Compuoffice Software Inc., (1997), 77 CPR (3d) 451 (FCTD)	16
Janssen Inc. v. Abbvie Corporation, 2014 FCA 112	14, 20
RJR-MacDonald Inc. v. Canada (AG), [1994] 1 SCR 311	57-58, 59, 342, 337-338, 342-347
Canadian Human Rights Commission v. Canada (Attorney General), 2010 FC 1135	73
Alizadeh-Ebadi v. Manitoba Telecom Services Inc., 2017 CHRT 36	
United States Steel Corp. v. Canada (Attorney General), 2010 FCA 200	
Canada (Attorney General) v. Amnesty International Canada, 2009 FC 426	29
Canada (Attorney General) v. Thwaites, (1993) 68 F.T.R. 153 (TD)	10
Canada (Minister of Human Resources Development) v. Gattelero, 2005 FC 883	8
King v. Canada (AG), 2000 CanLII 14974 (FC)	2
Wenham v. Canada (AG), 2018 FCA 199	41-42
Commissioner of Competition v. HarperCollins Publishers LLC and HarperCollins Canada Limited, 2017 CACT 14	
Canada v Canadian Council for Refugees, 2008 FCA 40	18