Court File No. T-402-19
T-141-20
T-1120-021

FEDERAL COURT

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige) AND JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

T-141-20

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON (by his litigation guardian, Carolyn Buffalo) CAROLYN BUFFALO AND DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

T-1120-21

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

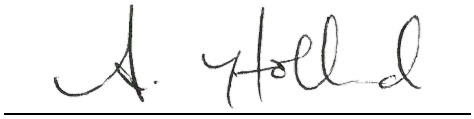
Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

BOOK OF AUTHORITIES OF THE PROPOSED INTEVENER, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA



September 7, 2022

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SOR/98-106

DORS/98-106

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(d) the proceeding against a party be stayed on condition that the party is bound by any findings against another party.

d) qu'il soit sursis à l'instance engagée contre une partie à la condition que celle-ci soit liée par les conclusions tirées contre une autre partie.

Separate determination of issues

107 (1) The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.

Instruction distincte des questions en litige

107 (1) La Cour peut, à tout moment, ordonner l'instruction d'une question soulevée ou ordonner que les questions en litige dans une instance soient jugées séparément.

Court may stipulate procedure

(2) In an order under subsection (1), the Court may give directions regarding the procedures to be followed, including those applicable to examinations for discovery and the discovery of documents.

Ordonnance de la Cour

(2) La Cour peut assortir l'ordonnance visée au paragraphe (1) de directives concernant les procédures à suivre, notamment pour la tenue d'un interrogatoire préalable et la communication de documents.

Interpleader

Interpleader

108 (1) Where two or more persons make conflicting claims against another person in respect of property in the possession of that person and that person

(a) claims no interest in the property, and

(b) is willing to deposit the property with the Court or dispose of it as the Court directs,

that person may bring an *ex parte* motion for directions as to how the claims are to be decided.

Interplaidoirie

Interplaidoirie

108 (1) Lorsque deux ou plusieurs personnes font valoir des réclamations contradictoires contre une autre personne à l'égard de biens qui sont en la possession de celle-ci, cette dernière peut, par voie de requête *ex parte*, demander des directives sur la façon de trancher ces réclamations, si :

a) d'une part, elle ne revendique aucun droit sur ces biens;

b) d'autre part, elle accepte de remettre les biens à la Cour ou d'en disposer selon les directives de celle-ci.

Directions

(2) On a motion under subsection (1), the Court shall give directions regarding

(a) notice to be given to possible claimants and advertising for claimants;

(b) the time within which claimants shall be required to file their claims; and

(c) the procedure to be followed in determining the rights of the claimants.

Directives

(2) Sur réception de la requête visée au paragraphe (1), la Cour donne des directives concernant :

a) l'avis à donner aux réclamants éventuels et la publicité pertinente;

b) le délai de dépôt des réclamations;

c) la procédure à suivre pour décider des droits des réclamants.

Intervention

Leave to intervene

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Interventions

Autorisation d'intervenir

109 (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

Directions

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

Questions of General Importance

Notice to Attorney General

110 Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,

(a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;

(b) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and

(c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.

Parties

Unincorporated associations

111 A proceeding may be brought by or against an unincorporated association in the name of the association.

Partnerships

111.1 A proceeding by or against two or more persons as partners may be brought in the name of the partnership.

SOR/2002-417, s. 11.

Avis de requête

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

Directives de la Cour

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

Question d'importance générale

Signification au procureur général

110 Lorsqu'une question d'importance générale, autre qu'une question visée à l'article 57 de la Loi, est soulevée dans une instance :

a) toute partie peut signifier un avis de la question au procureur général du Canada et au procureur général de toute province qui peut être intéressé;

b) la Cour peut ordonner à l'administrateur de porter l'instance à l'attention du procureur général du Canada et du procureur général de toute province qui peut être intéressé;

c) le procureur général du Canada et le procureur général de toute province peuvent demander l'autorisation d'intervenir.

Parties

Associations sans personnalité morale

111 Une instance peut être introduite par ou contre une association sans personnalité morale, en son nom.

Société de personnes

111.1 Une instance introduite par ou contre deux ou plusieurs personnes en qualité d'associées peut l'être au nom de la société de personnes.

DORS/2002-417, art. 11.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20220718

Docket: A-242-21

Citation: 2022 FCA 131

Present: **RENNIE J.A.**

BETWEEN:

ALLIANCE FOR EQUALITY OF BLIND CANADIANS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 18, 2022.

REASONS FOR ORDER BY: RENNIE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20220718

Docket: A-242-21

Citation: 2022 FCA 131

Present: **RENNIE J.A.**

BETWEEN:

ALLIANCE FOR EQUALITY OF BLIND CANADIANS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Intervener

REASONS FOR ORDER

RENNIE J.A.

[1] The First Nations Child and Family Caring Society of Canada [Caring Society] seeks an order under Rule 109 of the *Federal Courts Rules,* S.O.R./98-106 granting it leave to intervene in the hearing of this appeal.

[2] At issue is a decision of the Canadian Human Rights Commission [Commission] that it did not have jurisdiction to hear a complaint by the appellant Alliance for Equality of Blind Canadians [AEBC] as the alleged discrimination was against AEBC, as a corporate entity, and not against individuals as required by the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [CHRA].

[3] It is unnecessary and inadvisable to delve deeply into the decisions of either the Commission or the Federal Court. It is sufficient to note that the AEBC appealed the Federal Court decision on the basis that, by according "too much deference" to the Commission, it erred in its application of the reasonableness standard. It also appealed on the basis that the Commission and the Federal Court failed to consider that blind Canadians who would have benefited from the federal government funding that was withheld from AEBC and is said to constitute the discriminatory act were "individual[s]" under subsections 5(a) and 40(1) of the CHRA.

[4] The Caring Society proposes to make submissions to the effect that the Commission erred in failing to properly consider the Charter value of equality or to apply the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*]. In light of this, the Commission decision cannot be reasonable.

[5] The Attorney General's objection is to the scope of the proposed intervention. He contends that in advancing this argument, the Caring Society is introducing a new issue, beyond the scope of the appeal.

[6] The criteria governing whether or not leave to intervene should be granted have been considered in a number of decisions of a full panel of this Court (*Métis National Council and Manitoba Metis Federation Inc. v. Varley*, 2022 FCA 110; *Gordillo v. Canada (Attorney General)* 2022 FCA 23 [*Gordillo* 2022]; *Whapmagoostui First Nation v. McLean*, 2019 FCA 187; and *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3 [*Sport Maska*]).

[7] There are also numerous orders of single judges of this Court arising from motions for leave to intervene (*Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, 2022 FCA 67; *Canada (Environment and Climate Change) v. Ermineskin Cree Nation*, 2022 FCA 36 [*Ermineskin Cree Nation*]; *Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201; *Canada (Citizenship and Immigration) v. Camayo*, 2021 FCA 20; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13 [*Canadian Council for Refugees*]; *Gordillo v. Canada (Attorney General)*, 2020 FCA 198 [*Gordillo* 2020]; *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164).

[8] All of these cases take, as their point of departure, the decision of this Court in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, 103 N.R. 391 [*Rothmans*].

[9] *Rothmans* identified a number of considerations to be taken into account, including, amongst others, whether the intervener is directly affected by the outcome, whether the intervener's position is adequately advanced by one of the parties and whether the interests of justice are better served by the intervention. In *Sport Maska* this Court observed that none of the factors to be considered in *Rothmans* are, in and of themselves, determinative of the question. As Nadon J.A. said at paragraph 42:

> The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. "[a]re the interests of justice better served by the intervention of the proposed third party?" is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought.

[10] The *Rothmans* factors may, at times, need to be supplemented; at times they may also be of no relevance. Other considerations may come to the forefront. For example, whether an intervener has the knowledge and expertise necessary to support the argument it wishes to make is a pertinent consideration, one not identified in *Rothmans*, but one which is frequently advanced in argument. There is good reason for this; it is doubtful whether the utility requirement of Rule 109 can be met if the intervener does not have the background, experience or expertise to address the issue. Similarly, the *Rothmans* criteria which ask whether the appeal can proceed without the presence of interveners is arguably of little relevance. As noted in *Gordillo* 2020, if the appeal cannot proceed without the interveners, more fundamental problems are in play. So too is the requirement of a "justiciable or veritable issue"; if there is none, then that surely is an issue for the parties, and not an intervener, to identify.

[11] The fact that different factors or considerations play a greater role in one intervention motion than another does not mean that the test or criteria are ephemeral or that the law is not normative; rather it simply reflects judges doing what judges are required to do – exercising their discretion according to legally relevant criteria. Whether to grant leave to intervene is a discretionary decision, made in a unique legal, factual and procedural matrix. A grocery list approach to intervention criteria is to be avoided.

[12] One criteria is, however, invariable. It is required that the intervention be useful, in the sense that it will, in the language of Rule 109, "… assist the determination of a factual or legal issue." The requirement that submissions be useful requires, in turn, a judge to consider the nature of the issue on appeal, what the intervener proposes to say about those issues, and whether those submissions assist in determining issues in the proceeding.

[13] This raises the question of perspective. From whose perspective is the question of utility considered? The starting point is the notice of appeal, and from there, the parties' memoranda. These materials define what is in issue. As discussed in *Gordillo* 2022 at paragraph 99, an intervener must take the issues as framed by the parties, and not shape the case in a way that they prefer it to have been argued.

[14] I do not suggest that a motion for leave to intervene necessarily include a draft memorandum of fact and law of the arguments the intervener would make. While possibly helpful, to require a draft memorandum could impose a significant financial cost on a presumptive intervener and is inconsistent with the guiding principles that the rules and

procedures should extend access to justice, not impede it (Rule 3). However, the Court must have some indication of the substance of the intervener's position, otherwise there is no background against which the utility requirement can be assessed.

[15] A court must be satisfied that an intervention also furthers the interests of justice. This criteria broadens the scope of relevant considerations. In *Canadian Council for Refugees* at paragraph 14, Stratas J.A. identified a number of considerations which may arise under the broader question of whether the intervention is in the interests of justice. The timeliness of the intervention, whether the intervention will create an imbalance in the presentation of argument, and whether the intervener is prepared to accept the existing record and issues as framed by the parties are all considerations that may affect the exercise of discretion. I would add to these the question of prematurity: whether the intervention addresses the merits of the case when it is still at an interlocutory stage.

[16] These considerations are neither mandatory nor are they a definitive re-statement of the law on intervention. To treat them as such is inconsistent with diverse factual and legal matrices that characterize motions for intervention, and indeed with what Rule 109(2) requires. The criteria for determining whether or not to grant leave to intervene remain broad, and different cases will highlight different criteria based on their unique circumstances.

[17] It is suggested in argument that there is a divergence in the jurisprudence of this Court, best reflected in recent articulation of what is argued to be a new criteria, namely whether the intervention is "doomed to fail". While I disagree that there is a divergence, I agree that the

proposed criteria, depending on how it is understood, could be problematic. I say this for several reasons.

[18] First, it presupposes a view on the ultimate merits of the issues on appeal before the parties have even presented their case to the panel. As motions for leave to intervene are most frequently addressed by single judges sitting alone, judges are careful to avoid making comments on the merits of an appeal. Further, as this Court does not require an extensive elaboration of the proposed arguments, it is impossible to say that the intervener's argument is destined to fail. I note as well that most interventions before this Court, given the public and national dimension of its jurisdiction, are interest based. The purpose of the intervention is to advise the Court of the implication of the choices before it and how a decision may affect the intervener's interests. It is impossible to assess, let alone conclude, that an intervention of this nature is destined to fail.

[19] In light of these considerations, I believe that that language simply captures interventions which are frivolous and vexatious, take a position on the merits of a proceeding while it is in an interlocutory stage, or comprises overt political or policy arguments. In other words, the intervention cannot be useful or assist and therefore cannot meet the requirement of Rule 109. In sum, it is preferable to focus on the question whether the intervention may assist the Court, and not import concepts and tests associated with motions to strike under Rule 221.

[20] The focus is on the controlling test and whether the intervention may "assist" the Court in determining a legal or factual issue. An intervention need not be conclusive or determinative of the issue and it need not address all the issues before the Court. A motions judge must also keep

in mind that different members of the panel assigned to hear the appeal may have different views on the helpfulness of an intervention, which suggests a certain degree of latitude is appropriate in assessing a motion for leave to intervene.

[21] The purpose of an intervention is to advance the intervener's own perspective on a legal issue and not simply to duplicate the argument or support the result desired by one of the parties. This Court has consistently required proposed interveners to show that their submissions are different from the parties' (*Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 [*Prophet River*]; *Ermineskin Cree Nation*; *Gordillo* 2020).

[22] At no point has AEBC raised the Charter value of equality and the application of the *Doré/Loyola* (*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 [*Loyola*]) framework as a distinct issue before the Commission or as ground of review before the application judge. In this Court, AEBC's grounds of appeal allege that the application judge afforded "too much deference" to the Commission and that the Commission mischaracterized, misunderstood, or ignored the allegations. Neither the notice of appeal nor the appellant's factum mention Charter values or the *Doré/Loyola* framework.

[23] Interveners do not have a right to make the case into something that it is not. They must take the record, and the issues, as they find them.

[24] The Caring Society says, in response, that the Attorney General would not be prejudiced by the argument, that he has time to respond to the admittedly new issue.

[25] Two points may be said about this. First, the issue of prejudice is only tangentially relevant. This appeal arises in the context of judicial review. Whether the Attorney General has the time to respond to an argument, while a concern, is not predominant. Of greater concern is the fact that the Court would be denied the benefit of the Commission's and Federal Court's analysis of the *Doré* issue. There are two types of prejudice in play; any prejudice to a party can be addressed by extensions of time; but there is no remedial order that can substitute or replace the decisions of the lower tribunal and courts.

[26] While a Court has discretion to hear a constitutional question raised for the first time on appeal, it is to be exercised sparingly (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3). The rules which limit the extent to which a party may raise a new issue on appeal evolved in the case of parties; they apply with greater force when it is an intervener who seeks to raise the issues.

[27] In *Gordillo* 2022, this Court declined to consider the interveners' arguments about Charter values on an appeal from the decision of the Federal Court on judicial review. It did so on the basis that the arguments had not first been considered by the decision-maker. While the Court acknowledged *Doré* and that the Charter values may inform administrative decision-making, it determined it should not consider the merits of the arguments:

> …leaving aside any assessment of the merits of these interveners' submissions, there is a problem with our considering them in this appeal. They were not put to the Commissioner. Nor were they put to the Federal Court on judicial review.
>
> […]
>
> The reasonableness of an administrative decision cannot normally be impugned on the basis of an issue not put to the decision maker. Rather, to

> respect legislative choice as to where primary decision-making authority lies, issues like those raised before us by the interveners should be decided at first instance by those in whom Parliament has vested responsibility to decide the merits – in this case, the Commissioner – not by a reviewing court or a court sitting on appeal from a reviewing court, whose roles are more limited. If the decision is then judicially reviewed, the reviewing court will have the benefit, in assessing reasonableness, of the decision maker's reasons, experience and expertise. And if the matter then goes to appeal, the appellate court will have the further benefit (even if it is to decide on reasonableness de novo) of the reasons of the reviewing court [citations omitted].

[28] I would therefore grant the motion for intervention on a limited basis, on the terms set out in my order of this date.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-242-21
STYLE OF CAUSE:	ALLIANCE FOR EQUALITY OF BLIND CANADIANS v. ATTORNEY GENERAL OF CANADA AND FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RENNIE J.A.
DATED:	JULY 18, 2022

WRITTEN REPRESENTATIONS BY:

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Mathew Johnson Monika Rahman	FOR THE RESPONDENT
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Baxter et al. v. The Attorney General of Canada

[Indexed as: Baxter v. Canada (Attorney General)]

83 O.R. (3d) 481

Ontario Superior Court of Justice,
Winkler R.S.J.
December 15, 2006

Civil procedure -- Class proceedings -- Settlement -- Plaintiffs bring motion on consent for certification of action asserting claim in respect of Indian Residential School as class proceeding and for approval of settlement -- Settlement to be Canada-wide and intended to resolve some 15,000 ongoing claims in respect of residential schools -- Settlement approved subject to certain changes made -- Court requires that supervisor of proposed claims procedure be independent of government and report to courts -- Court requires that financial information regarding administration of settlement and in particular of claims procedure be provided for approval -- Court also set out process for review of contingent fees charged by counsel representing claimants under claims procedure.

The plaintiffs brought a motion, on consent, for certification of an action as a class proceeding and approval of a proposed settlement. The action related to claims arising as a result of the existence and operation of Indian Residential Schools ("IRS"). IRS were the subject of approximately 15,000 ongoing claims. The proposed settlement was Canada-wide and was meant to encompass all outstanding litigation. There were five elements to the compensation it provided. Two elements provided individual compensation for the Survivor class members (i.e., former residents, estimated at almost 79,000 persons): the Common Experience Payment ("CEP"),

based on verified attendance at one of the residential schools, and consisting of a base payment of $10,000 for attendance plus $3,000 for each additional year or part year of attendance; and the Independent Assessment Process ("IAP"), which was available to class members who were advancing personal claims based on serious physical abuse, sexual abuse or other abuse leading to serious psychological harm suffered while resident at a school. The remaining three elements were an Aboriginal Healing Foundation, to be given an initial endowment of $125 million, a Truth and Reconciliation Commission with funding of $60 million, and commemorative projects, for which $20 million had been earmarked. Canada had agreed to bear all internal administrative costs associated with delivery of the CEP and the IAP. The proposed settlement also contained terms relating to the payment of legal fees.

Held, the settlement should be approved, subject to certain changes being made.

It was clear that the criteria for certification were met with respect to the existence of a cause of action, identifiable classes, common issues and representative plaintiffs without conflicts on the common issues who could adequately represent the class members. However, the preferable procedure criterion still had to be satisfied. The court should not adopt a less rigorous standard with respect to consent certifications for settlement than with respect to opposed certification motions. Where certification is sought on consent for the purpose of approving a settlement, the court must be vigilant in scrutinizing the settlement, and in particular, its claims resolution and distribution mechanism, to ensure that the interests of the absent class members who are being bound by the settlement will be adequately protected. Thus the need for a "workable litigation plan" remains in full force. In this case, both the CEP and the IAP components would require claims procedures. The record was not sufficient to allow a determination that the proposed processes could be conducted in a fair, efficient and manageable manner. [page482] No administration plan was filed. The administration proposal in the settlement only required Canada to "commit sufficient resources" to ensure that a targeted number of claims could be

processed on an annual basis. The absence of detailed information about the plan of administration did not meet the standard of disclosure required on a motion for approval of settlements.

One deficiency in the proposed administrative scheme that had to be addressed was the potential for conflict between Canada's proposed role as administrator and its role as continuing litigant. The administration of the plan had to be neutral and independent of any concerns that Canada, as a party to the settlement, might otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function had to be completely isolated from the litigation function, with an autonomous supervisor or supervisory board reporting ultimately to the courts. Such person or persons, once appointed by the government and approved by the courts, should not be subject to removal by the government without further approval from the courts.

Another deficiency was the lack of specific cost analysis relating to the administration of the settlement. The parties proposed only a "commitment to fund" approach to the administration, with no budget, no information relating to cost and no commitment to provide any greater level of information to the court in the future. Moreover, the non-disclosure was compounded by the fact that Canada intended, by the express terms of the settlement, to maintain a veto over additional administrative expenditures. This combination of inadequate information and absolute veto power over expenditures was unacceptable. Financial information sufficient to make an informed decision regarding the administration of the settlement, and in particular the CEP and the IAP programs, had to be provided for the purposes of approval and thereafter on a periodic basis. Moreover, the provisions of the settlement relating to the ability of the court to exercise its ongoing jurisdiction over the administration had to be consistent with the obligations of the court to the class members under the Class Proceedings Act, 1992, S.O. 1992, c. 6. This would require, as stated above, the appointment of an autonomous supervisor or supervisory board reporting ultimately to the court.

The provisions of the settlement with respect to legal fees were generally reasonable. However, there was a problem with respect to future legal fees for IAP claimants. The IAP was meant to address the more serious personal injury claims. Under the terms of the settlement, Canada had agreed to pay an additional 15 per cent on top of any compensation awarded under the IAP to help defray the claimants' legal costs. However, notwithstanding this, lawyers representing individual IAP claimants would be charging contingent fees in excess of the 15 per cent payable by Canada. The settlement did not prevent his practice nor did it restrict the amount of such contingent fees payable by the claimant. There was no mechanism for dealing with future issues that might arise between IAP claimants and their respective counsel relating to fees. It was difficult to imagine that the claimants would be in a position to successfully navigate the legal system to ensure that their rights were protected in regard to the legal fees they might have to pay. There had to be a process to regulate fees charged by counsel under the IAP. All individual retainer agreements relating to the IAP should be provided to the adjudicator hearing the case after an award is rendered but before compensation is paid. All fees charged or to be charged to the individual claimant should be clearly set out. The adjudicator should assess the reasonableness of the fee having regard to the complexity of the case, the result achieved, the intent of the settlement to provide successful claimants with reasonable compensation and the fact that an additional 15 per cent of the compensation awarded would be paid by Canada. The adjudicator's decision as to fees [page483] was subject to appeal to the Chief Adjudicator or his designate in respect of errors in principle.

The parties were given 60 days to complete the required changes.

Cases referred to

Amchem Prods. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997);

Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, 192 O.A.C. 239, 247 D.L.R. (4th) 667, [2005] 1 C.N.L.R. 8, 27 C.C.L.T. (3d) 50, 2 C.P.C. (6th) 199 (C.A.), supp. reasons [2005] O.J. No. 733 (C.A.); Gariepy v. Shell Oil Co., [2002] O.J. No. 4022, [2002] O.T.C. 776, 21 C.L.R. (3d) 98, 26 C.P.C. (5th) 358, 117 A.C.W.S. (3d) 690 (S.C.J.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, [2001] O.T.C. 470, 8 C.P.C. (5th) 349, 106 A.C.W.S. (3d) 193 (S.C.J.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 567, [2001] O.T.C. 111, 8 C.P.C. (5th) 340, 103 A.C.W.S. (3d) 260 (S.C.J.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 103 O.T.C. 161, 40 C.P.C. (4th) 151, 91 A.C.W.S. (3d) 351 (S.C.J.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5

MOTION for the certification of an action as a class proceeding and for the approval of a settlement.

Kirk M. Baert and Celeste Poltak, for National Certification Committee.

L. Craig Brown, for Baxter plaintiffs.

Russell Raikes and Mohamed Moussa, for Cloud plaintiffs.

Jon Faulds, for Alberta plaintiffs.

Paul Vickery and Catherine Coughlan, for defendant.

John McKiggan and Arnold Pizzo McKiggan, for National Consortium.

S. John Page, for Anglican Church entities.

Rod Donlevy and Pierre Baribeau, for Catholic entities.

John Phillips, for Assembly of First Nations.

Janice Payne, for Inuit organizations.

Peter Grant, for unaffiliated counsel.

Anthony F. Merchant, Evatt Merchant and Jane Ann Summers, for Merchant Law Group.

Susan M. Vella and Nathaniel Carnegie, for certain objectors.

Paulette Pummells, for The New England Company.

Randy Bennett and Jordan Nichols, court-appointed monitor.

WINKLER R.S.J.: --

Overview

[1] The plaintiffs bring this motion, on consent, for a certification of the action as a class proceeding and approval of a proposed settlement including payment of class counsel fees. The [page484] action relates to claims arising throughout Canada as a result of the existence and operation of institutions known collectively as "Indian Residential Schools" ("IRS"). As is often the case on this type of motion, it is the position of the parties that in the event that the proposed settlement is not approved by the court, the consent to certification is a nullity and the parties will continue with litigation in the normal course. The proposed settlement before the court also includes terms relating to the payment of fees for lawyers other than class counsel. These lawyers have been advancing claims in individual litigation. It is proposed that this individual litigation will be terminated and the claims encompassed by the settlement. These payments are a departure from the norm and arise mainly as a result of the extensive litigation that has already been commenced in relation to the underlying class claims. In that respect, counsel for both plaintiffs and defendants anticipate that the settlement, if

approved, will largely end all existing litigation relating to IRS. This is explained in more detail below.

[2] For over 100 years, Canada pursued a policy of requiring the attendance of Aboriginal children at residential schools, which were largely operated by religious organizations under the supervision of the federal government. The children were required to reside at these institutions, in isolation from their families and communities, for varying periods of time. This policy was finally terminated in 1996 with the closing of the last of the residential schools and has now been widely acknowledged as a seriously flawed failure. In its attempts to address the damage inflicted by, or as a result of, this long-standing policy, the settlement is intended to offer a measure of closure for the former residents of the schools and their families.

[3] The flaws and failures of the policy and its implementation are at the root of the allegations of harm suffered by the class members. Upon review by the Royal Commission on Aboriginal Peoples, it was found that the children were removed from their families and communities to serve the purpose of carrying out a "concerted campaign to obliterate" the "habits and associations" of "Aboriginal languages, traditions and beliefs", in order to accomplish "a radical re-socialization" aimed at instilling the children instead with the values of Euro-centric civilization. The proposed settlement represents an effort to provide a measure of closure and, accordingly, has incorporated elements which provide both compensation to individuals and broader relief intended to address the harm suffered by the Aboriginal community at large.

[4] The parties are proposing a Canada-wide settlement, with approval orders being sought in this court and the superior [page485] courts of eight other provinces and territories. They have asked the courts to depart from the normal practice and approve, as a term of the settlement, the combining of all outstanding litigation relating to the residential schools, into a single class action which will effectively be filed in each jurisdiction in Canada if approval of the settlement is

granted. As a result of this approach, the class of former residents, identified as the "Survivor" class in the record, is estimated to number almost 79,000 persons. This national class is generally described as "All persons who resided at an IRS in Canada between January 1, 1920, and December 31, 1997, who were living as of May 30, 2005 . . . ."

[5] The national "Survivor" class will effectively be sub-classed for the purpose of determining which of the nine approving courts has jurisdiction over the claim of a specific class member. This will be accomplished by modifying the general class description with an additional province of residence requirement. The Ontario court, in addition to the jurisdiction over the residents of Ontario, will also have jurisdiction over the claims of the current residents of those provinces where approval has not been formally sought, specifically, New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island, as well as over the claims of those persons no longer resident in Canada. In addition, the class in Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.), which is currently the only certified action in respect of the residential schools litigation, will be included in the proposed settlement.

[6] In addition, under its terms, the settlement will only be effective if there is unanimous approval by the courts on "substantially the same terms and conditions".

[7] Under the proposed settlement, all members of the Survivor class will receive a cash payment, with the amount varying according to the length of time each individual spent as a student in the residential schools system. This class-wide compensatory payment, which is referred to as the Common Experience Payment ("CEP"), is one of five key elements of the settlement before the court. In addition, there is an Independent Assessment Process ("IAP"), which will facilitate the expedited resolution of claims for serious physical abuse, sexual assaults and other abuse resulting in serious psychological injury. The foregoing elements are aimed at personal compensation for the students who attended the schools. The other three elements of the settlement are

designed to provide more general, indirect benefits to the former students and their families. These elements are the establishment of a Truth and Reconciliation Commission, with a mandate to make a public and permanent record of [page486] the legacy of the schools, in conjunction with the earmarking of a significant portion of the settlement fund for healing and commemoration programs.

[8] In my view, the proposed compensation components of the settlement are fair and reasonable, if they are delivered in an expeditious manner consistent with the intention expressed in the settlement. However, I have concerns that there are aspects of the planned administration and implementation of the settlement that may have a deleterious impact on the benefit of the settlement to the class members. I am approving the settlement, subject to those concerns being satisfactorily addressed. My reasons follow.

The Role of the Court

[9] Whenever a proposed settlement comes before the court for approval in circumstances where the subject matter clearly has broader social and political implications, it is useful to review the court's role and, by extension, the proper limits of its jurisdiction. The court must review the settlement on established legal principles, to determine whether it is fair, reasonable and in the best interests of the class as a whole. As stated in Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 103 O.T.C. 161 (S.C.J.), at para. 77:

> . . . it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

[10] On a settlement approval motion, the court's review is not directed toward the merits of the action but rather is concerned with whether the settlement meets the criteria for court approval. Thus, in accordance with this approach, the record must explain in general terms the alleged wrongs and the factual background supporting the claims. This is consistent with the position that the settlement represents a compromise in which the defendants are not admitting liability but rather are joining with the plaintiffs in presenting the compromise to the court as a fair resolution of the outstanding issues. Consequently, on a motion of this nature supported by a record of this type, it is not appropriate for the court to make findings of fact on the merits of the litigation from which the settlement emanates. Instead, the [page487] court must examine the settlement in the context of the record before it. That examination includes a review of the allegations underlying the claims, the defences advanced in response and any objections to the settlement, to determine whether the settlement is "fair, reasonable and in the best interests of the class as a whole".

[11] From the evidence of the objectors who spoke at the hearing, based both on personal experience and in relation to the experiences of family members, it was clear that the effects of the residential school legacy were lasting and profound. Unfortunately, a motion for certification and approval of a compromise settlement is an inadequate forum for dealing with the underlying issues. Indeed, the very essence of the proposed settlement is to provide proceedings designed specifically for that purpose. The fact that the court is not reviewing in detail the history of residential schools in Canada or the individual histories of former residents is not to in any way diminish the significance of either the history or the impact on the individuals.

[12] In like fashion, the fact that the court is not making findings on the merits of the litigation on this motion ought not to be taken to mean that the approval process is a mere formality, or in the vernacular, a "rubber stamping" by the court. The court has an obligation under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA") to protect the interests of

the absent class members, both in determining whether the settlement meets the test for approval and in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members. In seeking the approval of the court, the plaintiffs and defendants essentially seek the benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the CPA.

The Settlement

[13] The residential schools are the subject of approximately 15,000 ongoing claims at present. Some of these claims are being advanced in traditional court litigation and some through the government's existing alternative dispute resolution process. The litigation stream includes a number of class actions, including the present proceeding and the Cloud v. Canada (Attorney General) action that was certified previously. In a bid to negotiate a global resolution to this litigation, Canada appointed the Honourable Frank Iacobucci as its chief negotiator on May 30, 2005. Multi-party negotiations ensued from June 2005 through [page488] to November 2005, when an Agreement in Principle was reached. The details of the settlement were finalized and approved by the federal cabinet on May 10, 2006. The negotiations involved representatives from native communities, church groups, the federal government and various legal counsel.

[14] In keeping with the objective of a global resolution, the settlement is pan-Canadian and meant to encompass all outstanding litigation. There are five elements to the compensation it provides. Two elements provide individual compensation for the Survivor class members, while the remaining three are initiatives designed to address broader historical and future concerns of the Survivor class members, their families and their communities at large.

[15] Individual compensation for the Survivor class members will be provided through the CEP and through access to an expedited IAP for certain serious claims.

[16] The CEP is based on verified attendance at one of the residential schools. Claimants will receive a base payment of $10,000 for attendance plus $3,000 for each additional year or part year of attendance. $1.9 billion will be allocated to a trust fund under the settlement for the purpose of making these payments. In the event that such amount is insufficient to pay all of the verified claims of the Survivor class members, Canada has agreed to supplement with the additional funding necessary to ensure full payment for all such claims. Another provision of the settlement deals with the prospect of a surplus in the original fund for the CEP. In the event that the verified claims do not exhaust the original $1.9 billion, additional compensation, up to $3,000 per person, will be paid to the claimants if the surplus exceeds $40 million. Any additional surplus amount after those supplementary payments have been made will be transferred to Aboriginal organizations for healing and education programs. Similarly, if the surplus at first instance is less than $40 million, there will be no additional individual compensation but rather, the entire amount will be transferred to Aboriginal organizations.

[17] The CEP is intended to provide class-wide relief based on attendance alone at a residential school. The IAP, on the other hand, will be available to a more limited number of class members who are also advancing personal claims based on abuse suffered while resident at a school. In respect of those claims, additional compensation will be available where the class member establishes that he or she suffered serious physical abuse, sexual abuse or other abuse leading to serious psychological harm. Remedies available under this process include compensation for non-economic loss, i.e., pain and suffering, along with compensation for "loss of opportunity", future care and other consequential [page489] harm. Compensation for these claims will be capped at $275,000 plus a modest additional amount for future care. There is an additional provision for payments for actual income losses, where they are proven in accordance with the standards applicable to the process, up to a maximum of $250,000. The latter amount will be determined based on the same legal and factual analysis for such loss of income that is utilized in

regular court proceedings. Canada will fund this program without any cumulative cap on the total amount of compensation to be paid.

[18] The individual compensation aspects of the settlement are complemented by the provision of funding for three initiatives that will provide broader community-based benefits. The Aboriginal Healing Foundation will be given an initial endowment of $125 million "to support the objective of addressing the healing needs of Aboriginal People affected by the Legacy of Indian Residential Schools, including the intergenerational impacts, by supporting holistic and community-based healing to address needs of individuals, families and communities . . .". There will be a Truth and Reconciliation Commission established, with funding of $60 million "to contribute to truth, healing and reconciliation", through hearings and reports as necessary, with an objective of creating a permanent and public record of the "legacy of the residential schools". Finally, an additional $20 million has been earmarked for commemorative projects.

[19] The individual compensation will not be diminished by the costs of administration of the programs. Canada has agreed to bear all internal administrative costs associated with the delivery of the CEP and IAP.

[20] The legal fees of class counsel are being paid directly by Canada, subject to approval by the courts. Such payments are over and above the amount of money available to be paid as compensation to the class members. In view of the extensive litigation already under way, there were also negotiations with individual claimant counsel which resulted in an agreement that such counsel would be paid directly by Canada, subject to a limit per case, on the understanding that claimants need make no further payment to those counsel with respect to the claim for, or receipt of, a CEP. However, claims made under the IAP will be subject to additional legal fees to be paid by the claimant. Canada has also agreed to pay successful claimants an amount equal to 15 per cent of any award to partially defray those fees.

Law and Analysis

[21] As stated above, my concerns do not go to the compensation elements of the settlement. Although not perfect in every [page490] respect, or perhaps in any respect, perfection is not the standard by which the settlement must be measured. Settlements represent a compromise between the parties and it is to be expected that the result will not be entirely satisfactory to any party or class member. My concerns with respect to this settlement go to its administration, the actual legal fees that may be charged to the class members, the potential fettering of the jurisdiction of this court as a result of some of the terms and the scope of the class to be bound by the settlement.

The CPA Requirements

[22] The administrative concerns may be best explained in the context of a certification analysis. Whether a motion for certification is being conducted on a contested basis or on consent for the purposes of settlement, the criteria set out in s. 5(1) of the CPA must be met. Briefly put, those requirements are (a) the existence of a cause of action, (b) shared by an identifiable class, (c) from which common issues of fact or law arise, (d) for which a class proceeding would be the preferable procedure for resolution, and (e) for which there is a representative plaintiff who has produced a workable litigation plan and who can fairly and adequately represent the interests of the class members without conflict on the common issues.

[23] On this motion, it is clear that the criteria are met with respect to the existence of a cause of action, identifiable classes, common issues and representative plaintiffs without conflicts on the common issues who can adequately represent the class members. However, the preferable procedure criterion must also be satisfied. It is now trite law that for a class proceeding to be the "preferable procedure" for the resolution of the claims of a given class, it must represent a "fair, efficient and manageable" procedure that is "preferable" to any alternative method of resolving the claims.

[24] The manageability aspect of the preferable procedure criterion is often the point of contention on opposed certification motions. The plaintiffs assert that courts adopt a less rigorous standard with respect to consent certifications for settlement. I do not share this view. Settlements may mandate a different approach, but this is because the process of arriving at a settlement often leads to the parties adopting a claims procedure that alleviates some or all of the manageability concerns that arise in class actions with respect to the determination of individual claims. As stated by Nordheimer J. in Gariepy v. Shell Oil Co., [2002] O.J. No. 4022, [2002] O.T.C. 776 (S.C.J.), at para. 27: [page491]

> . . . The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the Class Proceedings Act, 1992. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.

(Emphasis added)

[25] A similar view was expressed by the United States Supreme Court in Amchem Prods. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997). The majority held, at p. 620, that "[c] onfronted with a request for settlement-only class certification, a . . . court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial". In short, this means that while the certification test is not "relaxed" in the literal sense in the context of settlement, the test may be more easily satisfied in certain circumstances. However, the underlying assumption in both Gariepy and Amchem is that the administrative claims procedure will satisfy any manageability concerns, thereby leaving the case amenable to certification. However, the court must still examine the proposed claims procedure to ensure that it will indeed be a "manageable" process.

[26] In a contested certification motion, the court expects that the plaintiff moving for certification will be able to demonstrate that the action is manageable as a class proceeding, in part, through the provision of a workable litigation plan. It may be safely assumed that the defendant, in the traditions of the adversarial system, will bring any deficiencies in the plan to the attention of the court. This safeguard is not present where certification is sought on consent for the purpose of approving a settlement because the plaintiff and the defendant have a joint interest in seeing the settlement approved. Accordingly, the court must be vigilant in scrutinizing the settlement, and in particular, its claims resolution and distribution mechanism, to ensure that the interests of the absent class members who are being bound by the settlement will be adequately protected.

[27] In any event, the representative plaintiff and the defendant focus on the certification issues but this often provides a distorted perspective with respect to the individual claims. The representative plaintiff and the defendant may resolve the macro issues through a settlement, but this most often represents the real start, rather than the end, of the litigation for the individual class member, especially in those cases, as here, where a key term of the settlement is merely access to a modified claims resolution procedure. [page492]

[28] The fact that a settlement may provide only a modified claims resolution procedure for the class members is not objectionable in and of itself. However, the court must be especially cautious to ensure that the whole of the process does in fact confer an actual benefit to the class members individually. Thus, the need for a "workable litigation plan", although it may be framed as a plan of administration, remains in full force.

[29] This is particularly so where the claims resolution procedure represents a primary benefit under the settlement, and leaves the individual entitlement to a deferred resolution, with its attendant costs, burdens and risks. In other words, it cannot be the case that the class members receive nothing more

than the opportunity to litigate their claims in an extra-judicial process that offers no material advantages over normal course litigation. Otherwise, the class members are compromising their rights, and possibly the entirety of their claims, without receiving a corresponding benefit for having done so.

The Manageability of the Claims Procedures

[30] The court cannot make the determination as to whether a claims resolution procedure confers a benefit on class members in a vacuum. Typically, evidence is proffered regarding the claims procedure that must be followed in order for class members to obtain benefits under the settlement, along with an administration plan demonstrating that the resources are in place or will be in place to ensure that the benefits are delivered on a timely basis. This information is, in all material respects, the "litigation plan" which addresses the manageability concerns for the purposes of certification.

[31] In the present case, both the CEP and IAP components will require claims procedures. While the CEP may be relatively straightforward, the sheer volume of anticipated claims, at approximately 79,000, requires a careful consideration of the administrative plan and the resources available to carry out that plan. The court must be assured that the class members will receive the promised benefits in a timely manner. Similar, if not stricter, scrutiny must be applied to the proposed IAP, in view of counsel's concessions that it will indeed be more complicated and more time-consuming than the CEP process and in consideration of the very serious issues it is meant to address for certain class members.

[32] As a starting point, it should be noted that the record before the court is not sufficient to make a determination that the proposed processes can be conducted in a "fair, efficient and manageable" manner. There was no administration plan filed. An [page493] affidavit sworn by Luc Dumont, the current Director General of Operations at the Office of Indian Residential Schools Resolution Canada, was proffered setting out some details of the number of personnel that would be

assigned to administering the settlement. However, it did not contain sufficient detail to satisfy the court that the administration of the settlement will be efficiently and effectively carried out.

[33] This lack of information may have to do with the framing of the administration proposal in the settlement which only requires Canada to "commit sufficient resources" to ensure that a targeted number of claims can be processed on an annual basis. Some counsel conceded that this amounts to asking the court to "take it on faith" that the settlement can be properly administered. With the CPA now in its second decade, this court has sufficient experience with the administration of settlements in large and complex class actions to recognize the dangers in this approach. Further, the absence of detailed information about the plan of administration does not meet the standard of disclosure required on a motion for approval of settlements. As stated in McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, [2001] O.T.C. 470 (S.C.J.), at para. 19:

> The Court is obligated to carefully scrutinize proposed settlements in a class proceeding. Nonetheless, where settlement proposals are advanced on uncontested motions, in my view, there is a positive obligation on all parties and their counsel to provide full and frank disclosure of all material information to the Court.

The requirement for "full and frank disclosure" is manifest when the court is called upon to evaluate a settlement of this scope and magnitude and clearly extends to pertinent information about the proposed administration of the settlement.

[34] Moreover, I cannot accede to the submission of counsel for the Assembly of First Nations ("AFN") that, notwithstanding the currently unsatisfactory administration plan, the court should simply take a "wait and see" approach to the settlement administration because of the flexibility under the CPA to address deficiencies at a later point. The flexibility of the CPA may be properly utilized to address the inevitable but

unforeseeable issues that may arise in the course of complex litigation or the administration of a settlement. On the other hand, it would be an abdication of the court's role under the CPA to fail to address foreseeable deficiencies at this stage. As this court noted in McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 567, [2001] O.T.C. 111 (S.C.J.), at para. 19: [page494]

> Settlement approval in class proceedings cannot be granted on a speculative basis. As stated above, the court has a duty to safeguard the interests of absent class members, especially where those class members are being asked to surrender rights in return for a settlement which is not reflective of the damages suffered on a case by case basis. The court cannot perform its duty in the absence of evidence. As stated by Sharpe J. in Dabbs at paragraph 15:
>
> > . . . the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective impartial and independent assessment of the fairness of the settlement in all the circumstances.

[35] The court must protect the interests of the absent class members. Taking a "fix it later" approach in respect of concerns that are both readily apparent and capable of being addressed now does not meet that obligation. The AFN submission harkens back to the mistaken assumption that there is a relaxed standard to be employed under the CPA in respect of certification where settlement approval is sought. The parties moving for approval of a settlement that entails the possibility that class members will have to engage in a further dispute resolution process must satisfy the court that the process, and indeed the settlement administration in its totality, will be "fair, efficient and manageable". Where concerns are raised as to the structure and resources in place, or contemplated, to administer the settlement, the court cannot adopt a relaxed standard to the detriment of the proposed class members.

The Administrative Deficiencies

[36] I turn now to the specific deficiencies that must be addressed in the proposed administrative scheme. In my view, they are neither insurmountable nor do they require any material change to the settlement agreement itself.

[37] I preface my comments with a caution that the court has a general concern whenever a defendant proposes to change roles and become the administrator of a settlement. There must be a clear line of demarcation between the defendant as litigant and the defendant as neutral administrator. Further, there must be an express recognition by the defendant proposed as administrator that the settlement is being implemented and administered in a court supervised process and not subject to the direction of the defendant either directly or indirectly. The difficulty in drawing the distinction, and adhering to the underlying concept, is the reason why the court must be especially circumspect when considering the approval of a defendant as administrator. The line is even more blurred in this case where Canada, as defendant, will still be an instructing respondent in respect of individual claims made under the IAP. [page495]

[38] The potential for conflict for Canada between its proposed role as administrator and its role as continuing litigant is the first issue that must be addressed. One of the goals of this settlement is to resolve all ongoing litigation related to the residential schools. The structure of the administration must be consistent with this aim and not such as to render itself subject to claims of bias and partiality based on apparent conflicts of interest. If such perception exists, it has the potential to taint even those areas where the neutrality is more enshrined such as the adjudication process. Accordingly, the administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government

from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government. By extension, such person, or persons, once appointed by the government and approved by the courts, is not subject to removal by the government without further approval from the courts. This is consistent with the approach taken in all class action administrations and there is no reason to depart from that approach in this instance.

[39] The autonomous supervisor or supervisory board envisioned by the court will have the authority necessary to direct the administration of the plan in accordance with its terms, to communicate with the supervisory courts and to be responsible to those courts. Simply put, it cannot be the case that the "administrator", once directed by the courts to undertake a certain task, must seek the ultimate approval from Canada. The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.

[40] The foregoing are organizational issues that relate to what may be called the "executive oversight" role in the administration. There are other issues in relation to the operational framework [page496] for delivery of the benefits under the settlement, particularly with respect to the costs of administration.

[41] It is beyond dispute that the administration of this settlement will be expensive in absolute terms. In fact, there is evidence before the court that the current ADR process, upon which the IAP is based, was costing three times as much to administer as it was delivering in compensation in the early

stages of operation. Since the IAP appears to be essentially the same plan as the ADR with minor modifications there are obvious concerns. The material before the court relating to the proposed settlement is devoid of specific cost analysis relating to its administration. Moreover, there were no submissions made by any party regarding contemplated changes in the administration that would serve to reduce costs.

[42] Absent any explanation, the current costs of the ADR program appear to be excessively disproportionate when considered against the typical costs of administering a class action settlement. This court has never approved a settlement where the costs of administration exceed the compensation available let alone where the cost excess is a factor of three. It is no answer, as was suggested in argument, that since Canada, as defendant, has committed to funding the administrative cost separately from the settlement funding, the court need not be concerned with the quantum of that cost. This proposition must be rejected for a number of reasons. First, it ignores the court's supervisory role in class actions. Secondly, it fails to recognize how the peculiar aspects of certain terms of this settlement relating to funding can impact unfairly on the class members, while at the same time leaving the courts powerless to provide a remedy. This is addressed in more detail below. Thirdly, it fails to recognize that this is not a settlement where the administration is being paid out of a fixed settlement fund. The administrative costs will be paid from the general revenues of the government. This leads to a certain precariousness in respect of the administration and leads to the prospect of the ongoing administration of the settlement becoming a political issue to the potential detriment of the class members.

[43] The settlement administration cost is typically estimated by the parties when they seek court approval for a settlement. This enables the court to evaluate whether the claims under the settlement will be processed and compensation delivered to the class members in a satisfactory manner. Here, the parties have departed from the normal course and propose only a "commitment to fund" approach to the administration, with no budget, no information relating to cost and no

commitment to provide any greater level of information to the court in the future. Moreover, [page497] the non-disclosure is compounded by the fact that Canada intends, by the express terms of the settlement, to maintain a veto over additional administrative expenditures.

[44] This combination of inadequate information and absolute veto power over expenditures is unacceptable. The court cannot approve a settlement without adequate information to ensure that the class members' interests are being protected and that it will be able to maintain an effective ongoing supervisory role. As stated in McCarthy ([2001] O.J. No. 2474 (S.C.J.)) at para. 21:

> . . . a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party.

[45] The scope of the problem with the combination of undisclosed costs and overriding government veto is revealed by simple extrapolation from the evidence that was provided. The IAP program is estimated to provide potential total compensation in the amount of $2 to $3 billion. If the current ADR process cost to compensation ratio of 3:1 is maintained, this means that administration costs of this program alone will be in the range of $6 to $9 billion, effectively dwarfing the benefits provided to the class. Should this scenario come to pass, the remedy may not be the expenditure of more dollars, but rather the reallocation of funds to generate greater efficiencies or a more effective and expeditious administration. I caution that these numbers are based on limited data and conjecture by counsel. They do indicate, however, the possible magnitude of the problem and reveal the need for more precise information.

[46] I have not ignored the provision in the settlement providing an exception to the government veto in respect of its

commitment to fund the IAP program to ensure that a minimum of 2,500 claims are processed per year. While presented as a benchmark of performance, it is in fact an effective veto over any attempt to increase the number of claims processed over and above the 2,500 per year target. The evidence is that the class members are elderly and dying at a rate of approximately 1,000 per year. It is possible that efficiencies may be gleaned from the reallocation of funds without increasing expenditures. The structure of the settlement cannot be such as to preclude the administrator or the court in its supervisory role from considering options to improve the delivery of benefits.

[47] The principles engaged on this motion for settlement approval are twofold. First, the settlement must be fair, reasonable [page498] and in the best interests of the class as a whole. Secondly, the court must make its decision on a fully informed basis, bearing in mind that the court has an obligation to oversee the settlement until all of the benefits have been distributed to the class members.

[48] The IAP portion of the settlement is the area where the greatest administrative cost expenditure will occur. It is clear from Mr. Dumont's affidavit and the evidentiary record on the motion that the IAP is to be a continuation of the existing unilateral ADR program under a new name. As he states at para. 4:

> Based on experience with the current ADR process, the additional resources required in order to meet the continuing obligations related to the current ADR process and to meet new obligations related to the implementation of the IAP will number approximately 445 persons.

(Emphasis added)

He further deposes that "the current ADR process will have 48 adjudicators as of October 31, 2006" and although he states that "adjudicators employed in the ADR process will not be automatically transferred to the IAP" he also notes that "the Criteria for the Selection of Adjudicators in the IAP is the same criteria used for selecting model A adjudicators in the

ADR" and that therefore "planning has proceeded on the expectation that many ADR adjudicators will apply to be IAP adjudicators and will be successful in the procurement process".

[49] Mr. Dumont's evidence was offered based on his current experience with the ADR process. That may be the best guide available at the moment as to the requirements of the administration of the settlement. However, his evidence lacks any financial details as to the current or estimated costs of the administration. Further, as he states in para. 2, "the information provided in the affidavit is based on Canada's current planning assumptions, some of which will require further development, in co-operation with the other parties to the [settlement]". This pinpoints precisely the area of concern for the court. Mr. Dumont acknowledges that the administration plan is in a developmental stage. Nonetheless, under the terms of the proposed settlement, once approval is granted, the court is to have no role in approving any further developments in the implementation of the settlement without the acquiescence of Canada.

[50] The parties have put before the court an admittedly incomplete administration plan while at the same time attempting to foreclose the court's oversight role. This is unacceptable. As stated above, the role of the court in a class proceeding does not terminate at the point of settlement approval. It has an ongoing [page499] obligation to oversee the implementation of the settlement and to ensure that the interests of the class members are protected.

[51] I do not want the foregoing to be misunderstood as imparting a requirement that the court be the de facto administrator of the settlement. Rather, the court must be in a position to effectively evaluate the administration and the performance of the administrator and, further, be empowered to effect any changes that it finds necessary to ensure that the benefits promised under the settlement are being delivered. Any terms of the settlement that attempt to curtail this jurisdiction cannot be sanctioned by the court.

[52] In conclusion, this element of the settlement is problematic on two fronts. First, financial information sufficient to make an informed decision regarding the administration of the settlement, in particular the CEP program and the IAP, must be provided for the purposes of approval and thereafter on a periodic basis. Secondly, the provisions of the settlement relating to the ability of the court to exercise its ongoing jurisdiction over its administration must be consistent with the obligations of the court to the class members under the CPA. This will also require, as stated above, the appointment of an autonomous supervisor or supervisory board reporting ultimately to the court. In respect of this latter point, although I would not make it a condition of approval, I would strongly encourage that the administrator engage the assistance of a consultant experienced in the administration of complex class action settlements.

The Legal Fees

[53] The next issue to be addressed relates to the legal fees component of the settlement. The settlement agreement contemplates the payment of legal fees on two fronts. First, there will be payment for class counsel and certain unaligned "independent counsel" who have been representing claimants in individual actions. Secondly, the agreement has a provision regarding fees under the IAP in which Canada has undertaken to pay, in respect of any compensation awarded under the process, an additional 15 per cent to assist the claimant with his or her legal fees in advancing the claim.

[54] The payment to class counsel and independent counsel is anticipated to be in the range of $85-$100 million, divided as follows: $40 million to the National Consortium, $25-$40 million to the Merchant Law Group and approximately $20 million to the independent or unaffiliated counsel. I will address the basis for the range, as opposed to a fixed amount, for the fees of the Merchant Law Group later in these reasons. [page500]

[55] The basis for the fees being paid under the settlement differs amongst each of the groups. The counsel group identified as the National Consortium is comprised of 19 member

law firms, practising collectively in eight provinces and two territories. Within the National Consortium some firms were advancing primarily class actions, some primarily individual actions and some were advancing both. As of May 30, 2005, the National Consortium represented, on a collective basis, 4,826 named individual residential school survivors across the country. As part of the settlement, the National Consortium members agreed to waive any contingent fees on the CEP already incurred and to not charge fees to any future or prospective clients in respect of the CEP.

[56] Darcy Merkur, a partner with Thomson, Rogers, one of the member firms of the National Consortium, filed an affidavit in support of the legal fees. He states at para. 17:

> The $40 million, plus applicable taxes, payable by Canada to the National Consortium is intended to compensate Consortium members for the work they have done to November 20, 2005 and their agreement to waive their individual contingency retainer agreements by not charging fees to their clients on the CEP. It also compensates for their agreement not to charge fees on the CEP to any future or prospective clients, a substantial consideration given that there are an estimated 60,000 potential CEP clients who are not presently represented.

[57] Mr. Merkur deposes that he personally reviewed the dockets of the member firms of the National Consortium for the purpose of providing the federal representative with a summary during the negotiations. Based on his analysis of the information, as of October 15, 2005, the class action portion of the docketed time was categorized as follows in para. 132 of his affidavit:

> Value of Lead Counsel's time in active class actions: $3,952,533.75
>
> Value of Consortium time in support of the Baxter Action: $3,009,495.19
>
> Value of Consortium time in support of the Alberta test

cases: $5,461,896.85

Value of Consortium time in other class actions: $ 42,239.75

Value of Consortium time in other representative actions: $1,101,147.48.

In addition, Mr. Merkur states that between October 15 and November 20, 2005, the class members docketed additional time valued at $708,660. The total amount of class counsel time for the National Consortium is approximately $14.6 million based on these figures. When compared against the $40 million dollars being sought, it represents a request for a multiplier of approximately 2.73. [page501]

[58] Mr. Iacobucci has also filed an affidavit in support of the settlement. In the section dealing with fees for the National Consortium, he deposes at para. 32:

The National Consortium has prepared an affidavit describing the work done collectively by the National Consortium and each of its members, the proposed distributions of the $40 million payment to each of its members, and the rationales for the amounts of these payments. In accordance with the fees verification agreement between Canada and the National Consortium, I have reviewed the affidavit and agree that the payment of $40 million in legal fees, plus GST and PST of $3,213,048.99 and disbursements of $2,402,173.56 is fair and reasonable having regard to the substantial legal work, including significant class action work, undertaken by the National Consortium and its members over many years and the fact that National Consortium members, like others signing the agreement, have undertaken not to seek payment of any legal fees in respect of the Common Experience Payment.

[59] In his submissions on the fee issue, Mr. Baert, on behalf of the National Consortium, stated that the $40 million fee being sought by the consortium, and indeed the entire $100 million that might be paid to all of the "class" counsel groups, was justified on the basis of the CEP component alone notwithstanding any other benefits that were achieved for the

class through the settlement.

[60] The settlement provides that the "class" fee will be paid in a lump sum within 60 days of the implementation date. It is not conditional on the take-up rate for the CEP nor is it tied to specific percentages of the CEP fund being utilized. Accordingly, while the total potential fee of $100 million represents less than 5 per cent of the CEP fund, on the current estimates of 79,000 claimants, the percentage, as it relates to direct payments to the class members, could rise substantially depending on the number of claimants that come forward. Although any remainder in the CEP fund will not be returned to Canada in the event that there are less claimants than anticipated, the maximum increase to any claimant in the event of a surplus in the CEP fund is $3,000. The balance of the moneys would be utilized for purposes of general benefit to the class.

[61] Premium fees are awarded in respect of class actions in recognition of the risk undertaken and result obtained for the class. The risk in this case was self-evident given the complexity of the action, the uncertainty of success because of the novel causes of action asserted, the difficulties relating to damages assessments and the protracted litigation. Further, as this court recognized in Parsons, the fact that the parties engage in negotiations does not necessarily diminish the risk faced by class counsel. The elimination of the risk is only achieved once the court has approved the settlement. [page502]

[62] Looking only at the CEP component, there has been considerable success achieved for the class members. The evidence filed on the settlement indicates that this particular element was a serious bone of contention between the parties, and the plaintiffs' insistence on compensation for the class members on this front coupled with the defendant's intransigent refusal to give ground was an effective barrier to engaging in meaningful negotiations for a significant period of time. Having held fast to the point, the plaintiffs and their counsel reaped a significant benefit for the class members.

[63] Those counsel who are regarded as "independent" in that

they are neither members of the National Consortium or the Merchant Law Group but who are instead representing individual claimants will receive payments of fees under the settlement. These lawyers will receive payments of up to $4,000 for each retainer agreement or substantial solicitor-client relationship as of May 30, 2005. The rationale for this is set out in Mr. Iacobucci's affidavit at para. 26:

> Sections 13.05 and 13.06 of the Settlement Agreement establish the fundamental principle for the payment of legal fees under the Settlement Agreement, namely, each lawyer who had a retainer agreement or a substantial solicitor-client relationship (a "Retainer Agreement") with a former student as of May 30, 2005 will be paid for outstanding Work-in-Progress up to a cap of $4,000, so long as he or she does not charge any fees in respect of the Common Experience Payment. The requirement that a Retainer Agreement exist as of May 30, 2005 is intended to avoid providing a windfall to lawyers who "signed up" clients once my appointment and the existence of the settlement discussions was known.

[64] The fees to be paid to the "independent counsel" relate to individual retainers and the process contemplated will ensure their verification. There was an objection raised in respect of the $4,000 cap per retainer for the independent counsel fees in respect of Work-in-Progress. It was argued that this provision serves to disadvantage those individual claimants whose counsel have already expended more than the cap amount in pursuit of their individual claims. The underlying assumption is that there will be counsel who will not agree to accept the $4,000 in full settlement of their outstanding accounts and instead bring a claim for fees against any of their clients who file a claim for the CEP instead of opting out of the settlement.

[65] The "cap" objection was not addressed by any counsel moving, or supporting the motion, for settlement approval at the hearing. However, as a group, "independent counsel" were represented at the bargaining table and the proposal set out in the settlement was arrived at through negotiation. Given the number of independent counsel who appear to have accepted this

proposal, the lack [page503] of information before the court as to the scope of any potential problem in this regard and the reality that no viable alternative was proposed, I cannot accede to this objection as a basis for rejecting either the settlement as a whole or this term in particular. I have no concerns with either the proposed process for verification of the fees of the "independent counsel" or the amounts.

[66] As stated above, there was a range set out for the fees of the Merchant Law Group as opposed to a fixed number. In addition, a different verification process was followed. This too was addressed by Mr. Iacobucci in his affidavit. At para. 34 he states:

> The verification process agreed to with the Merchant Law Group is different from the verification process for the National Consortium because of the very serious concerns that I had and continue to have with respect to the Merchant Law Group fees. These concerns include:
>
> (a) uncertainty about the number of former residential school students that Merchant Law Group purports to represent;
>
> (b) lack of evidence or rationale to support the Merchant Law Group's claim that it had Work-in-Progress of approximately $80 million on its residential school files; and
>
> (c) an apparent discrepancy between the amount of class action work Merchant Law Group represented it had carried out and the amount of class action work it had actually done.

Mr. Iacobucci goes on to set out the proposed verification process in para. 35 of his affidavit. He states:

> The Merchant Law Group agreed to the following four-part verification process set out in the Merchant Fees Verification Agreement.

(a) First, the Merchant Law Group's dockets, computer records of Work in Progress and any other evidence relevant to the Merchant Law Group's claim for legal fees will be made available for review and verification by a firm to be chosen by me.

(b) Second, I will review the material from the verification process and consult with the Merchant Law Group to satisfy myself that the amount of legal fees to be paid to the Merchant Law Group is reasonable and equitable "taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement, including the payment of a 3 to 3.5 multiplier in respect of the time on class action files and the fact that the Merchant Law Group has incurred time on a combination of class action files and individual files.

(c) Third, if I am not satisfied that the $40 million is a fair and reasonable amount in light of this test, the Merchant Law Group and I will make reasonable efforts to agree on another amount.

(d) Fourth, if we cannot reach agreement, the amount of the fees shall be determined by Mr. Justice Ball or, if he is not available, another Justice of the Court of Queen's Bench in Saskatchewan. [page504]

[67] The fee verification process for the Merchant Law Group has been a source of contention and has generated a motion before Justice Ball in Saskatchewan. On that motion, Canada was seeking to enforce the terms of the agreement with the Merchant Law Group pursuant to the settlement. At the time, the parties had not moved before any court for approval of the settlement and Justice Ball dismissed the motion as premature. Now that the parties have moved for settlement approval, a motion in which the Merchant Law Group has participated, the issue is joined and no longer premature. Indeed, the verification process is a term of the settlement agreement.

[68] No argument of any force has been advanced as to why the contemplated fee verification process is not binding upon the Merchant Law Group. I am not persuaded by the argument that there are solicitor-client confidentiality considerations that prevail over the agreed process, especially in the context of a class action settlement where the benefit of engaging in the process will enure to the clients in that their legal fees, as verified, will be paid by the defendant. Further, I do not accept Mr. Merchant's argument that the current dispute between Canada and the Merchant Law Group relating to the fee verification process can hold up the entire settlement approval. In my view, the fee component of the settlement as it relates to the Merchant Law Group is the process agreed upon for arriving at the actual fee request. That process is clear from the agreement. Once an amount has been determined through this process, it will be assessed by the courts as to reasonableness on the same basis as are the fees of other "class" counsel. I see no reason to depart from the agreed process or to delay approval of the settlement on this basis.

[69] In my view, the "class" portion of the legal fees are reasonable. That does not conclude the fee analysis, however.

[70] It is apparent from the record that the class counsel fees might only represent a portion of the total fees that will be payable on behalf of those class members who make claims under the IAP. The IAP is meant to address the more serious personal injury claims. It is almost certain that most claimants will require the assistance of counsel to advance their claims in this process. Under the terms of the settlement, Canada has agreed to pay an additional 15 per cent on top of any compensation awarded under the IAP to help defray the legal costs of claimants. However, notwithstanding this, lawyers representing individual IAP claimants will be charging contingent fees in excess of 15 per cent payable by Canada. The settlement does not prevent this practice nor does it restrict the amount of such contingent fees payable by the claimant. Indeed, the absence of any control [page505] mechanism on individual fee arrangements appears to have been a conscious choice in the drafting of the settlement. This is evident from Mr. Merkur's affidavit. He deposes, at para. 18:

> The Settlement Agreement also recognizes that some counsel will be performing future work on behalf of individual clients who pursue further compensation through the [IAP] established by the Settlement Agreement. With respect to such future work, the Settlement Agreement takes a hand's off approach to whatever retainer agreements might exist between counsel and client. However, it does provide that Canada shall pay a further 15% of any IAP award to help defray lawyer's fees. This is a continuation of the approach taken by Canada under the IAP's predecessor, the Dispute Resolution process established in November, 2003.

(Emphasis added)

[71] During argument, Mr. Merchant advised the court that the Merchant Law Group would limit its contingent fees to an additional 15 per cent of any IAP compensation award, for a total of 30 per cent when added to the amount to be paid by Canada. Although this position regarding fees was eventually adopted by all counsel appearing at the hearing, this voluntary concession does not limit the fees that may be charged by other lawyers who may act for claimants under the IAP.

[72] It is estimated that the number of claimants under the IAP may reach 15,000. Mr. Merchant suggested that the total value of the settlement could be as much as $5 billion when all of the claims made under the IAP have been adjudicated. No other counsel challenged this number. Accordingly, when the value of the other benefits under the settlement are subtracted from this total, the IAP could generate over $2.5 billion in compensation. If this number is correct, it means that additional legal fees payable by Canada will total $375 million. Further, if the additional amount of fees charged by lawyers to individuals is held to another 15 per cent, the total fees to counsel under the IAP alone would total $750 million. This is in addition to the "class" fee of $100 million for total legal fees of $875 million, if all contingent fee agreements are limited to 30 per cent, which is not the case. Again, these numbers are based on limited data and conjecture by counsel.

[73] As stated above, the parties decided to take a "hand's off" approach with respect to the IAP contingent counsel fees. This position was urged upon the court as the proper approach. I cannot accede to this submission. During argument, I expressed a concern that in the event of issues arising between the IAP claimants and their respective counsel relating to fees, the claimant would have no effective recourse to challenge the reasonableness of any additional fees charged. Counsel responded that such claimants could follow the general procedures available in their [page506] province or territory of residence with respect to assessments of legal fees. In consideration of the evidence adduced in support of the counsel fee proposals, this appears to be an illusory remedy at best. As Mr. Merkur, addressing the difficulties counsel have in representing claimants in this case, deposes at para. 25 of his affidavit:

> Both Thomson, Rogers and Richard Courtis, our co-counsel, have toll free numbers that our client can call. In a typical week we will field some 50 calls from residential school survivors. We have found that many of our clients have literacy problems that make it extreme difficulty [sic] for them to fully understand our regular update correspondence, even when written with such limitations in mind. Our clients often call us for clarification of certain points set out in our letters and we spend much time doing this. Because of the geographic dispersion of our clients it is often difficult if not impossible to visit regularly with them in person. A further problem is miscommunication spread within the Aboriginal communities caused by false rumours about settlements and funds received.

Further, at para. 26 he deposes:

> Because of these challenges the process of making legal representations available to residential school claimants is more time consuming and difficult than with most other types of clients. Gathering information from clients in order to prepare pleadings and respond to motions, and meetings with clients in order to get ready for examinations for discovery

and other litigation steps are more difficult than in conventional litigation.

[74] In the face of this evidence, it is difficult to accept that the claimants will be in a position to successfully navigate the legal system to ensure that their rights are protected in regard to the legal fees they might have to pay. Accordingly, the suggestion that such disputes or concerns should be left to ordinary course litigation to be resolved must be rejected.

[75] As a general principle, wherever a settlement incorporates a claims resolution procedure, the entirety of that procedure is to be conducted under the supervision of the court. This must of necessity include the relationship between counsel and clients engaged in the process, especially where the legal fees or part thereof are paid pursuant to the settlement. As stated above, the court must ensure that claimants obtain the expected benefits of the settlement.

[76] One of the purported benefits of the settlement is the fact that it presents a comprehensive scheme for dealing with all issues arising from the residential school program. In keeping with the general principle, claimants must have recourse within the administration of this settlement to challenge the reasonableness of the fees they are charged by counsel.

[77] In my view, the submissions of Mr. Merchant on the contingent fee issue may serve as a guide. Mr. Merchant made representations [page507] to the court that he spoke from personal experience in that he has been involved in a number of contested trials relating to the residential schools. Accordingly, it appears that his suggestion that an additional 15 per cent was appropriate was based on that experience. Further, a fee of 30 per cent on a contingent basis is a substantial retainer in any event.

[78] There must be a process to regulate fees charged by counsel under the IAP. All individual retainer agreements relating to the IAP must be provided to the adjudicator hearing

the case after an award is rendered but before compensation is paid. All fees charged or to be charged to the individual claimant must be clearly set out. This means that any counsel participating in the process will be under an obligation to make full disclosure in respect of the fees charged, directly or indirectly to the claimant, including disbursements and taxes. The adjudicator will assess the reasonableness of the fee having regard to the complexity of the case, the result achieved, the intent of the settlement to provide successful claimants with reasonable compensation and the fact that an additional 15 per cent of the compensation awarded will be paid by Canada. The adjudicator's decision as to fees may be subject to appeal to the Chief Adjudicator or his designate in respect of errors in principle. Directions to pay to any person other than the claimant an amount in excess of the fees, including disbursements and any applicable taxes, determined to be reasonable by the adjudicator will be considered void.

The Jurisdiction of the Courts

[79] I turn now to the jurisdiction of the supervisory courts. At the outset, it must be recognized that once the parties have sought the approval of the courts for the settlement, they have attorned to the jurisdiction of each of those courts. To the extent that the terms of the settlement attempt to restrict the ability of any of the approving courts' jurisdiction to deal with matters pertaining to the settlement, including its ongoing administration, such provisions are unacceptable. By the same token, I accept that in a multi-jurisdictional settlement such as this, a provision requiring unanimous approval by all of the supervising courts prior to a "material" amendment being made to the agreement is not an unreasonable provision. Such a requirement does not infringe on the jurisdiction of this or any other court in the context of this settlement. Joint approval of the settlement has been sought from all of the supervisory courts, on the understanding that the settlement will fail unless it is approved by all of the courts. Accordingly, it follows [page508] that if a material amendment were to be sought by the parties, such an amendment would also require unanimous approval by the courts.

[80] My concern goes to the provisions of the settlement that may impact on the ability of this and every other approving court to exercise its respective power over the implementation and administration of the settlement, as it affects the class members under its specific jurisdiction. This concern was raised with the parties and it was not alleviated by the submissions made in response. This court has had considerable experience with the administration of complex class proceeding settlements. The problems with logistical co-ordination on a timely basis alone, notwithstanding any other difficulties that may arise, renders any approach that requires unanimous approval of nine courts unworkable in dealing with issues related to specific classes and class members. It is especially troubling where there is a class that has a large number of elderly members and time is of the essence in dealing with issues.

[81] I do not suggest that the parties need rewrite the agreement to deal with this issue. It is common in complex class actions that problems of this nature are dealt with by way of protocols prepared by the parties, in consultation with the courts, to ensure that the administration functions as intended. In my view, the jurisdictional concerns may be addressed by way of such a protocol, to be approved by all of the courts.

The Class Definitions

[82] Finally, I will deal with the issue arising from the proposed class definition as it relates to those who attended a residential school but died prior to May 30, 2005. The proposed settlement would exclude the estates of such persons from making claims under the CEP program or the IAP. It was argued that this provision was negotiated to ensure that the surviving members of the class benefited as much as possible from the direct compensation available. The incongruity of this argument is apparent in the submission that an estimated 1,000 class members have died since May 30, 2005 and, given the large number of elderly people in the class, this number is increasing. There was open disagreement between class counsel

as to whether the estates of those persons deceased prior to May 30, 2005 had a sustainable claim in any event. What is clear is that an arbitrary line has been drawn between class members in similar circumstances. Here, the estate of a person who died on May 29, 2005 is not entitled to make a claim whereas the estate of a person dying on [page509] May 30, 2005 is so entitled. Certain of the objectors characterized this arbitrary approach as being unfair.

[83] A key point about this arbitrary distinction is that the estates of those persons who died prior to the May 30, 2005 deadline will not receive CEP or IAP compensation. Nonetheless, it is still the intention to have those estates bound by the settlement terms in that their claims will be extinguished by the general releases to be granted if the settlement is approved. While it is not uncommon, or necessarily objectionable, to draw distinctions between class members for the purposes of distributing compensation from a global fund, in those cases where a distinction is drawn, compensation is usually paid to claimants on both sides of the divide albeit in reduced amounts on one side.

[84] Where the intention is to bind potential class members without direct compensatory payment, the court must apply careful scrutiny to the provisions of the settlement seeking to effect that result. This analysis must be conducted on a case by case basis. Here, it was contended that the indirect benefits to the family members of the deceased class members, through the healing and commemoration initiatives, was a countervailing benefit given in exchange for the right being extinguished by the settlement. In addition, the estates of those class members whose direct claims are being extinguished may exercise their opt out rights in order to pursue their individual litigation. I agree with these submissions, but would add that the opt out notices must be drafted in a manner to make it clear that these rights are being extinguished under this settlement.

Conclusion

[85] In conclusion, subject to the correction of the

deficiencies noted above, I would certify the action as a class proceeding as proposed and approve the settlement as being "fair, reasonable and in the best interests of the class as a whole". The changes that the court requires to the settlement are neither material nor substantial in the context of its scope and complexity. It would serve the interests of the proposed class to have these issues dealt with in an expeditious manner and to that end, I am prepared to grant the parties a reasonable period, not to exceed 60 days from the date of these reasons, to complete the required changes. I will make myself available on short notice to deal with any issues that may arise.

Order accordingly. [page510]

APPENDIX A

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE DIOCESE OF MOOSONEE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE PRESBYTERIAN CHURCH IN CANADA, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS, THE ROMAN

CATHOLIC BISHOP OF THUNDER BAY, THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, THE ROMAN CATHOLIC BISHOP OF VICTORIA, THE ROMAN CATHOLIC BISHOP OF NELSON, THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD -- McLENNAN, THE CATHOLIC ARCHDIOCESE OF EDMONTON, LA DIOCESE DE SAINT-PAUL, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, THE ROMAN [page511] CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE. MARIE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE MISSIONARY OBLATES OF MARY IMMACULATE -- GRANDIN PROVINCELES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), JESUIT FATHERS OF UPPER CANADA, THE MISSIONARY OBLATES OF MARY IMMACULATE -- PROVINCE OF ST. JOSEPH, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE, LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES TERRITOIRES DU NORD OUEST, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE U CANADA -- EST), THE SISTERS OF SAINT ANNE, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA), THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES, THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARIT (SOEURS GRISES) DE I'HPITAL GNRAL DE MONTREAL), THE GREY SISTERS NICOLET, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SOEURS DE L'ASSOMPTION DE LA SAINTE

VIERGE) DE NICOLET AND THE SISTERS OF ASSUMPTION, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, THE DAUGHTERS OF THE [page512] HEART OF MARY (also known as LA SOCIETE DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), LES SOEURS DE LA CHARITE D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA -- GREY NUNS OF THE CROSS), SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE), THE SISTERS OF CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA PRESENTATION DE MARIE), THE BENEDICTINE SISTERS, INSTITUT DES SOEURS DU BON CONSEIL, IMPACT NORTH MINISTRIES, THE BAPTIST CHURCH IN CANADA

Third Parties

A-158-13
2014 FCA 21

Attorney General of Canada (*Appellant*)

v.

Pictou Landing Band Council and **Maurina Beadle** (*Respondents*)

Indexed as: Pictou Landing First Nation v. Canada (Attorney General)

Federal Court of Appeal, Stratas J.A.—Ottawa, January 29, 2014.

Practice — Parties — Intervention — Motions seeking leave to intervene in appeal arising from Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant respondent Pictou Landing Band Council's funding request — Appellant arguing moving parties not satisfying test for intervention under Federal Courts Rules, r. 109, regard to be had to Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (Rothmans) — Factors in Rothmans requiring modification in light of today's litigation environment — New considerations implementing central concerns Rothmans factors meant to address, while dealing with challenges regularly presenting themselves today in litigation — Moving parties complying with procedural requirements of Federal Courts Rules, r. 109(2); having genuine interest in matter before Court; bringing different insights, perspectives — Issues in appeal assuming sufficient dimension of public interest, importance, complexity — Proposed interventions not inconsistent with Federal Courts Rules, r. 3 — Motions granted.

These were motions by the First Nations Child & Family Caring Society of Canada and by Amnesty International seeking leave to intervene in the appeal arising from the Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant the respondent Pictou Landing Band Council's funding request.

A-158-13
2014 CAF 21

Procureur général du Canada (*appelant*)

c.

Conseil de la bande de Pictou Landing et **Maurina Beadle** (*intimés*)

Répertorié : Première Nation Pictou Landing c. Canada (Procureur Général)

Cour d'appel fédérale, juge Stratas J.C.A.—Ottawa, 29 janvier 2014.

Pratique — Parties — Intervention — Requêtes visant à obtenir l'autorisation d'intervenir dans l'appel qui vise la décision par laquelle la Cour fédérale a annulé le refus d'Affaires autochtones et Développement du Nord Canada d'accorder le financement demandé par l'intimé, le Conseil de la bande de Pictou Landing — L'appelant a fait valoir que les parties requérantes n'ont pas satisfait au critère d'intervention énoncé à la règle 109 des Règles des Cours fédérales, et qu'il fallait prendre en considération la décision Rothmans, Benson & Hedges Inc. c. Canada (Procureur général) (Rothmans) — Il y avait lieu de modifier la liste de facteurs dressée dans la décision Rothmans, en raison des changements survenus en matière de contentieux — Les nouveaux facteurs s'inscrivaient fidèlement parmi les réponses aux principales préoccupations abordées dans la décision Rothmans, tout en permettant de surmonter les difficultés qui se présentent régulièrement de nos jours dans le cadre des litiges — Les parties requérantes se sont conformées aux exigences procédurales particulières prévues à la règle 109(2) des Règles des Cours fédérales; elles avaient un intérêt véritable dans l'affaire dont la Cour est saisie; elles ont fourni à la Cour d'autres précisions et perspectives utiles — Les questions à trancher dans le présent appel revêtent une dimension d'intérêt public, une importance et une complexité suffisante — Les interventions désirées ne sont pas incompatibles avec les exigences prévues à la règle 3 des Règles des Cours fédérales — Requêtes accueillies.

Il s'agissait de requêtes présentées par la Société de soutien à l'enfance et à la famille des Premières Nations et Amnistie internationale visant à obtenir l'autorisation d'intervenir dans l'appel qui vise la décision par laquelle la Cour fédérale a annulé le refus d'Affaires autochtones et Développement du Nord Canada d'accorder le financement demandé par l'intimé, le Conseil de la bande de Pictou Landing.

The Band Council had requested funding to cover the expenses for services rendered to Jeremy Meawasige and his mother, the respondent Maurina Beadle. Its request was based upon Jordan's Principle, a resolution passed by the House of Commons whereby Canada announced that it would provide funding for First Nations children in certain circumstances.

The appellant argued that the moving parties did not satisfy the test for intervention under rule 109 of the *Federal Courts Rules* and submitted that in deciding the motions for intervention the Court should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (*Rothmans*).

Held, the motions should be granted.

The common law list of factors, developed over two decades ago in *Rothmans*, required modification in light of today's litigation environment. The new considerations implemented some of the more central concerns that the *Rothmans* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts. In the case at bar, the moving parties complied with the specific procedural requirements in subsection 109(2) of the *Federal Courts Rules*. The evidence satisfactorily addressed the considerations relevant to the Court's exercise of discretion. The moving parties had a genuine interest in the matter before the Court and brought different and valuable insights and perspectives that would further the Court's determination of the appeal. The issues in the appeal—the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle—assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. Finally, the proposed interventions were not inconsistent with the imperatives in rule 3 of the *Federal Courts Rules*.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 15.
Federal Courts Rules, SOR/98-106, rr. 3, 65–68, 70, 109, 359–369.

Le Conseil de la bande avait demandé un financement pour les dépenses associées aux services fournis à Jeremy Meawasige et à sa mère, l'intimée Maurina Beadle. Sa demande était fondée sur le principe de Jordan, une résolution adoptée par la Chambre des communes, selon laquelle le Canada annonçait qu'il allait financer les services fournis aux enfants des Premières Nations dans certaines circonstances.

L'appelant a fait valoir que les parties requérantes n'ont pas satisfait au critère d'intervention énoncé à la règle 109 des *Règles des Cours fédérales* et ont soutenu que, pour statuer sur les requêtes en intervention, il fallait prendre en considération la décision *Rothmans, Benson & Hedges Inc. c. Canada (Procureur général)* (*Rothmans*).

Jugement : les requêtes doivent être accordées.

Il y avait lieu de modifier cette liste de facteurs de common law dressée il y a plus de vingt ans dans la décision *Rothmans*, en raison des changements survenus en matière de contentieux. Les nouveaux facteurs s'inscrivaient fidèlement parmi les réponses aux principales préoccupations abordées dans la décision *Rothmans*, tout en permettant de surmonter les difficultés qui se présentent régulièrement de nos jours dans le cadre des litiges devant les Cours fédérales. En l'espèce, les parties requérantes se sont conformées aux exigences procédurales particulières prévues au paragraphe 109(2) des *Règles des Cours fédérales*. La preuve s'attache de façon satisfaisante aux facteurs pertinents à l'exercice du pouvoir discrétionnaire de la Cour. Les parties requérantes avaient un intérêt véritable dans l'affaire dont la Cour est saisie et elles ont fourni à la Cour d'autres précisions et perspectives utiles qui ont aidé celle-ci à trancher l'appel. Les questions à trancher dans le présent appel, à savoir la responsabilité à l'égard du bien-être des enfants autochtones et l'interprétation à donner ainsi que la portée à accorder au principe de financement pertinent, revêtent une dimension d'intérêt public, une importance et une complexité suffisante pour permettre d'autoriser l'intervention. Finalement, les interventions désirées ne sont pas incompatibles avec les exigences prévues à la règle 3 des *Règles des Cours fédérales*.

LOIS ET RÈGLEMENTS CITÉS

Charte canadienne des droits et libertés, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, nº 44], art. 15.
Règles des Cours fédérales, DORS/98-106, règles 3, 65 à 68, 70, 109, 359 à 369.

CASES CITED

APPLIED:

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), [1990] 1 F.C. 74, (1989), 41 Admin. L.R. 102 (T.D.), affd [1990] 1 F.C. 90, (1989), 45 C.R.R. 382 (C.A.).

REFERRED TO:

CCH Canadian Ltd. v. Law Society of Upper Canada, 2000 CanLII 15284, 189 D.L.R. (4th) 125 (F.C.A.); *R. v. Salituro*, [1991] 3 S.C.R. 654, (1991), 68 C.R.R. (3d) 289; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236, 64 Admin. L.R. (5th) 80; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71; *Canada (Attorney General) v. Abraham*, 2012 FCA 266, [2013] 1 C.T.C. 69; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75.

AUTHORS CITED

Bryden, Philip L. "Public Intervention in the Courts" (1987), 66 *Can. Bar Rev.* 490.

Koch, John, "Making Room: New Directions in Third Party Intervention" (1990), 48 *U. T. Fac. L. Rev.* 151.

MOTIONS seeking leave to intervene in the appeal arising from the Federal Court's decision (2013 FC 342, 430 F.T.R. 141) to quash Aboriginal Affairs and Northern Development Canada's refusal to grant a funding request made by the respondent Pictou Landing Band Council. Motions granted.

APPEARANCES

Jonathan D. N. Tarlton and *Melissa Chan* for appellant.

Justin Safayeni and *Kathrin Furniss* for proposed intervener Amnesty International.

Katherine Hensel and *Sarah Clarke* for proposed intervener First Nations Child and Family Caring Society.

JURISPRUDENCE CITÉE

DÉCISION APPLIQUÉE :

Rothmans, Benson & Hedges Inc. c. Canada (Procureur général), [1990] 1 C.F. 74 (1ere inst.), conf. par [1990] 1 C.F. 90 (C.A.).

DÉCISIONS CITÉES :

CCH Canadian Ltd. c. Law Society of Upper Canada, 2000 CanLII 15284 (C.A.F.); *R. c. Salituro*, [1991] 3 R.C.S. 654; *Forest Ethics Advocacy Association c. Canada (Office national de l'énergie)*, 2013 CAF 236; *JP Morgan Asset Management (Canada) Inc. c. Canada (Revenu national)*, 2013 CAF 250, [2014] 2 R.C.F. 557; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71; *Canada (Procureur général) c. Abraham*, 2012 CAF 266; *Canada (Procureur général) c. Commission canadienne des droits de la personne*, 2013 CAF 75.

DOCTRINE CITÉE

Bryden, Philip L. « Public Intervention in the Courts » (1987), 66 *R. du B. can.* 490.

Koch, John, « Making Room: New Directions in Third Party Intervention » (1990), 48 *U. T. Fac. L. Rev.* 151.

REQUÊTES visant à obtenir l'autorisation d'intervenir dans l'appel qui vise la décision de la Cour fédérale (2013 CF 342) qui a annulé le refus d'Affaires autochtones et Développement du Nord Canada d'accorder le financement demandé par l'intimé, le Conseil de la bande de Pictou Landing. Requêtes accordées.

ONT COMPARU

Jonathan D. N. Tarlton et *Melissa Chan* pour l'appelant.

Justin Safayeni et *Kathrin Furniss* pour l'intervenant proposé Amnistie internationale.

Katherine Hensel et *Sarah Clarke* pour l'intervenant proposé Société de soutien à l'enfance et à la famille des Premières Nations.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

Champ & Associates, Ottawa, for respondents.
Stockwoods LLP Barristers, Toronto, for proposed intervener, Amnesty International.
Hensel Barristers, Toronto, for proposed intervener, First Nations Child and Family Caring Society.

The following are the reasons for order rendered in English by

[1] STRATAS J.A.: Two motions to intervene in this appeal have been brought: one by the First Nations Child & Family Caring Society of Canada and another by Amnesty International.

[2] The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under rule 109 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. The respondents consent to the motions.

[3] Rule 109 provides as follows:

Leave to intervene

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

Directions

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(*a*) the service of documents; and

(*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

AVOCATS INSCRITS AU DOSSIER

Le sous-procureur général du Canada pour l'appelant.
Champ & Associates, Ottawa, pour les intimés.
Stockwoods LLP, Toronto, pour l'intervenant proposé Amnistie internationale.
Hensel Barristers, Toronto, pour l'intervenant proposé Société de soutien à l'enfance et à la famille des Premières Nations.

Ce qui suit est la version française des motifs de l'ordonnance rendus par

[1] LE JUGE STRATAS, J.C.A. : La Société de soutien à l'enfance et à la famille des Premières Nations du Canada et Amnistie internationale ont présenté deux requêtes en intervention dans le présent appel.

[2] L'appelant procureur général s'y oppose, faisant valoir que les parties requérantes n'ont pas satisfait au critère d'intervention énoncé à la règle 109 des *Règles des Cours fédérales*, DORS/98-106 (les Règles). Les intimés consentent aux requêtes.

[3] La règle 109 prévoit ce qui suit :

Autorisation d'intervenir

109. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

Avis de requête

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

Directives de la Cour

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[4] Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

[5] The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (T.D.), at paragraph 12, affd [1990] 1 F.C. 90 (C.A.), an oft-applied authority: see, e.g. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2000 CanLII 15284, 189 D.L.R. (4th) 125 (F.C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

[6] In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654. For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987), 66 *Can. Bar Rev.* 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990), 48 *U. T. Fac. L. Rev.* 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

[7] In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to

[4] Je préciserai plus loin la nature du présent appel et les interventions proposées par les parties requérantes. Je souhaite toutefois aborder dès le départ le critère d'intervention applicable dans le cadre des présentes requêtes.

[5] Le procureur général soutient, tout comme les parties requérantes, que, pour statuer sur les requêtes en intervention, je devrais prendre en considération la décision *Rothmans, Benson & Hedges Inc. c. Canada (Procureur général)*, [1990] 1 C.F. 74 (1re inst.), au paragraphe 12, conf. par [1990] 1 C.F. 90 (C.A.), précédent qui est souvent appliqué : voir, par ex., *CCH Canadian Ltd. c. Law Society of Upper Canada*, 2000 CanLII 15284 (C.A.F.). Selon la décision *Rothmans, Benson & Hedges*, il existe six facteurs qui doivent orienter l'exercice de mon pouvoir discrétionnaire en l'espèce. Il n'est pas nécessaire que tous les facteurs soient présents pour faire droit aux requêtes.

[6] À mon avis, il y a lieu de modifier cette liste de facteurs de common law dressée il y a plus de 20 ans dans la décision *Rothmans, Benson & Hedges*, en raison des changements survenus en matière de contentieux : *R. c. Salituro*, [1991] 3 R.C.S. 654. Pour les motifs qui suivent, il semble y avoir une divergence entre plusieurs facteurs établis dans la décision *Rothmans, Benson & Hedges* et les véritables questions qui sont en jeu dans le cadre des requêtes en intervention portées aujourd'hui devant la Cour. La décision *Rothmans, Benson & Hedges* fait aussi abstraction d'autres considérations qui, au fil du temps, se sont vu attribuer une plus grande importance dans les décisions des Cours fédérales en matière de pratique et de procédure. En fait, il est possible d'affirmer que les facteurs énoncés dans la décision *Rothmans, Benson & Hedges* n'ont pas tenu compte des différentes façons de comprendre à l'époque la valeur de certaines interventions : Philip L. Bryden, « Public Intervention in the Courts » (1987), 66 *R. du B. can.* 490; John Koch, « Making Room: New Directions in Third Party Intervention » (1990), 48 *U. T. Fac. L. Rev.* 151. Il est temps de peaufiner la liste de facteurs dressée dans la décision *Rothmans, Benson & Hedges*.

[7] Dans les présents motifs, je pourrais entendre appliquer les facteurs énoncés dans la décision *Rothmans, Benson & Hedges* et accorder ainsi peu de

me, and ascribing more weight to others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

[8] In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

[9] The *Rothmans, Benson & Hedges* factors, and my observations concerning each, are as follows:

• *Is the proposed intervener directly affected by the outcome?* "Directly affected" is a requirement for full party status in an application for judicial review – i.e., standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236, 64 Admin. L.R. (5th) 80. All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.

• *Does there exist a justiciable issue and a veritable public interest?* Whether there is a justiciable issue is irrelevant to whether intervention should be granted. Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557.

poids, voire aucun, aux facteurs individuels qui me semblent illogiques et plus de poids à d'autres facteurs. Or, il s'agirait d'une démarche malhonnête sur le plan intellectuel. Je préfère analyser directement et ouvertement les facteurs eux-mêmes.

[8] Je tiens donc à préciser ma qualité de juge des requêtes et que mes motifs ne lient pas mes collègues de la Cour. C'est à eux qu'il appartient d'évaluer leur bien-fondé.

[9] Voici les facteurs énoncés dans la décision *Rothmans, Benson & Hedges*, ainsi que mes observations à l'égard de chacun de ces facteurs :

• *La personne qui se propose d'intervenir est-elle directement touchée par l'issue du litige?* Une partie doit être « directement touchée » pour pouvoir participer pleinement à titre d'intervenante dans le cadre d'une demande de contrôle judiciaire — c'est-à-dire avoir qualité de demanderesse ou de défenderesse dans le cadre d'une telle demande : *Forest Ethics Advocacy Association c. Canada (Office national de l'énergie)*, 2013 CAF 236. Tous les autres tribunaux canadiens établissent des exigences relatives au statut d'intervenant moins strictes mais tout aussi importantes. À mon avis, une personne qui désire intervenir doit seulement démontrer un intérêt véritable quant aux questions précises sur lesquelles repose vraisemblablement l'affaire. Cela permet de garantir à la Cour que la personne qui désire intervenir mettra en pratique ses compétences et ses ressources pour participer utilement à l'instance.

• *Y a-t-il une question qui est de la compétence des tribunaux ainsi qu'un véritable intérêt public?* L'existence d'une question qui est de la compétence des tribunaux n'est pas pertinente pour déterminer s'il convient d'accorder l'autorisation d'intervenir, mais plutôt pour établir si la demande de contrôle judiciaire est tout d'abord justifiée. En l'absence d'une question qui est de la compétence des tribunaux dans le cadre de la demande de contrôle judiciaire, il ne s'agit pas de déterminer s'il convient ou non d'autoriser une partie à intervenir, mais plutôt s'il convient de radier la demande, à défaut d'une cause d'action recevable en droit administratif : *JP Morgan Asset Management*

• *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners—and others—are not allowed to raise new questions on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 22–29.

• *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under susection 109(2) of the Rules, namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

• *Are the interests of justice better served by the intervention of the proposed third party?* Again, this is relevant and important. Sometimes the issues before the Court assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court. Sometimes that broader exposure is necessary to appear to be doing—and to do—justice in the case.

• *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable

(Canada) Inc. c. Canada (Revenu national), 2013 CAF 250, [2014] 2 R.C.F. 557.

• *S'agit-il d'un cas où il semble n'y avoir aucun autre moyen raisonnable ou efficace de soumettre la question à la Cour?* Ce facteur n'est pas pertinent. Si un intervenant peut contribuer à l'examen des questions soulevées lors du contrôle judiciaire ou de l'appel s'y rapportant, pourquoi la Cour refuserait-elle son intervention au motif que celui-ci peut s'adresser à une autre instance? Si la préoccupation sous-jacente à ce facteur vise l'existence d'une question soulevée pour la première fois que l'intervenant peut soumettre devant une autre instance, il est vrai qu'en règle générale, les intervenants — et d'autres personnes — ne sont pas autorisés à soulever une question pour la première fois dans le cadre d'une demande de contrôle judiciaire : *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, aux paragraphes 22 à 29.

• *La position de la personne qui se propose d'intervenir est-elle défendue adéquatement par l'une des parties au litige?* Voilà un facteur pertinent et important. Il soulève la question clé selon le paragraphe 109(2) des Règles, à savoir si l'intervenant fournira à la Cour d'autres précisions et perspectives utiles qui l'aideront à la prise d'une décision et l'aviseront notamment des répercussions des approches qu'elle pourrait adopter dans ses motifs.

• *L'intérêt de la justice sera-t-il mieux servi si l'intervention demandée est autorisée?* Voilà un autre facteur pertinent et important. Parfois, les questions dont la Cour est saisie comportent une dimension publique importante, de sorte que la Cour doit prendre connaissance d'autres points de vue que ceux exprimés par les parties à l'instance. Il est quelquefois nécessaire d'envisager une perspective plus large qui semble rendre et qui rend effectivement justice aux parties.

• *La Cour peut-elle entendre l'affaire et statuer sur le fond sans autoriser l'intervention?* Dans presque tous les cas, la Cour peut entendre et trancher une affaire sans autoriser l'intervention. La question la plus importante consiste à se demander si l'intervenant fournira à la Cour d'autres précisions et perspectives utiles qui l'aideront à la prise d'une décision.

insights and perspectives that will assist the Court in determining the matter.

[10] To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

• *Is the proposed intervention inconsistent with the imperatives in rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

• *Have the specific procedural requirements of subsection 109(2) and rules 359–369 been met?* Subsection 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding". Further, in a motion such as this, brought under rules 359–369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

[11] To summarize, in my view, the following considerations should guide whether intervener status should be granted:

I. Has the proposed intervener complied with the specific procedural requirements in subsection 109(2) of the Rules? Is the evidence offered in support detailed and well-particularized? If the answer to either of these

[10] J'aimerais ajouter deux autres facteurs qui ne se trouvent pas sur la liste dressée dans la décision *Rothmans, Benson & Hedges* :

• *L'intervention désirée est-elle incompatible avec les exigences énoncées à la règle 3 des Règles, à savoir de permettre « d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible »?* Par exemple, certaines requêtes en intervention seront trop tardives et perturberont le déroulement ordonné de l'instance. D'autres requêtes, même si elles ne sont pas trop tardives, de par leur nature, compliqueraient ou retarderaient indûment l'instance. Ce sont des considérations comme celles-là qui devraient à présent prévaloir en matière d'interprétation et d'application des règles de procédure : *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87.

• *Les exigences procédurales particulières du paragraphe 109(2) et des règles 359 à 369 des Règles sont-elles satisfaites?* Suivant le paragraphe 109(2), la partie requérante est tenue de préciser ses nom et adresse ainsi que ceux de son avocat, d'expliquer de quelle manière elle entend participer à l'instance et en quoi sa participation « aidera à la prise d'une décision sur toute autre question de fait et de droit se rapportant à l'instance ». En outre, dans le cadre d'une requête présentée en vertu des règles 359 à 369, comme en l'espèce, les parties requérantes doivent déposer des affidavits précis et détaillés pour convaincre la Cour que l'intervention est justifiée. La conformité aux Règles est impérative et doit faire partie du critère relatif aux requêtes en intervention.

[11] En résumé, voici les facteurs qui devraient, à mon avis, déterminer s'il convient d'accorder le statut d'intervenant :

I. La personne qui désire intervenir s'est-elle conformée aux exigences procédurales particulières énoncées au paragraphe 109(2) des Règles? La preuve présentée à l'appui est-elle précise et détaillée? Si la réponse à l'une ou l'autre de ces questions est négative, la Cour n'est

questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in rule 3?

[12] In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

pas en mesure d'évaluer adéquatement les autres facteurs et doit par conséquent refuser d'accorder le statut d'intervenant. Si la réponse aux deux questions est affirmative, la Cour est en mesure d'évaluer adéquatement les autres facteurs et de déterminer si, selon la prépondérance des probabilités, il convient d'accorder le statut d'intervenant.

II. La personne qui désire intervenir a-t-elle un intérêt véritable dans l'affaire dont la Cour est saisie, permettant ainsi de garantir à la Cour qu'elle possède les connaissances, les compétences et les ressources nécessaires et qu'elle les consacrera à l'affaire dont la Cour est saisie?

III. En participant au présent appel de la manière qu'elle se propose, la personne qui désire intervenir fournira-t-elle à la Cour d'autres précisions et perspectives utiles qui l'aideront effectivement à la prise d'une décision?

IV. Est-il dans l'intérêt de la justice d'autoriser l'intervention? Par exemple, l'affaire dont la Cour est saisie comporte-t-elle une dimension publique importante et complexe, de sorte que la Cour doit prendre connaissance d'autres points de vue que ceux exprimés par les parties à l'instance? La personne qui désire intervenir a-t-elle participé à des procédures antérieures concernant l'affaire?

V. L'intervention désirée est-elle incompatible avec les exigences énoncées à la règle 3 des Règles, à savoir de permettre « d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible »? L'intervention devrait-elle être assujettie à des conditions qui pourraient répondre aux exigences prévues à la règle 3?

[12] J'estime que ces facteurs s'inscrivent fidèlement parmi les réponses aux principales préoccupations abordées dans la décision *Rothmans, Benson & Hedges*, tout en permettant de surmonter les difficultés qui se présentent régulièrement de nos jours dans le cadre des litiges devant les Cours fédérales, notamment dans le cadre des litiges de droit public.

[13] I shall now apply these considerations to the motions before me.

– I –

[14] The moving parties have complied with the specific procedural requirements in subsection 109(2) of the Rules. This is not a case where the party seeking to intervene has failed to describe with sufficient particularity the nature of its participation and how its participation will assist the Court: for an example where a party failed this requirement, see *Forest Ethics Advocacy Association*, above, at paragraphs 34–39. The evidence offered is particular and detailed, not vague and general. The evidence satisfactorily addresses the considerations relevant to the Court's exercise of discretion.

– II –

[15] The moving parties have persuaded me that they have a genuine interest in the matter before the Court. In this regard, the moving parties' activities and previous interventions in legal and policy matters have persuaded me that they have considerable knowledge, skills and resources relevant to the questions before the Court and will deploy them to assist the Court.

– III –

[16] Both moving parties assert that they bring different and valuable insights and perspectives to the Court that will further the Court's determination of the appeal.

[17] To evaluate this assertion, it is first necessary to examine the nature of this appeal. Since this Court's hearing on the merits of the appeal will soon take place, I shall offer only a very brief, top-level summary.

[18] This appeal arises from the Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant a funding request made by the respondent Band Council: *Pictou*

[13] Je vais maintenant appliquer ces facteurs aux requêtes dont je suis saisi.

– I –

[14] Les parties requérantes se sont conformées aux exigences procédurales particulières prévues au paragraphe 109(2) des Règles. Il ne s'agit pas d'une affaire où la partie qui demande d'intervenir n'a pas réussi à expliquer d'une manière suffisamment détaillée la nature de sa participation et en quoi sa participation aidera la Cour : par exemple, pour le cas où une partie ne respecte pas cette exigence, voir l'arrêt *Forest Ethics Advocacy Association*, précité, aux paragraphes 34 à 39. La preuve fournie est précise et détaillée, et non vague et générale. La preuve s'attache de façon satisfaisante aux facteurs pertinents à l'exercice du pouvoir discrétionnaire de la Cour.

– II –

[15] Les parties requérantes m'ont convaincu qu'elles ont un intérêt véritable dans l'affaire dont la Cour est saisie. À cet égard, leurs activités et leurs interventions antérieures relativement à des questions juridiques et de politique générale m'ont convaincu que les parties requérantes possèdent de vastes connaissances, compétences et ressources pertinentes à l'égard des questions dont la Cour est saisie et qu'elles les mettront en pratique pour aider la Cour.

– III –

[16] Les deux parties requérantes affirment qu'elles fourniront à la Cour d'autres précisions et perspectives utiles qui aideront celle-ci à trancher l'appel.

[17] Afin d'évaluer cette affirmation, il est tout d'abord nécessaire d'examiner la nature du présent appel. Puisque notre Cour procédera bientôt à l'audition de l'appel sur le fond, je présenterai un bref résumé de l'affaire.

[18] Le présent appel vise la décision par laquelle la Cour fédérale a annulé le refus d'Affaires autochtones et Développement du Nord Canada d'accorder le financement demandé par l'intimé Conseil de la bande :

Landing Band Council v. Canada (Attorney General), 2013 FC 342, 430 F.T.R. 141. The Band Council requested funding to cover the expenses for services rendered to Jeremy Meawasige and his mother, the respondent Maurina Beadle.

[19] Jeremy is a 17-year-old disabled teenager. His condition requires assistance and care 24 hours a day. His mother served as his sole caregiver. But in May 2010, she suffered a stroke. After that, she could not care for Jeremy without assistance. To this end, the Band provided funding for Jeremy's care.

[20] Later, the Band requested that Canada cover Jeremy's expenses. Its request was based upon Jordan's Principle, a resolution passed by the House of Commons. In this resolution, Canada announced that it would provide funding for First Nations children in certain circumstances. Exactly what circumstances is very much an issue in this case.

[21] Aboriginal Affairs and Northern Development Canada considered this funding principle, applied it to the facts of this case, and rejected the Band Council's request for funding. The respondents successfully quashed this rejection in the Federal Court. The appellant has appealed to this Court.

[22] The memoranda of fact and law of the appellant and the respondents have been filed. The parties raise a number of issues. But the two-key issues are whether the Federal Court selected the correct standard of review and, if so, whether the Federal Court applied that standard of review correctly.

[23] The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of

Conseil de la bande de Pictou Landing c. Canada (Procureur général), 2013 CF 342. Le Conseil de la bande avait demandé un financement pour les dépenses associées aux services fournis à Jeremy Meawasige et à sa mère, l'intimée Maurina Beadle.

[19] Jeremy est un adolescent de 17 ans atteint d'incapacité. À cause de son état de santé, il a besoin de soins 24 heures sur 24. Sa mère était la principale aidante. Or, en mai 2010, elle a subi un accident vasculaire cérébral. Après cet accident, elle n'a plus été en mesure de prendre soin de Jeremy sans aide extérieure. La bande a fourni des fonds pour les soins administrés à Jeremy.

[20] La bande a ensuite demandé que le Canada finance les dépenses associées aux soins fournis à Jeremy. Sa demande était fondée sur le principe de Jordan, une résolution adoptée par la Chambre des communes. Le Canada annonçait qu'il allait financer les services fournis aux enfants des Premières Nations dans certaines circonstances. La question consistant à déterminer avec certitude ces circonstances est fortement en cause en l'espèce.

[21] Affaires autochtones et Développement du Nord Canada a examiné ce principe de financement, l'a appliqué aux faits de la présente affaire et a refusé d'accorder le financement demandé par le Conseil de la bande. Les intimés ont contesté avec succès ce refus devant la Cour fédérale. L'appelant a interjeté appel devant notre Cour.

[22] L'appelant et les intimés ont déposé leurs mémoires des faits et du droit. Les parties soulèvent un certain nombre de questions. Or, les deux questions principales à trancher sont de savoir si la Cour fédérale a choisi la bonne norme de contrôle et, dans l'affirmative, si la Cour fédérale a appliqué correctement cette norme.

[23] Les parties requérantes ont toutes deux l'intention de placer le principe de financement dans le contexte de la jurisprudence relative à l'article 15 de la Charte [*Charte canadienne des droits et libertés*, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, nº 44]], des instruments internationaux, des ententes et de la jurisprudence en matière de droits de la personne, en général, et d'autres questions contextuelles. Bien que l'appelant et les intimés

this context, in my view the Court will be assisted by further exploration of it.

[24] This further exploration of contextual matters may inform the Court's determination whether the standard of review is correctness or reasonableness. It will be for the Court to decide whether, in law, that is so and, if so, how it bears upon the selection of the standard of review.

[25] The further exploration of contextual matters may also assist the Court in its task of assessing the funding principle and whether Aboriginal Affairs was correct in finding it inapplicable or was reasonable in finding it inapplicable.

[26] If reasonableness is the standard of review, the contextual matters may have a bearing upon the range of acceptable and defensible options available to Aboriginal Affairs. The range of acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paragraphs 37–41 and see also *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71, at paragraph 22; *Canada (Attorney General) v. Abraham*, 2012 FCA 266, [2013] 1 C.T.C. 69, at paragraphs 37–50; and *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, at paragraphs 13–14. In what precise circumstances the range broadens or narrows is unclear—at this time it cannot be ruled out that the contextual matters the interveners propose to raise have a bearing on this.

[27] In making these observations, I am not offering conclusions on the relevance of the contextual matters to the issues in the appeal. In the end, the panel determining this appeal may find the contextual matters irrelevant to the appeal. At present, it is enough to say that the proposed interveners' submissions on the

invoquent certains de ces éléments, à mon avis, la Cour sera mieux servie par un examen plus approfondi à cet égard.

[24] Cet examen approfondi des questions contextuelles peut aider la Cour à établir si la bonne norme de contrôle est celle de la décision correcte ou celle de la décision raisonnable. Il appartiendra à la Cour de déterminer s'il en est ainsi en droit et, dans l'affirmative, quelles sont les conséquences sur le choix de la norme de contrôle.

[25] L'examen approfondi des questions contextuelles peut également aider la Cour à évaluer le principe de financement et à déterminer si Affaires autochtones a correctement conclu à l'inapplicabilité de ce principe ou si cette conclusion était raisonnable.

[26] Si la norme de contrôle applicable est celle de la décision raisonnable, les questions contextuelles peuvent influer sur les solutions acceptables et défendables qui s'offrent à Affaires autochtones. L'éventail de solutions acceptables et défendables s'adapte au contexte, s'élargissant ou se réduisant selon la nature de la question et des autres circonstances : voir l'arrêt *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895, aux paragraphes 37 à 41, et voir également l'arrêt *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71, au paragraphe 22, l'arrêt *Canada (Procureur général) c. Abraham*, 2012 CAF 266, aux paragraphes 37 à 50, et l'arrêt *Canada (Procureur général) c. Commission canadienne des droits de la personne*, 2013 CAF 75, aux paragraphes 13 et 14. On ne peut pas déterminer avec certitude les circonstances particulières entourant la multiplication ou la réduction des solutions — on ne peut pas écarter à ce stade la pertinence des questions contextuelles que les intervenants se proposent de soulever.

[27] Mes observations ne constituent pas des conclusions sur la pertinence des questions contextuelles en l'espèce. En dernière analyse, les juges qui trancheront le présent appel peuvent conclure que les questions contextuelles sont dénuées de pertinence. Pour le moment, il suffit de préciser que les observations que les personnes qui désirent intervenir présentent sur les

contextual matters they propose to raise—informed by their different and valuable insights and perspectives—will actually further the Court's determination of the appeal one way or the other.

– IV –

[28] Having reviewed some of the jurisprudence offered by the moving parties, in my view the issues in this appeal—the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle—have assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. In the circumstances of this case, it is in the interests of justice that the Court should expose itself to perspectives beyond those advanced by the existing parties before the Court.

[29] These observations should not be taken in any way to be prejudging the merits of the matter before the Court.

– V –

[30] The proposed interventions are not inconsistent with the imperatives in rule 3. Indeed, as explained above, by assisting the Court in determining the issues before it, the interventions may well further the "just … determination of [this] proceeding on its merits."

[31] The matters the moving parties intend to raise do not duplicate the matters already raised in the parties' memoranda of fact and law.

[32] Although the motions to intervene were brought well after the filing of the notice of appeal in this Court, the interventions will, at best, delay the hearing of the appeal by only the three weeks required to file memoranda of fact and law. Further, in these circumstances, and bearing in mind the fact that the issues the interveners will address are closely related to those already in issue, the existing parties will not suffer any significant prejudice. Consistent with the imperatives of

questions contextuelles qu'elles se proposent de soulever — auxquelles s'ajoutent d'autres précisions et perspectives utiles qu'elles fourniront — aideront effectivement la Cour à trancher l'appel dans un sens ou dans l'autre.

– IV –

[28] Après examen de certaines décisions invoquées par les parties requérantes, j'estime que les questions à trancher dans le présent appel, à savoir la responsabilité à l'égard du bien-être des enfants autochtones et l'interprétation à donner ainsi que la portée à accorder au principe de financement pertinent, revêtent une dimension d'intérêt public, une importance et une complexité suffisante pour permettre d'autoriser l'intervention. Dans les circonstances de l'espèce, il est dans l'intérêt de la justice que la Cour prenne connaissance d'autres points de vue que ceux exprimés par les parties actuelles.

[29] Il ne faut pas interpréter ces observations comme préjugeant le fond de l'affaire dont la Cour est saisie.

– V –

[30] Les interventions désirées ne sont pas incompatibles avec les exigences prévues à la règle 3 des Règles. En fait, comme je l'ai expliqué ci-dessus, en aidant la Cour à trancher les questions dont elle est saisie, les interventions peuvent bien apporter une solution au présent litige qui soit « juste ».

[31] Les questions que les parties requérantes se proposent de soulever ne reproduisent pas les questions que les parties ont déjà invoquées dans leurs mémoires des faits et du droit.

[32] Bien que les requêtes en intervention aient été présentées bien après le dépôt de l'avis d'appel devant notre Cour, les interventions retarderont tout au plus l'audition de l'appel seulement de trois semaines, délai nécessaire pour déposer des mémoires des faits et du droit. En outre, compte tenu de ces circonstances et du fait que les questions que les intervenants aborderont sont étroitement liées aux questions déjà en litige, les parties actuelles ne subiront aucun préjudice important.

rule 3, I shall impose strict terms on the moving parties' intervention.

[33] In summary, I conclude that the relevant considerations, taken together, suggest that the moving parties' motions to intervene should be granted.

[34] Therefore, for the foregoing reasons, I shall grant the motions to intervene. By February 20, 2014, the interveners shall file their memoranda of fact and law on the contextual matters described in these reasons (at paragraph 23, above) as they relate to the two main issues before the Court (see paragraph 22, above). The interveners' memoranda shall not duplicate the submissions of the appellant and the respondents in their memoranda. The interveners' memoranda shall comply with rules 65–68 and 70, and shall be no more than 10 pages in length (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover). The interveners shall not add to the evidentiary record before the Court. Each intervener may address the Court for no more than 15 minutes at the hearing of the appeal. The interveners are not permitted to seek costs, nor shall they be liable for costs absent any abuse of process on their part. There shall be no costs of this motion.

Conformément aux exigences de la règle 3 des Règles, j'imposerai des conditions strictes quant à l'intervention des parties requérantes.

[33] En résumé, je conclus, compte tenu des considérations pertinentes, dans leur ensemble, qu'il convient d'accueillir les requêtes en intervention présentées par les parties requérantes.

[34] Je suis donc d'avis, pour les motifs qui précèdent, d'accueillir les requêtes en intervention. Au plus tard le 20 février 2014, les intervenantes devront déposer leurs mémoires des faits et du droit sur les questions contextuelles énoncées dans les présents motifs (au paragraphe 23 ci-dessus), étant donné qu'elles concernent les deux questions principales dont la Cour est saisie (voir le paragraphe 22 ci-dessus). Les mémoires des intervenantes ne devront pas reproduire les observations présentées par l'appelant et par les intimés dans leurs mémoires. Les mémoires des intervenantes devront se conformer aux règles 65 à 68 et 70 des Règles et ne pas contenir plus de 10 pages (abstraction faite de la page couverture, de toute table des matières, de la liste de la jurisprudence et de la doctrine à la partie V, des annexes A et B et de la couverture arrière). Les intervenantes ne devront ajouter aucun nouvel élément au dossier de preuve dont dispose la Cour. Chacune des intervenantes peut présenter à la Cour, à l'audition de l'appel, des observations qui ne doivent pas dépasser 15 minutes. Les intervenantes ne sont pas autorisées à réclamer des dépens et ne seront pas responsables des dépens s'il n'y a pas d'abus de procédure de leur part. Aucuns dépens ne sont adjugés relativement à la présente requête.

Federal Court  Cour fédérale

vDate: 20210929

Dockets: T-1559-20
T-1621-19

Citation: 2021 FC 969

Ottawa, Ontario, September 29, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL AND NISHNAWBE ASKI NATION

Respondents

and

CONGRESS OF ABORIGINAL PEOPLES

Intervener

JUDGMENT AND REASONS

TABLE OF CONTENTS

I. Nature of the Matter

[1] This is a judicial review brought by the Applicant, the Attorney General of Canada representing the Minister of Indigenous Services Canada [Canada]. The Applicant requests that various decisions of the Canadian Human Rights Tribunal [Tribunal], all of which are listed below, be set aside and remitted to a different panel. The applications for judicial review, as amended, relate to the following Tribunal decisions:

(1) The September 6, 2019 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2019 CHRT 39 [Compensation Decision]. This is the decision at issue in the Federal Court File T-1621-19. The following Tribunal Decisions modified the Compensation Decision:

(i) The April 16, 2020 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 7 [Additional Compensation Decision];

(ii) The May 28, 2020 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 15 [Definitions Decision];

(iii) The February 11, 2021 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2021 CHRT 6 [Trust Decision]; and

(iv) The February 12, 2021 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2021 CHRT 7 [Framework Decision].

(2) The July 17, 2020 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 20 [Eligibility Decision]. This is the decision at issue in the Federal Court File T-1559-20. The following Tribunal decisions modified and confirmed the Eligibility Decision:

(i) The November 25, 2020 decision in *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 36 [2020 CHRT 36], as incorporated into the Framework Decision.

[2] The Compensation and Eligibility Decisions originate from a January 26, 2016 Tribunal decision (*First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 2 [Merit Decision]). The Merit Decision dealt with a February 23, 2007 human rights complaint [Complaint] made by the First Nations Child and Family Caring Society of Canada [Caring Society] and the Assembly of First Nations [AFN]. The Tribunal found sufficient evidence to establish a *prima facie* case of discrimination under section 5 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [*CHRA*]. In the Merit Decision, the Caring Society and the AFN established that First Nations children and families living on reserve and in the Yukon were denied equal child and family services under section 5(a) of the *CHRA* and/or were adversely differentiated under section 5(b) of the *CHRA*. The Tribunal's finding of discrimination pertains to Canada's funding of the First Nations Child and Family Services Program [FNCFS Program] and the funding of Jordan's Principle for related health services to First Nations children.

[3] Section 5 of the *CHRA* states that "it is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination."

[4] The application for review of the Compensation Decision is dismissed.

[5] The application for judicial review of the Eligibility Decision is dismissed.

II. Background and Context

[6] The background context and procedural history leading to these applications for judicial review is complex to say the least. The underlying matters in this application have been ongoing for over a decade. The submissions and the record in these applications were extensive. While only two sets of decisions are the subject of this judicial review, it is useful to provide an overview of some key concepts and related Tribunal decisions to establish the proper context.

A. *The Complaint*

[7] In 2007, the Caring Society and the AFN filed the Complaint with the Canadian Human Rights Commission [Commission]. They alleged that Canada was violating the *CHRA* by discriminating against First Nations children and families who live on reserve by underfunding the delivery of child and family services. They argued that this discrimination was based on race and national or ethic origin. The Complaint noted the dramatic overrepresentation of First Nations children in foster care, the need for the proper implementation of Jordan's Principle (discussed in more detail below), and the systemic and ongoing nature of the discrimination. The Complaint also described past efforts by the Caring Society, AFN, and others to advocate for program reform and additional funding. The Commission exercised its discretion and referred the Complaint to the Tribunal for a hearing.

[8] Canada filed a judicial review application requesting that this Court quash the Commission's referral decision and prohibit the Tribunal from hearing the Complaint. In November 2009, the application was stayed (*Canada (AG) v First Nations Child and Family Caring Society of Canada* (24 Nov 2009), Ottawa T-1753-08 (FC)). Canada sought judicial review of the stay decision and this Court dismissed the application (*Canada (AG) v First Nations Child and Family Caring Society of Canada*, 2010 FC 343).

B. *FNCFS Program*

[9] In Canada, each province and territory has its own legislation that governs the delivery of services to children and families in need. However, First Nations children living on reserve and in the Yukon receive child and family services from the federal government through the FNCFS Program. This is because the federal government has "legislative authority" over "Indians, and lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. The separation of powers are the driving force behind the types of jurisdictional disputes discussed in this decision.

[10] At the time the Complaint was filed, FNCFS agencies were funded by Canada according to a funding formula known as Directive 20-1 or as the Enhanced Prevention Focused Approach. In Ontario, funding is provided to FNCFS agencies under the 1965 Child Welfare Agreement. Where there are no FNCFS agencies within a province, provinces provide the service and may be reimbursed by Canada.

[11] The purpose of the FNCFS Program is to ensure that on reserve and Yukon-based First Nations children and families receive culturally appropriate assistance or benefits that are reasonably comparable to services provided to residents in other provinces. On reserve and Yukon-based First Nations children and families also receive other kinds of social services and products from the federal government.

C. *Jordan's Principle*

[12] Jordan's Principle is named after Jordan River Anderson, who was from Norway House Cree Nation in Manitoba. Jordan had complex medical needs. His parents surrendered him to provincial care so that he could receive the necessary treatment. Jordan could have gone to a specialized foster home but Canada and Manitoba disagreed over who should pay the foster care costs. Jordan died at age five having never lived outside the hospital. Based on these circumstances, Jordan's Principle was established. Jordan's Principle is described in the Merit Decision as follows:

> Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them (at para 351).
>
> [Emphasis in original.]

[13] The House of Commons unanimously passed Jordan's Principle on December 12, 2007 in House of Commons Motion 296:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

[14] A Memorandum of Understanding on Jordan's Principle [MOU] was signed between Aboriginal Affairs and Northern Development Canada [AANDC] and Health Canada in 2009. The MOU indicated that AANDC's role in responding to Jordan's Principle was by virtue of the range of social programs it provides to First Nations people, including: special education, assisted living, income assistance, and the FNCFS Program. The MOU was renewed in 2013.

D. *Parties before the Tribunal*

[15] The Caring Society and the AFN were co-complainants before the Tribunal. The Caring Society is a non-profit organization committed to research, policy development, and advocacy on behalf of First Nations agencies serving the well-being of children, youth, and families. The AFN is a national advocacy organization working on behalf of over 600 First Nations. The Commission represented the public interest. Canada was the Respondent. After the Tribunal requested an inquiry into the Complaint, the Tribunal granted interested party status to the Chiefs of Ontario [COO], who advocates on behalf of 133 First Nations in Ontario, and Amnesty International [Amnesty], an international non-governmental organization committed to the advancement of human rights across the globe. Nishnawbe Aski Nation [NAN], representing 49 First Nations' interests in Northern Ontario, and the Congress of the Aboriginal Peoples [CAP], representing off-reserve First Nations, Métis, and Inuit, were added after the Merit Decision.

III. Procedural History

[16] While it is not possible to summarize every legal argument or submission relied on by the parties in every proceeding, I will summarize the Tribunal's main decisions or rulings and the main submissions that are relevant to disposing of the applications before this Court.

A. *Canada's motion to strike the Complaint*

[17] In December 2009, the Applicant brought a preliminary motion at the Tribunal to strike the Complaint. It argued that its responsibility to fund the FNCFS Program and Jordan's Principle did not constitute a "service" within the meaning of the *CHRA*. It also characterized the Complaint as a cross-jurisdictional comparison of services and argued that such comparisons cannot establish discrimination.

[18] In March 2011, the Tribunal granted the Applicant's motion to strike based on the comparison issue. However, in April 2012, this Court quashed that decision and reinstated the Complaint (*Canadian Human Rights Commission v Canada (AG)*, 2012 FC 445). In March 2013, the Federal Court of Appeal dismissed the Applicant's appeal of that decision (*Canada (AG) v Canadian Human Rights Commission*, 2013 FCA 75).

B. *Retaliation*

[19] In 2013, the Tribunal held a hearing into the allegations that the Applicant had retaliated against the Caring Society's executive director, Dr. Blackstock. The Tribunal found that the Applicant had retaliated against Dr. Blackstock by prohibiting her participation in a COO meeting held at the Minister's Office. The Tribunal ordered the Applicant to pay $10,000 for

retaliation and $10,000 for pain and suffering (*First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 2). The Applicant did not seek judicial review of that decision.

C. *The Merit Decision*

[20] The Complaint hearing took approximately 70 days from February to October 2013. There were 25 witnesses and 500 documentary exhibits. Partway through the hearing, there was a three-month delay when the Caring Society discovered that the Applicant had knowingly failed to disclose 100,000 documents (Merit Decision at paras 14-16). Many of these documents were later held to be "prejudicial to Canada's case and highly relevant" *(First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2019 CHRT 1 at para 13 [2019 CHRT 1]). The Tribunal issued a consent order, requiring the Applicant to compensate the Caring Society, the AFN, and the COO for "lack of transparency and blatant disregard" for the Tribunal process and because of "the serious impacts it had on the proceedings" (2019 CHRT 1 at para 30).

[21] The Applicant's submissions before the Tribunal included an overview of its commitment to the funding of the FNCFS Program, Jordan's Principle, and other programs. It submitted that there was insufficient evidence to substantiate the Complaint and that the documentary evidence should be given little, if any weight. The documentary evidence included Auditor General Reports, provincial Children's Advocates reports, the Blue Hills Report, and the Wen:De Reports. It also submitted that the Tribunal lacked jurisdiction to assess violations of international law or to provide remedies for any such alleged breaches. The Tribunal was also

exceeding its jurisdiction by intruding into the role of the Executive branch of the government and formulating policy and funding decisions.

[22] The Applicant also submitted that Jordan's Principle was not a child welfare concept. Therefore, it was beyond the scope of the Complaint. Canada's response to Jordan's Principle did not demonstrate a *prima facie* case of discrimination.

[23] The Applicant did not argue that the Tribunal lacked jurisdiction to grant financial awards. Rather, Canada argued that there was insufficient evidence brought by the Complainants to support the requested monetary award for "victims" or "[children] being removed from their home."

[24] The Tribunal found that the Applicant had violated section 5 of the *CHRA* in two ways. First, the FNCFS Program discriminated against First Nations children and families on reserve and in the Yukon. The FNCFS Program resulted in inadequate fixed funding that hindered the delivery of culturally appropriate child welfare services, created incentives for its agencies to take First Nations children into care, and failed to consider the unique needs of First Nations children and families.

[25] Second, the Applicant discriminated by taking an overly narrow approach to Jordan's Principle. This resulted in service gaps, delays, and denials. The Tribunal stated the following about the connection between the FNCFS Program and Jordan's Principle:

> In the Panel's view, while not strictly a child welfare concept, Jordan's Principle is relevant and often intertwined with the

> provision of child and family services to First Nations, including under the FNCFS Program. *Wen:De Report Three* specifically recommended the implementation of Jordan's Principle on the following basis, at page 16:
>
> > Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children […] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSA in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources (at para 362).
> >
> > [Emphasis in original.]

[26] The Tribunal found that the Applicant was aware that the FNCFS Program was creating inequalities and disparities for First Nations children trying to access essential services. It also noted that there were evidence-based solutions, as referenced in the National Policy Review reports of 2000 and the three Wen:De Reports, which Canada participated in. Despite having awareness of the problem and potential solutions, the Applicant had failed to make any substantive changes to address the issues (Merit Decision at paras 150-185). This decision also referred to the 2008 Auditor General Report, the 2008 and 2010 Report on the Standing Committee on Public Accounts, the 2011 Status Report of the Auditor General, and various other reports and testimonies (Merit Decision at paras 186-216).

[27] The Merit Decision recognized that the Applicant's discriminatory funding practices caused First Nations children and families living on reserves and in the Yukon to suffer. It found that "these adverse impacts perpetuate the historical disadvantage and trauma suffered by

Aboriginal people, in particular as a result of the Residential Schools system" (Merit Decision at para 459). The Tribunal ordered that the Applicant immediately cease its discriminatory practices and engage in any reforms needed to bring itself into compliance with the Merit Decision. It also ordered the immediate implementation of Jordan's Principle's full meaning and scope. Finally, the Tribunal sought submissions on remedies.

[28] The Tribunal remained seized of the Complaint in order to oversee the Applicant's efforts to bring itself into compliance with the Merit Decision. It also remained seized to resolve outstanding issues related to victims' financial compensation. The Applicant did not seek judicial review of the Merit Decision.

D. *Decisions following the Merit Decision*

[29] After the Merit Decision, the Tribunal held several times that it retained jurisdiction to monitor matters to ensure discrimination ceased. The complexity of this proceeding is reflected in the summaries of certain other decisions, the most pertinent of which are below.

(1) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 10 [2016 CHRT 10]

[30] In April 2016, the Tribunal ordered the Applicant to take immediate action on certain findings in the Merit Decision and to provide a comprehensive report on actions taken. While it acknowledged that the Applicant was taking immediate steps to consult on ways to remedy the discrimination, it reminded the Applicant that it had ordered the immediate cessation of the

discrimination. The Tribunal also explained that there is an increased need to retain jurisdiction because remedial orders responding to systemic discrimination can be difficult to implement.

[31] The Tribunal advised that it would address the outstanding questions of remedies in three steps:

> First, the panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. This is the subject of the present ruling.
>
> Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Parties will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA* (2016 CHRT 10 at paras 4-5).

[32] The Applicant did not seek judicial review of this decision.

(2) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 16 [2016 CHRT 16]

[33] In September 2016, the Tribunal found that the Applicant was restricting the application of Jordan's Principle to First Nations children on reserve, as opposed to all First Nations children. The Tribunal also found that the Applicant was similarly restricting its application to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (2016 CHRT 16 at para 119). The Tribunal clarified that Jordan's Principle extends to all First Nations children, whether they live on or off reserve (2016 CHRT 16 at paras 118-119).

[34] The Tribunal requested that the Applicant provide further information on its consultations regarding Jordan's Principle and the process for dealing with claims. It ordered Canada to provide the names and contact information of all Jordan's Principle focal points to each FNCFS agency. The Tribunal noted that the Applicant's new formulation of Jordan's Principle once again appeared to be more restrictive than that created by the unanimous House of Commons motion and ordered Canada to address this (2016 CHRT 16 at paras 118-119, 160). Canada did not seek judicial review of this ruling.

(3) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2017 CHRT 14 [2017 CHRT 14]

[35] In May 2017, the Tribunal found that the Applicant had still not brought itself into compliance with the prior rulings on Jordan's Principle. This decision also addressed NAN's submissions concerning a tragic situation in Wapekeka First Nation [Wapekeka], located in northern Ontario.

[36] In July 2016, Wapekeka made a proposal to Health Canada seeking funding for an in-community mental health team. In the proposal, Wapekeka alerted Health Canada to concerns about a suicide pact amongst a group of young girls. In January 2017, two twelve-year-old children tragically took their own lives.

[37] NAN amended its notice of motion seeking remedies with respect to the loss of these children. NAN filed two affidavits to support its amended motion. One affidavit was from Dr. Michael Kirlew, a community and family physician for Wapekeka, and an Investigating Coroner

for Ontario's northwest region. Dr. Kirlew's evidence was that a Health Canada official had told him that Health Canada delayed responding to the Wapekeka proposal because it came at an "awkward time" in the federal funding cycle.

[38] The Applicant filed an affidavit of Robin Buckland, then Executive Director of the Office of Primary Health Care within Health Canada's First Nations Inuit Health Branch [FNIHB] and national lead for Jordan's Principle. In cross-examination, Ms. Buckland agreed that the Wapekeka proposal identified an example of a 'service gap' for children. She could not explain why Canada was not meeting the needs identified in the proposal.

[39] NAN submitted that there is a need to define what constitutes a 'service gap' under Jordan's Principle. Doing so will help ensure First Nations children properly receive sufficient government services. NAN also argued that a claimant should not automatically be denied compensation eligibility if they are unable to demonstrate a specific request for a service or support. NAN's submissions informed the definition of 'service gap' included in the Tribunal's ordered compensation framework [Compensation Framework].

[40] The Tribunal gave precise directions on how to process Jordan's Principle claims, reiterating two of its key purposes. First, an important goal of Jordan's Principle is to ensure that First Nations children do not experience gaps in services due to jurisdictional disputes. Second, because First Nations children may have additional needs, the delivery of services can go beyond what is otherwise not available to other persons. The Tribunal noted that a key concept of

Jordan's Principle is that it is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve.

(4) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2017 CHRT 35 [2017 CHRT 35]

[41] The Applicant sought judicial review of 2017 CHRT 14 with respect to certain details about case conferences and timelines but discontinued this application after the Tribunal issued a consent order in November 2017. The Tribunal found that the Applicant was in substantial compliance with its directions regarding Jordan's Principle.

[42] The Tribunal set out key points to inform the Applicant's definition and application of Jordan's Principle. First, the Applicant must eliminate service gaps and engage a child-first approach that applies equally to all First Nations children, whether on or off reserve. Additionally, if a government service is available to all other children, the department of first contact must pay for the service without first engaging in any administrative procedure for funding and approval. Further, the Applicant should only engage in clinical case conferencing with professionals who have the relevant competencies and training. These consultations are only required as reasonably necessary to determine the requestor's clinical needs. The department of first contact can seek reimbursement after the recommended service is approved and funding is provided.

[43] The Tribunal further stated that where a government service is not necessarily available to all other children or is beyond the normative standard of care, the department of first contact

must still evaluate whether a requested service should be provided. The department of first contact must pay for the service the First Nations child requests, without engaging in any administrative procedure before the recommended service is approved and funding is provided. The Applicant may also consult with the family, First Nation community, or service providers to fund services within set timeframes.

[44] Lastly, while Jordan's Principle can apply to jurisdictional disputes between governments and within the same government, such disputes are not a requirement for the application of Jordan's Principle.

(5) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2018 CHRT 4 [2018 CHRT 4]

[45] In February 2018, the Tribunal again dealt with issues of noncompliance by the Applicant. It found that discrimination was continuing to occur on a national scale and the lack of prevention programs was leading to a disproportionate apprehension of First Nations children. The Applicant was ordered to pay FNCFS agencies' actual costs for certain matters and create a consultation committee where all the parties would meet to discuss the implementation of the Tribunal's orders.

[46] The Applicant raised concerns about the fairness of the Tribunal's approach to remedial jurisdiction. However, the Tribunal found no unfairness and stated that it would remain seized to ensure discrimination is eliminated. Specifically, the Tribunal found that "any potential procedural fairness 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" (2018 CHRT 4 at para 389).

[47] The Tribunal reiterated its intent to move forward to the issue of compensation (2018 CHRT 4 at para 385). The Applicant did not seek judicial review of this ruling.

[48] While not part of the ruling, I pause to note that on March 2, 2018 the parties signed a Consultation Protocol that covered significant principles governing the parties' discussions. It also acknowledged the Tribunal's three-stage approach to remedies.

(6) *First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2019 CHRT 7 [Interim Eligibility Decision]

[49] The Caring Society brought a motion for relief to ensure that the definition of "First Nations child" as articulated in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16, and 2017 CHRT 14 was defined. The proposed motion read:

> An order that, pending adjudication of the compliance with the Tribunal's orders of Canada's definition of "First Nations Child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent service needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent service needs, pursuant to Jordan's Principle (Interim Eligibility Decision at para 27).

[50] The Caring Society brought this motion because the Caring Society had recently paid for the medical services of a First Nations child [SJ]. SJ did not have status under the *Indian Act*, RCS, 1985, c I-5 [*Indian Act*] but had one parent with section 6(2) *Indian Act* status. In other

words, SJ lacked status because of the second generation cut-off rule. For this reason, and because of SJ's off-reserve residence, Canada refused to pay for the medical expenses (Interim Eligibility Decision at para 80).

[51] The Tribunal ordered the following:

> The Panel, in light of its findings and reasons, its approach to remedies and its previous orders in this case, above mentioned and, pursuant to section 53(2) a and b of the *CHRA*, orders that, pending the adjudication of the compliance with this Tribunal's orders and of Canada's definition of "First Nations child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent and/or life threatening needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent and/or life threatening service needs, pursuant to Jordan's Principle (Interim Eligibility Decision at para 87).

E. *Compensation Decisions*

(1) The Compensation Decision: T-1621-19

[52] On March 15, 2019, prior to the hearing on compensation, the Tribunal sent the parties written questions about their respective positions on the topic. In short, the combined submissions of the Caring Society and AFN were that Canada should pay compensation for every child affected by the FNCFS Program that was taken into out-of-home care and that the compensation should be paid to First Nations children and their parents or grandparents. Further, the compensation should be retroactive to 2006 until such time that the Tribunal deemed the Applicant compliant with the Merit Decision. The other respondents echoed these submissions. In response, the Applicant opposed the claims made for individual financial compensation on the

basis that the Tribunal lacked jurisdiction to grant such awards in cases about systemic discrimination.

[53] The Tribunal found that there are victims of Canada's discriminatory practices who are entitled to compensation. At paragraph 11 of the Framework Decision, the Tribunal provided a succinct summary of the Tribunal's ruling in the Compensation Decision:

> In the *Compensation Decision*, the Tribunal ordered compensation for children who were apprehended from their homes to start as of January 1, 2006. In this decision, the Tribunal determined that children who were apprehended from their home prior to January 1, 2006 but remained in care as of January 1, 2006 were within the scope of the *Compensation Decision* and eligible for compensation (paras. 37-76). Finally, the Tribunal determined that compensation should be paid to the estates of beneficiaries who experienced Canada's discriminatory conduct but passed away before being able to receive compensation (paras. 77-151).

[54] The Tribunal found that Canada's approach to funding was based on financial considerations. Further, Canada's practices resulted in First Nations children being removed from their homes, families, and communities, which led to "trauma and harm to the highest degree causing pain and suffering" (Compensation Decision at para 193). According to the Tribunal, Canada acted with little to no regard for the consequences of removal of First Nations children from their families. As a result, the Tribunal awarded First Nations children, parents, or grandparents $40,000 each. Pursuant to section 53(2)(e) of the *CHRA*, the first $20,000 was for pain and suffering. Pursuant to section 53(3) of the *CHRA*, the remaining $20,000 was awarded as special compensation for the discriminatory practices under the FNCFS Program and Jordan's Principle.

[55] The Tribunal did not order that Canada immediately pay compensation. Instead, the Tribunal ordered Canada to define eligibility for victims, create an appropriate methodology to govern distribution, and consult with the other parties who could provide comments and suggestions about the orders. The Tribunal directed that the consultations should generate procedures that would allow, but not obligate, First Nations to identify children for the purposes of Jordan's Principle. This interim ruling would remain in effect until a final order. The Tribunal retained jurisdiction.

[56] The Applicant judicially reviewed the Compensation Decision and requested a stay pending a decision on the Merit. In response, the Caring Society sought to stay the application for judicial review. Both motions were dismissed (*Canada (AG) v First Nations Child and Family Caring Society of Canada*, 2019 FC 1529).

(2) Additional Compensation Decision

[57] Notwithstanding the Applicant's pending judicial review application, in February 2020 the Applicant, the AFN, and the Caring Society provided the Tribunal with a draft Compensation Framework. The parties also asked the Tribunal for guidance and clarification regarding compensation. In April 2020, the Tribunal clarified that:

(a) Child beneficiaries should gain unrestricted access to their compensation upon reaching their province's age of majority;

(b) Compensation should be paid to eligible First Nations children (and to the parents or grandparents) who entered into care before and remained in care until at least January 1, 2006; and

(c) Compensation should be paid to the estates of deceased individuals who otherwise would have been eligible for compensation (Additional Compensation Decision at paras 36, 75, 76, 152).

[58] There remained some elements of the draft Compensation Framework that were not agreed upon.

(3) The Definitions Decision

[59] On May 28, 2020, the Tribunal clarified the terms used in the Compensation Decision including ‘essential service’, ‘service gap’, and ‘unreasonable delay’. The decision also affirmed that eligible family caregivers did not extend beyond parents or grandparents. The Tribunal directed the parties to adopt three definitions to reflect its reasons in the finalization of the draft Compensation Framework.

(4) The Trusts Decision

[60] The Tribunal held that compensation payable to minors and individuals lacking capacity is to be paid into a trust. The Tribunal again retained jurisdiction and was empowered to resolve any individual disputes over compensation entitlements.

(5) The Framework Decision

[61] In this decision, the Tribunal addressed the process for compensation to First Nations children and beneficiaries as well as their parents or grandparents. The Tribunal approved the parties’ revised Compensation Framework and its accompanying schedules. The Compensation

Framework was consistent with, and subordinate to, the Tribunal's orders. One of the features of this decision was that victims could opt out of the compensation process. Within the present judicial review, this decision is being challenged under the Eligibility Decision.

F. *Jordan's Principle Eligibility Decisions*

[62] The rulings from 2016 to 2018, including the Merit Decision, did not expressly define the term 'all First Nations children' in connection with eligibility under Jordan's Principle. In February 2017, one of Canada's witnesses said that status under the *Indian Act* was not a mandatory requirement for receipt of services under Jordan's Principle. The following decisions contemplated whether non-status First Nations children are eligible for Jordan's Principle.

(1) Interim Eligibility Decision

[63] In February 2019, the Tribunal issued an interim ruling. The Applicant was ordered to provide non-status First Nations children living off reserve who had urgent and/or life threatening needs with the services required to meet those needs, pursuant to Jordan's Principle. The Tribunal ordered that this interim relief applied to (1) First Nations children without *Indian Act* status who live off reserve but are recognized as members by their Nation, and (2) those who have urgent and/or life-threatening needs. This interim relief order applied until a full hearing decided the definition of a 'First Nations child' under Jordan's Principle.

(2) Eligibility Decision: T-1559-20

[64] In May 2019, contrary to what was stated by one of Canada's officials in February 2017 (see paragraph 62 above), the then Associate Deputy Minister Mr. Perron said that "since the beginning" Canada understood the Tribunal's orders as applying only to children registered under the *Indian Act*. Canada ultimately broadened its approach to include non-status First Nations children who ordinarily reside on reserve. However, the Caring Society remained concerned that this approach was still too narrow and did not comply with 2017 CHRT 14, as it excludes children living off reserve. Accordingly, the Caring Society brought a motion for clarification and interim relief.

[65] At the Eligibility Decision hearing the Caring Society noted that there were three categories of children that Canada agreed were within the scope of the 2017 CHRT 14 Order:

> (a) A child, whether resident on or off reserve, with *Indian Act* status;
>
> (b) A child, whether resident on or off reserve, who is eligible for *Indian Act* status; and
>
> (c) A child, residing on or off reserve, covered by a First Nations self-government agreement or arrangement (Eligibility Decision at para 25).

[66] The Caring Society also argued that Canada was improperly excluding the following categories:

> (a) Children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people;

(b) First Nations children, residing on or off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program; and

(c) First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status (Eligibility Decision at para 26).

[67] The Applicant argued that it was not appropriate to expand the scope of Jordan's Principle as requested by the Caring Society. The Caring Society's request extended beyond the Complaint, the particulars, the evidence, and the Tribunal's jurisdiction, as evidenced by the lack of consensus amongst the complainants. It also submitted that it was complying with the orders by providing Jordan's Principle eligibility to: registered First Nations children on or off reserve; First Nations children who are entitled to be registered; and Indigenous children, including non-status Indigenous children who are ordinarily resident on reserve (Eligibility Decision at para 73).

[68] After reviewing submissions on self-government and self-determination, treaties, international obligations, and constitutional principles, the Tribunal found that it was not determining citizenship or membership of First Nations but only eligibility for Jordan's Principle. In so doing, it confirmed that the categories currently used by Canada were appropriate for the purposes of Jordan's Principle. The Tribunal did find, however, that two new categories proposed by the Caring Society were within the scope of the Complaint and the evidence and thus eligible for Jordan's Principle:

(a) First Nations children, without Indian status, who are recognized as citizens or members of their respective First Nations; and

(b) First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for *Indian Act* status.

[69] The Tribunal refused to admit the third category (those who lost their connection to their First Nations communities due to the Indian Residential Schools System, the Sixties Scoop, discrimination within the FNCFS Program, or other reasons). The Tribunal further stated that the Applicant should let the admitted categories of First Nations children "through the door" (including those who were already being admitted by virtue of Canada's expanded definition) and then assess case-by-case whether the actual provision of services would be consistent with substantive equality principles (Eligibility Decision at para 215). At this point, Canada sought judicial review of this decision.

(3) 2020 CHRT 36

[70] The parties made joint submissions on a proposed eligibility process for Jordan's Principle and asked the Tribunal to approve the eligibility criteria. Accordingly, the Tribunal ordered that cases meeting any one of four following criteria are eligible for consideration under Jordan's Principle:

(a) The child is registered or eligible to be registered under the *Indian Act*, as amended from time to time;

(b) The child has one parent/guardian who is registered or eligible to be registered under the *Indian Act*;

(c) The child is recognized by their Nation for the purposes of Jordan's Principle; or

(d) The child is ordinarily resident on reserve.

[71] The Tribunal reconfirmed it would retain jurisdiction for the time being. The Tribunal committed that it would cede its jurisdiction once the parties confirm eligibility criteria and a mechanism for implementation is developed and effective.

(4) The Framework Decision

[72] On February 12, 2021, the Tribunal approved the parties' revised Compensation Framework and its accompanying schedules. This Compensation Framework is consistent with, and subordinate to, the Tribunal's Orders. Under the Compensation Framework, an Administrator will oversee the compensation process and victims can opt out.

IV. Issues and Standard of Review

[73] Having reviewed the parties' submissions and arguments, the issues in this matter are:

(1) Was the Compensation Decision reasonable?

(2) Was the Eligibility Decision reasonable?

(3) Was Canada denied procedural fairness?

[74] The parties agree that the appropriate standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]), save for any submissions on procedural fairness.

[75] The Applicant submits that a reasonableness review is a "robust exercise" where both the reasoning process and the outcome must bear the hallmarks of reasonableness (*Vavilov* at paras 12-13, 67, 72, 86, 99-100, 104). It submits that a failure to respect the statutory context or binding jurisprudence renders a decision unreasonable as does the failure to follow a logical line of reasoning or to properly consider the evidence (*Vavilov* at paras 102, 122-124).

[76] The Caring Society submits that the Applicant is actually proposing a correctness review. It submits that the Tribunal's findings of fact are not open to review in the absence of special circumstances. The Caring Society submits that the "robust exercise" referred to by the Applicant finds "its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers." The Caring Society cites *Vavilov* at paragraphs 5 and 74 in support of this position. Accordingly, this Court should take a position of restraint and pay attention to the Tribunal's expertise in light of a lengthy, complex case comprised of mostly uncontested rulings (*O'Grady v Bell Canada*, 2020 FC 535 at para 31).

[77] The AFN states that the Court should accord respectful deference to the factual and legal determinations of the Tribunal given the lengthy process and numerous rulings and orders. The AFN also asks this Court to accept the Tribunal's interpretation of the broad remedial provisions of the *CHRA*. It submits that an administrative decision-maker has a large permissible space for

acceptable decision-making where: the evidence before that decision-maker permits a number of outcomes; the decision-maker relies on its expertise and knowledge; and where there is little in the way of constraining legislative language (*Vavilov* at paras 31, 111-114, 125-126; *Canada (Attorney General) v Zalys*, 2020 FCA 81 at para 79).

[78] The Commission also submits that a reasonableness review starts from a position of judicial restraint. Accordingly, this Court must show respect for the distinct role of an administrative decision-maker such as the Tribunal. It submits that a reviewing Court is not to ask itself what decision it would have made, but only whether the party challenging the decision has met its burden of showing that an impugned decision was unreasonable (*Vavilov* at paras 83, 100).

[79] The remaining Respondents generally accept the positions of the Caring Society, the AFN, and the Commission concerning the standard of review.

[80] In light of *Vavilov*, I agree with the parties that reasonableness is the applicable standard for both the first and second issue. This means that a Court should not ask itself what decision it would have made if seized of the matter. Instead, a Court should only consider whether the moving party has met the burden of showing that the impugned decision was unreasonable in its rationale and outcome (*Vavilov* at paras 15, 75).

[81] I also agree that, absent exceptional circumstances, a reviewing Court is to leave a decision-maker’s factual findings undisturbed. If a decision is internally coherent and based on a

rational chain of analysis, a Court should defer to it (*Vavilov* at paras 125, 85). When reviewing for reasonableness, a Court does not assess the decision-maker's written reasons against a standard of perfection (*Vavilov* at paras 91-92). Minor flaws or missteps in a decision-maker's decision will not be sufficient to establish a reversible lack of justification, intelligibility and transparency – "sufficiently serious shortcomings" are required (*Vavilov* at para 100).

[82] On the issue of procedural fairness, no deference is owed to the Tribunal. The Federal Court of Appeal recently stated in *Canada (AG) v Ennis*, 2021 FCA 95:

> In this regard, it is well settled that administrative decision-makers are not afforded deference in respect of procedural fairness issues: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at paras. 34-56; *Wong v. Canada (Public Works and Government Services)*, 2018 FCA 101, 2018 C.L.L.C. 230-038 at para. 19 [*Wong*]; *Ritchie v. Canada (Attorney General)*, 2017 FCA 114, 19 Admin. L.R. (6th) 177 at para. 16 [*Ritchie*] (at para 45).

[83] As such, the issue of procedural fairness is reviewable on the correctness standard.

V. Parties' Positions

[84] As stated above, the parties' submissions and the record is extensive. Below is a brief overview of the parties' respective positions in the matters before this Court.

A. *Compensation Decision*

(1) Applicant's Position

[85] The Applicant does not dispute that the FNCFS Program was broken and needed fixing. The Applicant also recognizes a need to compensate the children affected. The essence of the Applicant's submissions are that the Tribunal exceeded its authority under the *CHRA* in making the Orders in question. It submits that a reasonable exercise of remedial jurisdiction must be consistent with the nature of the Complaint, the evidence, and the statutory framework. It submits that both decisions fail on these points.

[86] It also submits that the Tribunal did not have jurisdiction to provide compensation similar to a class action, particularly when the Complaint dealt with systemic discrimination. The Applicant notes that no individuals entitled to compensation were party to the proceeding or provided evidence before the Tribunal.

[87] The Applicant's specific challenges to the reasonableness of the Compensation Decision can be summarized as follows:

(a) It was inconsistent with the nature of the Complaint;

(b) It turned the case into a class action;

(c) It failed to respect the principles of damage law;

(d) The reasons are inadequate;

(e) It erred in providing compensation under Jordan's Principle;

(f) The definitions in the Definitions Decision are unreasonable;

(g) It erred in finding that Canada's conduct was wilful and reckless; and

(h) It erred in giving compensation to caregivers.

[88] The Applicant submits that the Compensation Decision, in whole or in part, is unreasonable and that it should be remitted to a newly constituted panel of the Tribunal.

(2) Caring Society's Position

[89] The Caring Society submits that the Compensation Decision is reasonable and the Court should not set it aside for the following reasons:

(a) Victims of systemic discrimination are entitled to individual remedies;

(b) Canada's arguments about class actions are a red herring;

(c) Principles of tort law have no application to human rights remedies;

(d) The estates and trusts orders are reasonable;

(e) The evidence was clear that First Nations children have endured pain and suffering;

(f) Canada's knowledge of the harms being caused warrants a finding of wilful and reckless discrimination; and

(g) The finding of ongoing discrimination under the FNCFS Program is reasonable and supported by the evidence.

[90] The Caring Society also states that the Applicant raises arguments about several decisions that are not at issue in this judicial review. Accordingly, the Applicant is making an improper collateral attack on them and on the Merit Decision. Alternatively, if the Court finds any part of the Compensation Decision unreasonable, then it should only remit that part of the decision to the same panel of the Tribunal.

(3) The AFN's Position

[91] The AFN echoes the Caring Society's position. The AFN submits that the Tribunal has broad remedial discretion to make victims of discrimination whole again. Further, the Tribunal may address the perpetrator's wilful or reckless conduct. It submits that the Applicant mischaracterizes the individual compensation award as a class action by comparing it with the type of damages one may obtain in that type of court proceeding.

[92] Additionally, the AFN argues that the Tribunal properly assessed the evidence. Namely, there was evidence that children suffered harm because they were removed from their families due to the Applicant's underfunding of the FNCFS Program. The AFN points out that witnesses testified at the Tribunal about the harms families face when a child is removed from the family unit. Additionally, Canada was aware that underfunding caused harm because Canada has been party to various reports on the topic for the past 20 years. The Tribunal reasonably found that this constitutes wilful and reckless discrimination.

(4) The Commission's Position

[93] The Commission adopts the same position on reasonableness as the Caring Society and the AFN. The Commission states that the Court should approach the Compensation Decision from a position of judicial restraint. It points to the fact that the Tribunal has been seized with this matter for nine years, it has heard from many witnesses, and has received voluminous documentary evidence substantiating both systemic and individual discrimination due to the underfunding of the FNCFS Program. It also points to the many rulings, including the Merit Decision, which Canada has not challenged.

[94] The Commission notes that while aspects of the Compensation Decision may be bold, extraordinary violations of the *CHRA* appropriately call for extraordinary remedies. The Commission focuses on general principles of the *CHRA* and leaves the issues of victims and compensation to the Respondents.

(5) The COO's Position

[95] The COO focuses on the Eligibility Decision. As such, its submissions are set out below.

(6) NAN's Position

[96] NAN adopts the same position as the Caring Society, the AFN, and the Commission. The focus of NAN's submissions relate to the definition of certain terms found in the Definitions Decision, particularly the term 'service gap'. It drew the Court's attention, as it did before the Tribunal, to the tragic events in Wapekeka. These events illustrate that systemic and individual

discrimination exists, contrary to what Canada claims. It submits that Canada's conduct was wilful and reckless and the financial awards are reasonable.

(7) Amnesty's Position

[97] Amnesty's interest in these proceedings is to ensure that the Compensation Decision and the Eligibility Decision are reviewed in light of Canada's international legal obligations. It submits that the Tribunal properly addressed Canada's international legal obligations.

(1) CAP's Position

[98] The Court granted CAP intervener status with the parties' consent but only with respect to the Eligibility Decision. Therefore, CAP's submissions are set out below.

B. *Eligibility Decision*

[99] The Applicant referred to this Decision as the 'First Nations child Definition decision' and the other parties referred to it as the 'Eligibility Decision'. In looking at the context, I have chosen to refer to it as the Eligibility Decision. As the Compensation Decision and the Eligibility Decision are connected, many of the parties' submissions about these two decisions overlap. Below I summarize the submissions directly related to the Eligibility Decision.

(1) The Applicant's Position

[100] The Applicant submits that the Eligibility Decision is unreasonable because the Tribunal exceeded its jurisdiction under the *CHRA*.

[101] The Applicant submits that the Complaint dealt with discrimination on reserve and in the Yukon. Further, there was no evidence related to the two additional classes of First Nations children which the Tribunal ruled were eligible for consideration:

> (a) Non-status children who are recognized by a First Nation as being a member of their community; and
>
> (b) Non-status children of parents who are eligible for *Indian Act* status.

[102] The Applicant submits that the first additional category imposes a burden to determine who is eligible within First Nations when these First Nations were not parties to the litigation and not consulted. The second category decides a complex question of identity that was not before the Tribunal and on which there is no consensus among First Nations.

(2) The Caring Society's Position

[103] The Caring Society submits that 'all First Nations children' does not mean 'children with *Indian Act* status'. The Tribunal modified the definition of 'First Nations child' to ensure that its Jordan's Principle Orders did not create further discrimination or result in additional complaints.

[104] The Caring Society disagrees with the Applicant's characterization of the Eligibility Decision. First, the definition adopted by the Tribunal is limited to the threshold question of

whose service requests the Applicant must *consider*. Second, there is no obligation on First Nations to render any determinations on recognition of the children. Third, no First Nation has intervened to support Canada's position that consultation should have occurred or that this definition is too expansive or creates any obligations on them.

[105] It states that the Tribunal properly considered issues of First Nations identity, self-determination, international legal obligations, federal legislation, section 35 rights, and the scope of the Complaint. Alternatively, if any part of the Eligibility Decision is found to be unreasonable then only that part should be remitted to the same panel of the Tribunal.

(3) The AFN's Position

[106] The AFN submits that the Tribunal properly considered the colonial aspect of the *Indian Act's* status provisions and assimilationist policies within the context of Treaties and inherent rights. It states that the Tribunal reasonably found that the status provisions in the *Indian Act* did not meet human rights standards. In so doing, the Tribunal was not challenging the *Indian Act* status provisions. Rather, the Tribunal recognized that certain members of First Nations continued to experience discrimination when trying to access health services because of Canada's reliance on the *Indian Act*'s definition of 'Indian'.

[107] In light of this entrenched systemic discrimination, it was open to the Tribunal to take a purposive approach in interpreting the *CHRA*. The Tribunal acted reasonably in extending eligibility for Jordan's Principle to individuals without Indian status who are recognized by their First Nations as citizens and members.

[108] The AFN requests that if the Court finds any part of the decision to be unreasonable, the Court should remit only that part for re-determination to the same panel of the Tribunal.

(4) The Commission's Position

[109] The Commission echoes the Caring Society and AFN's submissions. The Commission also submits that its interest was to urge the Tribunal to apply a human rights framework while taking into account principles of self-governance and self-determination. It notes that the Tribunal was not delving into First Nations' jurisdiction over citizenship or membership but was merely looking at eligibility under Jordan's Principle. The Tribunal, looking at the context of the *Indian Act's* history, properly noted that the *Indian Act* does not correspond with First Nations' own traditions and that it continues to have a discriminatory impact.

(5) The COO's Position

[110] The COO adopts the same position as the Caring Society, the AFN, and the Commission concerning the reasonableness of the Eligibility Decision. The COO focuses on the Tribunal's respect for First Nations' rights to self-determination. It also rejects the Applicant's submission that consultation and consensus with First Nations was required before the Eligibility Decision could be rendered. Canada cites no authority for its position that consultation with Frist Nations is required prior to the decision being rendered on this issue. It submits that the Court should endorse the approach taken by the Tribunal in constructing a remedy that accounts for the jurisdiction of First Nations.

(6) NAN's Position

[111] NAN adopts the same position as the Caring Society, the AFN, and the Commission concerning the reasonableness of the Eligibility Decision. It states that the overarching objective was to prevent further discrimination by exercising its remedial jurisdiction while also recognizing First Nations' jurisdiction over citizenship and membership. It states that the Tribunal properly considered eligibility under Jordan's Principle within the context of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [UNDRIP].

(7) Amnesty's Position

[112] Amnesty's interest in these proceedings is to ensure that the Court reviews the Eligibility Decision in light of the Applicant's international legal obligations.

(8) CAP's Position

[113] CAP notes that the Applicant accepts the eligibility of non-status children who are ordinarily resident on reserve for Jordan's Principle. CAP submits that the additional two classes of eligibility added by the Tribunal were reasonable in light of the evidence and prior proceedings.

C. *Procedural Fairness*

(1) Applicant's Position

[114] The Applicant submits that the Tribunal denied it procedural fairness by:

(a) changing the nature of the Complaint in the remedial phase;

(b) failing to provide notice that it was assessing the ongoing nature of the discrimination;

(c) failing to provide sufficient reasons concerning the individual remedies;

(d) requiring the parties to create a new process to identify beneficiaries of the compensation order; and

(e) inviting the parties to request new beneficiaries in the same decision that it determined who qualifies for compensation.

(2) Position of the Respondents and Intervener

[115] The Respondents and Intervener generally submit that the Applicant was not denied procedural fairness. The Tribunal had not yet completed the remedies stage. Therefore, it was reasonable for the Tribunal to find that discrimination had not ceased. They also submit that the Tribunal provided notice of the issues it was considering to all parties. In particular, the Merit Decision identified various issues that the Tribunal would consider in the future. Further, the Applicant did not seek judicial review of that decision.

VI. Analysis

A. *Preliminary Matter – Motion*

[116] The Applicant's written submissions included a reference to two Parliamentary Budget Office Reports [PBO Reports] dated March 10, 2021 and February 23, 2021. Prior to finalizing

the submissions, the Applicant sought agreement from the parties for their inclusion by way of email with a request of three days for reply. The parties did not respond to the Applicant's request and its written submissions included references to the two PBO Reports.

[117] The AFN objected to the inclusion of the PBO Reports and stated that their non-response was not an agreement for their acceptance. The AFN states that the Applicant did not bring forward a motion seeking to adduce fresh evidence on the matter. Therefore, the inclusion of the reports is improper and the Court should exclude them.

[118] The Applicant and the AFN agreed that the Court could dispense with this matter on the materials filed rather than devoting any time to this issue at the judicial review hearing. The Court agreed with this approach.

[119] Generally, an application for judicial review proceeds on the evidence before the decision-maker (*Assn of Architects (Ontario) v Assn of Architectural Technologists (Ontario)*, 2002 FCA 218). The scenarios where the Court can consider new evidence are limited and include such issues as procedural fairness and jurisdiction *(Gitxsan Treaty Society v HEU* (1999), [2000] 1 FC 135; *Reid v Canada (Citizenship and Immigration)*, 2020 FC 222 at para 33). The Applicant has raised the issue of the Tribunal rendering a decision without proper jurisdiction. In certain circumstances, this position can only succeed by bringing new evidence before the Court (*Gitxsan Treaty Society v Hospital Employees' Union* (1999), 177 DLR (4th) 687 at para 13 citing *R v Nat Bell Liquors Ltd* (1922), 65 DLR 1). I do not find that these circumstances arise here.

[120] I find that the inclusion of the PBO Reports has no bearing on the issues before this Court. The AFN is correct that the PBO Reports were not before the Tribunal in either of the applications for judicial review. As such, to the extent that they are relevant, I will rely on them solely for background purposes.

B. *The Compensation Decision*

(1) Reasonableness

[121] After considering the parties' submissions and the record before me, I find that the Tribunal has exercised its broad discretion in accordance with the *CHRA* and the jurisprudence. As a result, the Court defers to the Tribunal's approach and methodology concerning the Compensation Decision, which, when read as a whole, meets the *Vavilov* standard of reasonableness.

[122] The broad, remedial discretion of the *CHRA* must be considered in light of the context of this extraordinary proceeding, which involves a vulnerable segment of our society impacted by funding decisions within a complex jurisdictional scheme. It is not in dispute that First Nations occupy a unique position within Canada's constitutional legal structure. Further, no one can seriously doubt that First Nations people are amongst the most disadvantaged and marginalized members of Canadian society (*Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445 at paras 332, 334). The Tribunal was aware of this and reasonably attempted to remedy the discrimination while being attentive to the very different positions of the parties. The Tribunal's overview of the parties' respective positions at every stage of the proceedings highlighted the

fundamentally different perspectives of the Applicant and the Respondents. These differences were once again illustrated in the submissions on these judicial reviews.

[123] On one hand, the Applicant sought clarification and made submissions to focus on the requirement for individualistic proof of harms and the fact that it was attempting to remedy any shortcoming in funding with more funding. On the other hand, the Respondents and Interveners submit that the Tribunal was taking a holistic view of this matter. According to the Respondents, the Tribunal focused on the collective harms to children, families, and communities, from the residential school era through to the impacts caused by the funding of the FNCFS Program and Jordan's Principle.

[124] My reasons concerning the Tribunal's jurisdiction generally, as well as the eight specific challenges submitted by the Applicant, are set forth below.

(a) *The Scope of the Tribunal's Jurisdiction*

[125] There is no dispute amongst the parties concerning the principles governing human rights law and, in particular, the scope of the Tribunal's jurisdiction pursuant to the *CHRA*. However, the parties do disagree on whether the Tribunal exercised its powers within the parameters of the *CHRA*.

[126] The Supreme Court of Canada has previously held that the *CHRA* provides the Tribunal with broad statutory discretion to fashion appropriate remedies. These remedies attempt to make victims whole and prevent the recurrence of the same or similar discriminatory practices

(*Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 at paras 13-15; *Canada (Human Rights Commission) v Canada (AG)*, 2011 SCC 53 at para 62 [*Mowat*]).

[127] Similarly, the Federal Court of Appeal has held that the appropriate remedies in any given case is a question of mixed fact and law that is squarely within the Tribunal's expertise (*Canada (Social Development) v Canada (Human Rights Commission)*, 2011 FCA 202 at para 17 [*Walden 2011*]; *Collins v Attorney General of Canada*, 2013 FCA 105 at para 4).

[128] It is also clear that human rights legislation is fundamental or quasi-constitutional and should be interpreted in a broad and purposive manner (*Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566 at para 18). In other words, human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect (*Jane Doe v Attorney General of Canada*, 2018 FCA 183 at para 23 [*Jane Doe*]).

[129] The Applicant argues that the Tribunal only had authority to deal with the Complaint, which was in relation to an allegation of systemic underfunding. It also submits that there was insufficient evidence of individual harms before the Tribunal. The Applicant made similar arguments before the Tribunal as set out in the Compensation Decision at paragraphs 49-58. A brief summary of the Merit Decision, highlighted above at paragraphs 20-28, also set out some of the Applicant's arguments.

[130] The Respondents state that the Tribunal canvassed the nature of its jurisdiction at paragraph 94 of the Compensation Decision. The Tribunal wrote, "[t]he Tribunal's authority to

award remedies such as compensation for pain and suffering and special damages for wilful and reckless conduct is found in the *CHRA* characterized by the Supreme Court of Canada on numerous occasions, to be quasi-constitutional legislation." In that same paragraph the Tribunal also referenced passages it wrote on its authority to grant remedies in 2018 CHRT 4, which was unchallenged. 2018 CHRT 4 states:

> [30] It is through the lens of the *CHRA* and Parliament's intent that remedies must be considered, rather than through the lens of the Treasury board authorities and/or the *Financial Administration Act*, R.S.C., 1985, c. F-11. The separation of powers argument is usually brought up in the context of remedies ordered under section 24 of the *Charter (see for example Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, which distracts from the proper interpretation of the *CHRA*. Moreover, the AGC did not demonstrate that the separation of powers is part of the *CHRA* interpretation analysis. None of the case law put forward by Canada and considered by the Panel changes the Panel's views on remedies under the *CHRA*.

[131] The Applicant also argues that the Tribunal improperly exercised its authority by retaining jurisdiction over its subsequent rulings. According to the Applicant, the Tribunal effectively abdicated its adjudicative responsibilities by directing the parties to try to reach agreements and by remaining seized to oversee implementation.

[132] I disagree with the Applicant. I am persuaded by the Respondents' submissions that the Tribunal's approach to the retention of jurisdiction has precedent. In *Hughes v Elections Canada*, 2010 CHRT 4 [*Hughes 2010*], Elections Canada was deemed to have engaged in discriminatory practice by failing to provide a barrier-free polling location. In that case, the Tribunal awarded broad public interest remedies and remained seized until the order in question and any subsequent implementation orders were carried out. The Tribunal also ordered the parties to

consult with one another about various aspects of the Order, including their implementation (*Hughes 2010* at para 100).

[133] Tribunals have also adopted this approach in various cases involving financial remedies for a single victim and large groups of victims (*Grant v Manitoba Telecom Services Inc*, 2012 CHRT 20 at paras 15, 23; *Public Service Alliance of Canada v Canada (Treasury Board)*, 32 CHRR 349 at para 507, Order #9). The Tribunal also referenced that there was precedent for remaining seized with a case for up to ten years to ensure discrimination was remedied, mindsets had the opportunity to change, and settlement discussions occurred (Compensation Decision at para 10. See also 2018 CHRT 4 at para 388; *McKinnon v Ontario (Ministry of Correctional Services)*, 1998 CarswellOnt 5895).

[134] Additionally, the Tribunal pointed out that there is nothing in the language of the *CHRA* that prevents awards of multiple remedies (Compensation Decision at para 130). I agree. The large, liberal approach to human rights legislation permits this method.

[135] The fact that the Tribunal has remained seized of this matter has allowed the Tribunal to foster dialogue between the parties. The Commission states that the leading commentators in this area support the use of a dialogic approach in cases of systemic discrimination involving government respondents (Gwen Brodsky, Shelagh Day & Frances M Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies”, (2017) 6:1 Can J of Human Rights 1). The Commission described this approach as bold considering the nature of the Complaint and the complexity of the proceedings.

[136] The dialogic approach contributes to the goal of reconciliation between Indigenous people and the Crown. It gives the parties opportunities to provide input, seek further direction from the Tribunal if necessary, and access information about Canada's efforts to bring itself in compliance with the decisions. As discussed later in my analysis of the Eligibility Decision, this approach allowed the Tribunal to set parameters on what it is able to address based on its jurisdiction under the *CHRA*, the Complaint, and its remedial jurisdiction.

[137] The Commission states that the dialogic approach was first adopted in this proceeding in 2016 and has been repeatedly affirmed since then. It submits that the application of the dialogic approach is relevant to the reasonableness considerations in that Canada has not sought judicial review of these prior rulings.

[138] I agree with the Tribunal's reliance on *Grover v Canada (National Research Council)* (1994), 24 CHRR 390 [*Grover*] where the task of determining "effective" remedies was characterized as demanding "innovation and flexibility on the part of the Tribunal…" (2016 CHRT 10 at para 15). Furthermore, I agree that "the [*CHRA*] is structured so as to encourage this flexibility" (2016 CHRT 10 at para 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at para 40). The approach in *Grover*, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.

[139] Finally, given that Parliament tasked the Tribunal with the primary responsibility for remedying discrimination, I agree that the Court should show deference to the Tribunal in light of its statutory jurisdiction outlined above.

(b) *Scope of the Complaint*

[140] I am not persuaded by the Applicant's argument that the Tribunal transformed the Complaint from systemic discrimination to individual discrimination and, therefore, unreasonably awarded damages to individuals. The Applicant is correct that the Complaint was brought by two organizations rather than individuals. However, when one reviews the proceedings and rulings in their entirety, it is evident that from the outset, First Nations children and their families were identified as the subject matter of the Complaint or, alternatively, as victims.

[141] More importantly, the Merit Decision addressed all of the Applicant's submissions on this as well as the remaining issues. The Applicant did not challenge the Merit Decision. It cannot do so now. Nevertheless, I will review each of its submissions.

[142] The opening sentence of the Complaint reads as follows:

> On behalf of the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada, we are writing to file a complaint pursuant to the Human Rights Act regarding the inequitable levels of child welfare funding provided to First Nations children and families on reserve pursuant to the Indian and Northern Affairs Canada (INAC) funding formula…
>
> [Emphasis added.]

[143] The Applicant states that the Tribunal's Rules of Procedure require that the nature of a complaint be spelled out in the Statement of Particulars, to allow the Respondent awareness of the case to be met. It states that in this case there were no victims identified at the outset. The Applicant relies on *Re CNR and Canadian Human Rights Commission* (1985), 20 DLR (4th) 668 (FCA), which states:

> [10] This is not to say that such restitution is in every case impossible. On the contrary, paras. (*b*), (*c*) and (*d*) provide specifically for compensation, in kind or in money. Such compensation is limited to "the victim" of the discriminatory practice, which makes it impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination where, by the nature of things, individual victims are not always readily identifiable.

[144] The Applicant also cites *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*] where the Supreme Court of Canada emphasized that remedies must flow from the claim as framed by the complainants. The Applicant also cites *Moore* for the proposition that the Tribunal is not, in the words of the Applicant, a "roving commission of inquiry" (*Moore* at paras 64, 68-70).

[145] I agree with the principle that remedies must flow from the Complaint. However, I also note that the Court in *Moore* was still cognizant of the need for evidence in order to consider whether an individual or systemic claim of discrimination was established:

> [64] …the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centered on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine

> if *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

[146] Clearly, the Court in *Moore* focused on the absence of evidence related to systemic discrimination and noted that the evidence related to individual discrimination. In the present matter, there was evidence of both systemic and individual discrimination and evidence of harms entitling the Tribunal to award remedies for both.

[147] It is also important to note that at paragraph 58 of *Moore* the Court stated that discrimination is not to be understood in a binary way, or to be an "either or" proposition:

> It was, however, neither necessary nor conceptually helpful to divide discrimination into these two discrete categories. A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systematically on several.

[148] Regarding the statement of particulars, the Commission clearly identified who the Complaint sought to benefit. At paragraph 16 of its updated/amended statement of particulars, the Commission stated numerous times that the Complaint concerned "First Nations children and families normally resident on reserve." Similarly, at paragraph 17 of its updated/amended statement of particulars, the Commission described the issue as follows:

> Has the Respondent discriminated against Aboriginal children in the provision of a service, namely either the lack of funding and/or the effect of the funding formula used for the funding of child welfare services to First Nations children and families, or adversely affected them, the whole contrary to s.5 of the Act on the grounds of race and national or ethnic origin?
>
> [Emphasis added.]

[149] The Commission also clarified that that the Caring Society and the AFN were seeking compensation for those removed from their communities and the full and proper implementation of Jordan's Principle, pursuant to House of Commons Motion 296.

[150] In the Eligibility Decision, the Tribunal also noted at paragraph 200 that it had "already addressed the scope of the claim (complaint, Statement of Particulars, evidence, argument etc.) as opposed to the scope of the complaint in previous rulings and what forms part of the claim (see 2019 CHRT 39 at paras 99-102)." The Tribunal went further at paragraph 201 to state that "[t]his question was already asked and answered. The only other question to be answered on the Tribunal's jurisdiction here is if this motion goes beyond the claim or not. The Panel's response is that for issues I and II of this ruling it does not." The reference to "issues I and II" relate to the two additional categories of First Nations children.

[151] The Applicant, having been provided with the statements of particulars, responded with its own particulars. The Respondent also provided an updated statement of particulars in February 2013, which responded to the same issues it is now raising in this application.

[152] In addition, paragraphs 486, 487 and 489 of the Merit Decision set forth the positions of the Caring Society, the AFN, and the Applicant concerning compensation. There is no question that compensation was being sought for First Nations children and their families.

[153] I find that the Tribunal properly assessed the inter-relationship between the Complaint and the parties' statements of particulars. The Tribunal stated that the complaint form is just one

aspect of the Complaint and that it is does not serve the purposes of a pleading (*Polhill v Keeseekoowenin*, 2017 CHRT 34 at para 13 [*Polhill CHRT*]). This would appear to be consistent with the overall objective of the *CHRA*, where proceedings before the Tribunal are "intended to be as expeditious and informal as possible" (*Polhill CHRT* at para 19).

[154] The Applicant's argument that the Respondents did not identify the victim in the Complaint is technical in nature. It is inappropriate to read quasi-constitutional legislation in a way that denies victims resolution of their complaint because of a technicality. Furthermore, a complaint form only provides a synopsis of the complaint, which will become clearer during the course of the process, and as the conditions for the hearing are defined in the statement of particulars (*Polhill CHRT* at para 36). If the Applicant is suggesting it was prejudiced by this alleged transformation of the Complaint, I do not see it on the face of the record before me.

[155] I agree with the Respondents that the Applicant's arguments concerning individual versus systemic remedies could have been made earlier. For example, this argument could have been raised when the Merit Decision was released. At paragraphs 383-394, the Merit Decision includes various findings made in relation to First Nations children and their families. These findings are in reference to the First Nations children and families identified in the Complaint and the statements of particulars filed by the parties themselves. The Merit Decision's 'summary of findings' section analyzes, in detail, the findings in relation to the FNCFS Program and Jordan's Principle and it gave advance warning that damages would be addressed in the future. All of the Tribunal's findings in the Merit Decision are tied to First Nations children and their

families. These findings are reflected in virtually every subsequent decision, whether challenged or not.

[156] I agree with the Caring Society and the AFN that the Applicant cannot contest the compensatory consequences of systemic harm when the Applicant appears to accept the Tribunal's finding that widespread discrimination occurred. I note that, although the Applicant disagrees with the Tribunal's reasoning process and outcome, it recognized "a need to compensate the children affected" in its opening statement at the hearing for this judicial review. I also agree that the quantum of compensation awards for harm to dignity are tied to seriousness of the psychological impacts and discriminatory practices upon the victim, which does not require medical or other type of evidence to be proven.

[157] The Tribunal reviewed the Complaint and Statement of Particulars and noted that the Caring Society and AFN requested compensation for pain and suffering and special compensation remedies. At paragraphs 6-10 of the Compensation Decision the Tribunal reproduced its three-stage approach to remedies from 2016 CHRT 10 and its prior rulings to indicate that compensation was going to be addressed. Prior to the Compensation Decision, the Tribunal sent all the parties written questions concerning compensation and it invited submissions. That document also indicated the positions of the Caring Society and the AFN on damages. The Applicant's memorandum of law at paragraph 54 acknowledges that the Caring Society's request for a trust fund was to provide some compensation to removed children. The Applicant went on to suggest that the Caring Society did not request compensation be paid

directly to individuals. Both of these statements indicate awareness that individual remedies were being contemplated.

[158] Compensation awarded pursuant to section 53(2)(a) of the *CHRA* is, of course, to compensate individuals for the loss of their right to be free from discrimination and the experience of victimization (*Panacci v Attorney General of Canada*, 2014 FC 368 at para 34). It is also intended to compensate for harm to dignity (*Jane Doe* at paras 13, 28). At paragraph 467 of the Merit Decision, the Tribunal acknowledged that the harm in question is the removal of First Nations children on the children and their families. At paragraphs 485-490 of the Merit Decision, the Tribunal summarized the parties' positions on compensation. It was clearly set forth that individual compensation was being sought. The Tribunal concluded by indicating it would send the parties some questions prior to determining compensation.

[159] Canada did not challenge the rulings prior to the Compensation Decision. Rather, Canada responded to the questions posed by the Tribunal on March 15, 2019. It is particularly important to note the third question posed by the Tribunal and its associated issues:

> 3. The Panel notices the co-complainants have requested different ways to award remedies in regards to compensation of victims under the *CHRA*.
>
> The Caring Society requested the compensation amounts awarded should be placed into an independent trust that will fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services. The Caring Society submits that an in-trust remedy that will lead to the establishment of a program of healing measures directed at persons who have been subjected to substandard child and family services is better suited to offering the children who have been taken into care since 2006 a meaningful remedy than awards of individual compensation could ever be. In this regard, the Caring Society specified that an analogy may be drawn to the

> component of the Indian Residential Schools Settlement that provided for the payment of amounts to a healing foundation for the purpose of setting up healing programs for the benefit of survivors.
>
> The Panel is aware of the IAP process for residential schools' survivors and also knows there were both a healing foundation established and a fund for individual compensations for people that attended residential schools and then, there was an adjudication process for victims of abuse in the residential schools.
>
> The AFN requested the financial compensation be awarded to the victims and their families directly with its assistance to distribute the funds rather than placed in a healing fund.
>
> Why not do both instead of one or the other?
>
> The Panel would not want to adopt a paternalistic approach to awarding remedies in deciding what to do with the compensation funds in the event a compensation is awarded to the victims.
>
> Some children are now adults and may prefer financial compensation to healing activities. Some may want to start a business or do something else with their compensation. This raises the question of who should decide for the victims? The victims' rights belong to the victims do they not?
>
> [Emphasis added.]

[160] At the Tribunal, the Applicant asserted that individual compensation must be predicated on individual victims being a party to the Complaint. The Tribunal addressed this argument by pointing out that section 40(1) of the *CHRA* allows a group to advance a complaint. The Tribunal also noted that pursuant to AFN resolution 85/201 the AFN is empowered to speak on behalf of First Nations children that have been discriminated against by Canada. This was a reasonable finding.

[161] The above passage indicates that the Tribunal considered systemic reforms and individual compensation at the heart of the Complaint. Further, over the course of many hearings the Applicant never adduced evidence in response to this proposition. The Applicant only ever stated that they disagreed with it or that the evidence was lacking. The Tribunal gave abundant consideration to the evidence before awarding relief, and was entitled to receive and accept any evidence it saw fit pursuant to section 50(3)(c) of the *CHRA*.

[162] I disagree with the Applicant's characterization of the decisions following the Merit Decision as an "open-ended series of proceedings." Rather, the subsequent proceedings reflect the Tribunal's management of the proceedings utilizing the dialogic approach. The Tribunal sought to enable negotiation and practical solutions to implementing its order and to give full recognition of human rights. As well, significant portions of the proceedings following the Merit Decision were a result of motions to ensure Canada's compliance with the various Tribunal orders and rulings.

[163] Additionally, I find that the Tribunal properly analyzed the *CHRA* and understood that victims and complainants can be different people (Compensation Decision at paras 112-115). The Tribunal has awarded non-complainant victims compensation before, in a pay equity case (*Public Service Alliance of Canada v Canada Post Corporation*, 2005 CHRT 39 at para 1023, Order #1 [*PSAC CHRT*]). It is also true that, in that same case, the Tribunal declined to award compensation for pain and suffering where no victims testified (*PSAC CHRT* at paras 991-992). However, these paragraphs emphasize that other evidence substantiating the claim of discrimination was lacking. As discussed below, this is unlike the present case because here, the

Tribunal relied on extensive evidence. This evidence was referred to throughout the various decisions.

[164] Section 50(3)(c) of the *CHRA* gives the Tribunal broad discretion to accept any evidence it sees fit, even if that evidence would not be available in a court of law, including hearsay. In *Canadian Human Rights Commission v Canada (Attorney General)*, 2010 FC 1135 aff'd *Walden 2011* [*Walden FC*], this Court held that the Tribunal does not necessarily need to hear from all the alleged victims of discrimination in order to compensate all of them for pain and suffering (at para 73). There is nothing in the *CHRA* that requires testimony from a small group of representative victims either. The Tribunal has the discretion to rely on whatever evidence it wishes so long as its decision-making process is intelligible and reasonable.

[165] It is also important to clarify what pain and suffering the Tribunal was considering. The Applicant argues that individual complainants were required to provide evidence to particularize their harms. However, the Tribunal's overview of the evidence makes it clear that the harm in question includes harms to dignity stemming from the removal of children from their families (Compensation Decision at paras 13, 82-83, 86, 147-148, 161-162, 180, 182, 188, 223, 239A). As such, there was no need to particularize the specific harms flowing from the removal. It is the removal itself and the harm to dignity that the Tribunal was considering. The testimony of children and other victims was therefore unnecessary.

[166] I also find that the Tribunal did not err in finding that it had extensive evidence of both individual and systemic discrimination. At paragraphs 406-427 of the Merit Decision the

Tribunal discussed the impact that removal of a child has on families through the lens of the residential school system. The Tribunal referred to the evidence of Dr. John Milloy, Elder Robert Joseph, and Dr. Amy Bombay.

[167] In the Compensation Decision, the Tribunal referred to the evidence it was relying on, which it fulsomely canvassed at paragraphs 156-197. I find that this treatment of the evidence is consistent with the principles regarding the sufficiency of evidence as found in *Moore*. In short, the Tribunal had a basis upon which to decide the way it did.

[168] I note that the Tribunal rejected Canada's individual versus systemic dichotomy as did the Court in *Moore* (Compensation Decision at para 146; *Moore* at para 58). The Applicant's argument that it is necessary to have proof of individual harm and the effect of removal of children from families and communities highlights this dichotomy. Clearly, the parties' different perspectives toward the nature of this dispute and the perspective of whether discrimination was being remedied resulted in the multiplicity of proceedings.

[169] I find that individual and systemic discrimination are not mutually exclusive for the purposes of such a compensation order. Furthermore, the idea that victims should be barred from individual remedies because of the systemic nature of the harm is unsupported by the language in the *CHRA* (*Moore* at para 58; *Hughes 2010* at paras 64-74).

[170] The Commission submits that the Applicant relies heavily on a statement made by the Federal Court of Appeal that it would be impossible to award individual compensation to groups

as they are not always readily available (*Re CNR Co and Canadian Human Rights Commission* (1985), 20 DLR (4th) 668 (FCA) at para 10). The Respondents note that the Supreme Court of Canada reversed this judgment (*CN v Canada (Human Rights Commission)*, [1987] 1 SCR 1114). Therefore, they request that this Court disregard the Applicant's submission. Notwithstanding the Supreme Court's decision, I agree with the Commission that the statement relied on by the Applicant is distinguishable because, as already pointed out above, it is not necessary for individuals to be present and provide evidence.

[171] The Commission states that the Tribunal reasonably concluded that the *CHRA* allows it to compensate non-complainant victims of discrimination. The Commission submits that the Tribunal properly distinguished *Menghani v Canada (Employment & Immigration Commission)* (1993), 110 DLR (4th) 700 (FCTD) [*Menghani*]. The Applicant submits *Menghani* as an authority for not granting a remedy to a non-complainant. Having reviewed *Menghani* and the Tribunal's reasons, I find that the Tribunal properly distinguished the case in light of its review of the Applicant's argument that child victims testify. The issue in *Menghani* was the lack of standing under the *CHRA* for the non-complainant, which is not the case in the present matters.

[172] Further, in the Compensation Decision, the Tribunal's response to the Applicant's submission was as follows:

> [108] It is clear from reviewing the Complainants' Statement of Particulars that they were seeking compensation from the beginning and also before the start of the hearing on the merits. The Tribunal requests parties to prepare statements of particulars in order to detail the claim given that the complaint form is short and cannot possibly contain all the elements of the claim. It also is

> a fairness and natural justice instrument permitting parties to know their opponents' theory of the cause in advance in order to prepare their case. Sometimes, parties also present motions seeking to have allegations contained in the Statement of Particulars quashed in order to prevent the other party from presenting evidence on the issue.
>
> [109] The AGC responded to these compensation allegations and requests both in its updated Statement of Particulars of February 15, 2013 demonstrating it was well aware that the complainants the Caring Society and the AFN were seeking remedies for pain and suffering and for special compensation for individual children as part of their claim.
>
> …
>
> [144] The Panel finds it is unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it. The AGC in making its submissions does not consider the Tribunal's findings in 2016 accepting numerous findings in reliable reports as its own. The AGC omits to consider the Tribunal's findings of the children's suffering in past and unchallenged decisions in this case.
>
> [Emphasis added.]

[173] The Applicant also submits that the categories of people entitled to compensation as set out in paragraphs 245-251 of the Compensation Decision is quite different from what the Caring Society and AFN asked for. In those paragraphs, the Tribunal refers to the terms “necessarily removed” children, “unnecessarily removed” children, children affected by Jordan’s Principle as well as parents and caregiving grandparents. In my view, the Tribunal reasonably considered the various ways that underfunding of the FNCFS Program and Jordan’s Principle led to the removal of children from families and communities for the complex and multi-faceted reasons that the Applicant pointed out. It was reasonable to make finer distinctions between the reasons for

removal, but regardless of the reason, the affected children were removed and were denied culturally appropriate services in their own communities. Again, this was the basis of the Complaint and the Orders are not so different than what the Caring Society and the AFN were asking for.

[174] For all of the above reasons, I find that the Tribunal did not go beyond the scope of the Complaint in arriving at its decision.

(c) *Class Action*

[175] The Applicant submits that the Order the Tribunal made was equivalent to a class action settlement without the proper representation of class members. As such, the Tribunal improperly extended its powers beyond what the legislation intended, which rendered the decision unreasonable (*Vavilov* at para 68). I disagree.

[176] The Applicant mischaracterizes the compensation award. Canada compares the award to the type of damages that one may obtain in a court proceeding. However, awards for pain and suffering under section 53 of the *CHRA* are compensation for the loss of one's right to be free from discrimination, from the experience of victimization, and the harm to their dignity. A victim is not required to prove loss (*Lemire v Canada (Human Rights Commission)*, 2014 FCA 18 at para 85).

[177] It is clear that the Tribunal did not order compensation for tort-like damages or personal harm as is required in a class action proceeding. Rather, the Tribunal, as highlighted above, had a

staged approach to remedies and specifically afforded the parties with an opportunity to present their positions on compensation. Once the submissions were received, the Tribunal considered the arguments and ordered compensation under section 53 of the *CHRA*.

[178] As seen above, the Tribunal can award both individual and systemic remedies, subject to the sufficiency of the evidence before it. A class action, however, focuses on the individual compensation award and there is no certainty that any systemic remedies will be awarded. The *CHRA* afforded the Caring Society and AFN with a process where both systemic and individual remedies can be sought and the Tribunal did not err when awarding both. The development of a Compensation Framework was consistent with the goals of determining the process for compensation to individuals.

[179] I also note that there is nothing in the *CHRA* that prohibits individuals from seeking remedies by way of class actions or separate legal actions. Other court processes can be pursued by the victims should they opt out of the Compensation Framework. As the Applicant pointed out, the AFN has commenced a class action for a class of people affected by removals. However, I find that the class action proceeding does not have a bearing on the issues at hand for the reasons just stated. The development of the Compensation Framework also does not suggest that a class action was the preferred way or the only way to proceed. I agree with the Caring Society that the option of a class action does not negate the Compensation Orders. Both remedies can be pursued simultaneously.

(d) *Principles of Damages Law*

[180] The Applicant also submits that the Compensation Decision breaches the principles of damages law. The Applicant argues that the Compensation Decision fails to distinguish between children removed for a short time versus children removed for a longer time and between children who experienced different circumstances. The Applicant cites many cases related to civil claims, which stand for the proposition that causation and proportionality must be considered when awarding damages (See e.g. *Whiten v Pilot Insurance,* 2002 SCC 118). However, I find that these cases are distinguishable due to the statutory framework at play in this case. The *CHRA* enables the Tribunal to award compensation for one's loss of dignity from discriminatory actions. As stated previously, no actual physical harm is required.

[181] Once again, the Applicant submits that the Tribunal should have required at least one individual to provide evidence about the harms they suffered (*Walden FC* at para 72). It states that it is unreasonable to assume that all removed children, regardless of their unique circumstances, meet the statutory criteria for compensation without evidence thereof.

[182] I disagree. Paragraph 73 of *Walden FC* is a direct answer to the Applicant's submission:

> 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 suffering of a group.

[183] The Respondents' position has consistently been that they seek to remedy the harms arising from the removal of First Nations children from their families and their communities.

They were not seeking individual tort-like loss suffered by each child or their families. The Tribunal reviewed the evidence related to harm in the Merit Decision, the Compensation Decision, and throughout numerous other rulings.

[184] The Applicant also cites *Hughes v Canada (AG)*, 2019 FC 1026 at paras 42, 64 [*Hughes 2019*], stating that there must be a causal link between the discriminatory practice and the loss claimed. It submits that the Tribunal did not engage in an analysis of the effects that underfunding had on any of the recipients of compensation or the harms they suffered. The Applicant also states that the Tribunal did not differentiate between the circumstances of the recipients. The Applicant also refers to *Youmbi Eken v Netrium Networks Inc*, 2019 CHRT 44 [*Netrium*] for the proposition that the statutory maximum is awarded only in the most egregious of circumstances (at para 70).

[185] I agree with the principles of *Hughes 2019* as pointed out by the Applicant. However, unlike the present case, the damages in that case were lost wages and the issue was the cut-off date for the damages. This matter involves an award of compensation for pain and suffering caused by discriminatory conduct resulting in the removal of children from their homes and communities. This is clearly distinguishable from a wage loss complaint. In *Hughes 2019* the Court also noted that causation findings are intensive fact-finding inquiries which attract a high degree of deference (*Hughes 2019* at para 72). I agree.

[186] The circumstances in *Netrium* are also unlike the circumstances of this matter. The complainant was an adult who suffered a job loss and she was awarded $7,000. In this matter, we

are dealing with the harmful effects of removal on children over a considerable period of time. The awarding of the statutory maximum is within the discretion of the Tribunal to award based on the facts before it.

[187] The Applicant states that where the jurisdiction to consider group claims exists in human rights legislation, it is because legislatures have clearly provided it, such as the jurisdiction for Tribunals to deal with costs (*Mowat* at paras 57, 60). In *Mowat* the appellant argued that the broad, liberal, and purposive approach could lead to a finding that costs or expenses are compensable. That is not the case here. Neither the Caring Society nor the AFN are seeking anything more than what is contained in the *CHRA* and within the scope of the Tribunal's jurisdiction under the *CHRA*.

[188] I agree with the Respondents that tort law principles do not apply. The harm in this case, as determined by the Tribunal, was the removal of First Nations children from their families because of Canada's discriminatory funding model. As stated above, awards of compensation for pain and suffering are intended to compensate for an infringement of a person's dignity. The loss of dignity resulting from removal is a different harm that is not measured in the same manner as a tort or personal injury.

[189] The *CHRA* is not designed to address different levels of damages or engage in processes to assess fault-based personal harm. The Tribunal made human rights awards for pain and suffering because of the victim's loss of freedom from discrimination, experience of victimization, and harm to dignity. This falls squarely within the jurisdiction of the Tribunal.

[190] The quantum of compensation awards for harm to an individual's dignity is limited but is tied to the seriousness of psychological impacts upon the victim. The Tribunal considered the approach taken in the Residential Schools Settlement Agreement Common Experience Payment. However, the Tribunal only considered this for a Compensation Framework, not for the application of class action principles. The very purpose of the compensation award is to compensate a biological parent or grandparent for the loss of their child to a system that discriminated against them because they are First Nations.

[191] I agree with the Commission that it was open for the Tribunal to find that financial awards under the *CHRA* serve particular purposes that are unique to the human rights context. Namely, compensation for pain and suffering and special compensation for wilful and reckless discrimination, which are permitted within the quasi-constitutional *CHRA.*

[192] In this case, sections 53(2)(a), 53(2)(e), and 53(3) of the *CHRA* are relevant. They relate to a victim's dignity interests and the seriousness of psychological impacts. Vulnerability of the victim is relevant to the quantum of award, and the Commission submits that this is especially true when the victims are young (*Opheim v Gill,* 2016 CHRT 12 at para 43).

[193] The Caring Society submits that the quantum of damages awarded in the Compensation Decision is more than reasonable considering that Dr. Blackstock herself received two awards of $10,000. When this amount is viewed in relation to the category of victims and the harms they experienced, the Caring Society submits that the maximum award is reasonable. I agree with this submission.

[194] Ultimately, the unique context of the harms that were found in this case limits the application of damages law, contrary to the Applicant's submissions. In the unchallenged Merit Decision, it was clear that the harm was related to the removal of children from their families and the harm to the children's dignity as opposed to individualized tort-like harms that they suffered from the removal. The Tribunal has already determined what the harms were, who suffered those harms, and that the harms were caused by Canada's discriminatory funding regime (Merit Decision at para 349).

(e) *Wilful and Reckless*

[195] The Applicant submits that the Tribunal's finding of wilful and reckless discrimination was unreasonable and unprecedented because it had no regard to proportionality or the evidence. I disagree.

[196] Once again, the Applicant states that this cannot be determined without an inquiry into the facts and circumstances of individual cases. A reasonable decision would assess the causal relationship between the act of underfunding and the harm suffered and award compensation proportional to individual experiences. The Applicant states that the Tribunal did not do this. These arguments were already addressed in the previous section of this decision.

[197] The Applicant states that Canada did not discriminate wilfully and recklessly but rather made significant investments and changes to policies. For example, Canada commenced the funding of prevention activities. Furthermore, even if underfunding was a contributing factor to adverse outcomes for First Nations children, it was not the only factor in a complex situation.

The Applicant cites *Canada (AG) v Johnstone*, 2013 FC 113 [*Johnstone*] (aff'd 2014 FCA 110) where the Court set out the purpose of section 53(3) and defined "wilful and reckless" (*Johnstone* at para 155). Section 53(3) is a punitive provision, intended to provide a deterrent and to discourage those who deliberately discriminate. To be wilful, the discriminatory action must be intentional. Reckless discriminatory acts "disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (*Johnstone* at para 155).

[198] In this proceeding, the Applicant pointed to changes it was making when the Tribunal ruled. It also pointed out additional changes it made to specifically address matters identified by the Tribunal. The Applicant states that there was no deliberate attempt to ignore the needs of First Nations children.

[199] The Caring Society and AFN submit that extensive evidence was before the Tribunal showing that the Applicant was aware of the ongoing harm to First Nations children. Despite this, the Applicant chose not to take corrective action. The Tribunal pointed to the various Wen:De Reports, the National Policy Review reports, and the Auditor General Reports which were accepted by the parties in the Merit Decision (See paras 257-305). The Tribunal also heard evidence from many witnesses, all of which was canvassed in the Merit Decision (See paras 149-216) and the Compensation Decision (see paras 33, 90, 144-145, 152, 155-157, 162, 172, 174, 184).

[200] Based on its review of various internal, external, and parliamentary reports over the course of twenty years, the Tribunal had ample evidence to determine that Canada was aware of

these issues. Therefore, it had a basis to award additional compensation up to $20,000 based on what it considered to be Canada's wilful and reckless discriminatory behaviour.

[201] When there is evidence that discriminatory practices caused pain and suffering, compensation should follow and be neither in excess of the $20,000 cap nor too low so as to trivialize the social importance of the *CHRA*. Special compensation for wilful and reckless conduct is a punitive provision intended to deter discrimination (*Johnstone* at para 155).

[202] As stated above, proof of loss by a victim is not required. The Commission submits that 'punitive' ought to be read in light of *Lemire*. In *Lemire*, the Federal Court of Appeal held that wilful and reckless conduct damages under *CHRA* are not penal in nature, but are to ensure compliance with statutory objectives of the *CHRA* (at para 90).

[203] The Tribunal properly considered the factual record in determining whether to award damages for wilful and reckless conduct. There was more than enough evidence in the form of reports, which Canada participated in, and which were independent, to ground this finding. The process and outcome of the Tribunal's decision amply reflects an internally coherent and rational chain of analysis.

(f) *Definitions in the Definitions Decision*

[204] The Applicant submits that the Compensation Decision and the subsequent decisions, particularly the Definitions Decision, produce unreasonable results. This is true even if the Court finds that some compensation to some children is appropriate for Jordan's Principle. More

specifically, the Applicant submits that the combined effect of these decisions is that children and their caregivers are entitled to the maximum compensation even where no request is made; where the failure or delay to provide the service caused no harm; or the delay was not greater than what was experienced by a non-First Nations child. It again points to the lack of proportionality and a lack of evidence of individual harm. It submits that the Tribunal determined that every case is the worst case, which is the wrong way to consider the issue.

[205] As noted above, the Definitions Decision considered three terms used in the Compensation Decision: ‘essential services’, ‘service gaps’, and ‘unreasonable delay’. The parties could not agree on their meaning and had to ask the Tribunal to clarify these terms.

[206] The Applicant submits that the term ‘essential services’ was used multiple times in the Compensation Decision without being defined. Additionally, the Tribunal unreasonably rejected the Applicant’s submission that an ‘essential service’ was one that was necessary for the safety and security of the child. The Applicant takes issue with the Tribunal’s finding that any conduct that widens the gap between First Nations children and the rest of society is compensable, not only when it has an adverse impact on the health and safety of a First Nations child (Definitions Decision at para 147).

[207] The Caring Society submits that this Court should show deference to the Tribunal’s approach in developing a Compensation Framework for victims, which ultimately referenced these terms. The orders, read together, clearly define the class of victims who will receive compensation. I agree with the Caring Society’s submissions that the Tribunal also logically

defined ‘essential services’ in its assessment of compensation, limiting compensation to situations “that widened the gap between First Nations children and the rest of Canadian society.” The Tribunal stated numerous times that the goal of the exercise of its remedial discretion was to remedy discrimination. Its findings in relation to ‘essential services’ are consistent with the goal of remedying discrimination against First Nation children.

[208] In comparison, the Applicant submits that the Tribunal’s definition of the term ‘service gap’ is unreasonable. It submits that the Tribunal unreasonably rejected Canada’s proposed criteria that would have given meaning to this term: the service should be requested; there should be a dispute between jurisdictions regarding who should pay; and the service should normally be publicly funded for any child in Canada (Definitions Decisions at para 107).

[209] NAN notes that Canada appears to take issue with the fact that the Compensation Framework permits compensation for unmet services absent a “request” being communicated to Canada. NAN agrees with the Caring Society’s position on the issue of ‘service gaps’ and submits that the Tribunal made a reasonable decision in accordance with the evidence and submissions before it. NAN made submissions before the Tribunal on the definition of ‘service gaps’ from the perspective of northern First Nations who routinely face systemic service gaps in essential services. NAN submits that it is clear from the Compensation Framework that the Tribunal carefully considered NAN’s perspective and incorporated its submissions in the ‘service gap’ definition. I find that the Tribunal had evidence and submissions before it to make this finding within the overarching jurisdiction of remedying discrimination.

[210] Regarding the term ‘unreasonable delay’, the Applicant submits that the Tribunal acknowledged that the Applicant must provide a much higher level of service in order to remedy past injustices and that it should not have to compensate where there are only minor deviations from those standards. However, it did not impose any reasonable limits (Definitions Decision at para 171, 174). In short, the Applicant submits that it is unreasonable to compensate everyone who experiences delay for any service at the levels ordered in the Compensation Decision.

[211] The Caring Society disagrees with the Applicant that compensation for any delay is inappropriate, as it is only *unreasonable* delay that factors into compensation. I agree with the Caring Society’s characterization of the Tribunal’s concept of delay. It is clear that not every delay is a factor. Further, the Caring Society takes issue with the Applicant’s characterization of the trust orders. Although the Applicant is not challenging them, the Caring Society argues that the Applicant is attempting to rely on them to raise doubts about the Tribunal’s overall analysis. The Caring Society states that these orders are reasonable and “anchored in sound legal principles.” I agree for the reasons stated above.

[212] The Commission submits that the Tribunal’s decision to compensate estates is justified and reasonable. The *CHRA* has broad remedial purposes and does not bar compensation to estates, as discussed in *Stevenson v Canada (Human Rights Commission)* (1983), 150 DLR (3d) 385. Canada has not actually pointed to any contrary decisions by a federal court interpreting the *CHRA.*

[213] The Applicant does rely on *Canada (AG) v Hislop*, 2007 SCC 10 [*Hislop*], but this case dealt with individuals who were deceased *before* the allegedly discriminatory laws were passed. Further, *Hislop* did not create a general rule that claims under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] always end upon death. The Tribunal also addressed *Gregoire,* wherein the British Columbia Court of Appeal found that an estate was not a "person" capable of making a claim under British Columbia's *Human Rights Code* (*British Columbia v Gregoire,* 2005 BCCA 585 [*Gregoire*] at para 14). The Tribunal distinguished the present matter from *Gregoire* and found that the claims for First Nations children and families were being pursued on behalf of "victims" – a term not used in British Columbia's *Human Rights Code.* As stated above, the Applicant was not necessarily challenging the finding with respect to estates, but argued it was yet another example of an unreasonable reasoning process.

[214] With respect to compelling public interest considerations, the Tribunal held that compensating estates would serve a dual purpose. It would compensate victims for pain and suffering caused by discrimination and would deter Canada from discriminating again. I agree with the Commission's submission that recent Tribunal rulings, which accept that financial remedies may be awarded to estates, suggests that the panel in this case was not rogue, but rather, reasonable.

[215] As stated throughout this judgment and reasons, the Applicant's insistence on individual harms misinterprets the nature of the Complaint advanced by the Caring Society and the AFN. Both were seeking remedies caused by the mass removal of children. As also noted above, the

scope of the findings of the Tribunal were all an attempt to remedy discrimination, which it has jurisdiction to do. This is common as a proceeding moves through the process, but even more so considering the scope of the Complaint and the unprecedented nature of the claims and proceedings. The evolution of this case is not a departure from the essence of the Complaint. It is but a refinement due to the unique nature of this very complex and precedent-setting process.

[216] After considering the parties' submissions, I find that the Tribunal reasonably determined definitions for the terms 'essential services', 'service gaps', and 'unreasonable delay'. The Tribunal based its determinations on the Compensation Decision and with the overall goal of remedying and preventing discrimination. It reasonably exercised its jurisdiction as permitted under the *CHRA*.

(g) *Inadequate Reasons*

[217] The Applicant submits that the Tribunal's reasons were inadequate because they failed to explain its departure from the *Menghani*, *Moore*, and *CNR* decisions. Furthermore, the reasons were unresponsive to Canada's arguments. For example, the Applicant states that the Tribunal concluded that *Gregoire* does not apply because this is a complaint brought by organizations on behalf of victims and *Gregoire* involved a single representative of an individual complainant (Additional Compensation Decision at paras 133-134 distinguishing *Gregoire* at paras 7, 11-12). The Applicant submits that the Tribunal did not explain the significance of this difference.

[218] While the Applicant is not challenging the Tribunal's findings on compensation for estates, it nevertheless points out the Tribunal's failure to apply the rule in *Hislop*. *Hislop* stands

for the proposition that an estate is not an individual and therefore it has no dignity than can be infringed. The Tribunal simply stated that the rule in that case is context-specific, and the human rights context justifies departing from the rule. The Applicant states that the Tribunal failed to explain why and that this is an example of lack of reasoning.

[219] The Applicant submits that the Tribunal also ignores relevant statutory authority, including sections 52 and 52.3 of the *Indian Act*. Section 52 of the *Indian Act* gives the Minister the authority to deal with the property of beneficiaries lacking competence. Section 52.3 contemplates the Minister working with Band Councils and parents to manage the property of minors within the relevant provincial schemes. Since the complainants did not challenge the constitutionality of the *Indian Act* the Tribunal was obliged to follow it.

[220] All of the above passages throughout this section of my reasons actually illustrate the scope of the Tribunal's analysis as well as the rationale for its findings. I find that the reasons are sufficient to show why it made its findings. The Applicant simply disagrees with those findings.

(h) *Jordan's Principle Compensation*

[221] The Applicant states that through a series of decisions the Tribunal has created a new government policy and awarded compensation for a failure to implement that policy. The Applicant states that by adopting Jordan's Principle, the House of Commons endorsed the principle that intergovernmental funding disputes should not delay the provision of necessary products and services to First Nations children.

[222] The Applicant submits that Jordan's Principle received only passing reference in the Complaint. Over the course of the litigation, the Tribunal transformed Jordan's Principle from a resolution aimed at addressing jurisdictional wrangling, to a "legal rule" that ensures substantive equality to a far greater group than First Nations children on reserve and in the Yukon. The Applicant says it "accepted" these rulings because they reflected progressive policy choices and that the results have been impressive.

[223] The Caring Society disagrees with the Applicant's assertion that Jordan's Principle never formed part of the Complaint. Rather, they submit that the Tribunal had previously addressed this claim and ruled that Jordan's Principle was intertwined with the FNCFS Program (see paragraph 25 above). Because the Applicant previously accepted these findings, they state that Canada cannot argue that they are unreasonable on judicial review. I agree. The Applicant has forgone its right to challenge the Merit Decision. Also, as pointed out in paragraph 14 above, the MOU between AANDC and Health Canada also referenced the link between the FNCFS Program and Jordan's Principle.

[224] I agree with the Commission that the issues pleaded are broad enough to encompass matters relating to Jordan's Principle. The Tribunal made rulings in 2016 and 2017 that expressly rejected the Applicant's argument that Jordan's Principle was beyond the scope of the Tribunal's inquiry. I agree with the Commission that if the Applicant truly believed that Jordan's Principle is beyond the Tribunal's scope, then it should have applied for judicial review of those earlier rulings.

(i) *Compensation to Caregivers*

[225] The Applicant states that there was no basis for awarding compensation to caregivers as there was no evidence of the impact of funding policies on that group. Additionally, family members must advance claims themselves and provide evidence of the harm they suffered, which they have not (*Menghani* at 29).

[226] The Applicant submits that the Complaint was silent regarding compensation. Furthermore, prior to the AFN's submissions that family members should be compensated, the Caring Society had only submitted that any compensation should be paid into a trust. Since there were no caregiver complainants and no evidence of the harms they suffered, the decision is unreasonable.

[227] In my view, the Tribunal reasonably found that the AFN is empowered via the mandate of the Chiefs-in-Assembly to speak on behalf of First Nations parents and caregiving grandparents as victims of Canada's discrimination. The Tribunal also interpreted the *CHRA* and found that complaints on behalf of victims made by representatives can occur. The Commission has the discretion to refuse to deal with a complaint if the victim does not consent.

[228] The record also confirms that the Tribunal always used the terms 'First Nations children and families' from the Merit Decision onwards. The Complaint, statement of particulars, and numerous passages of the Merit Decision confirm this. In fact, all parties' submissions referred to the victims in this manner.

[229] There was extensive evidence before the Tribunal at the hearing of the Compensation Decision. This evidence particularized the alleged harms and the impact of removal on children, families, and communities. There was extensive evidence from several experts as well as reports that Canada had endorsed, including the Royal Commission on Aboriginal Peoples, which explained the significance of family in First Nations culture. The Tribunal therefore had evidence before it to inform its ruling concerning families.

[230] The Tribunal received and accepted evidence it saw fit pursuant to section 50(3)(c) *CHRA*. It accepted evidence in relation to harms suffered by these victims, which was ample and sufficient to make its finding that each parent or grandparent who had a child unnecessarily removed has suffered. The evidence of the various reports showed that communities and extended families also suffered by the removal of children but the Tribunal did not extend the compensation to all family members. In my view, the Tribunal was sensitive to the kinship systems in First Nations communities (See e.g. Compensation Decision at para 255). At the same time, it was also cognisant of the limits to its jurisdiction and the evidence in restricting the compensation only to parents or caregivers despite the general submissions related to ‘families’. Ultimately, the Tribunal’s reasons were clearly alive to the issue of not only children, but families and caregivers as well (Compensation Decision at paras 11, 13, 32, 141, 153-155, 162, 166-167, 171, 187, 193, 255). The Tribunal’s finding with respect to compensating parents or caregiving grandparents is transparent, intelligible, and justified.

(2) Compensation Decision Conclusion

[231] Ultimately, the Compensation Decision is reasonable because the *CHRA* provides the Tribunal with broad discretion to fashion appropriate remedies to fit the circumstances. To receive an award, the victims did not need to testify to establish individual harm. The Tribunal already had extensive evidence of Canada's discrimination; the resulting harm experienced by First Nations children and their families (the removal of First Nations children from their homes); and Canada's knowledge of that harm. Further, the Tribunal did not turn the proceedings into a class action because the nature and rationale behind the awards are different from those ordered in a class action. From the outset, First Nations children and families were the subject matter of the complaint and Canada always knew that the Respondents were seeking compensation for the victims. If Canada wanted to challenge these aspects of the Complaint, it should have done so earlier. Canada may not collaterally attack the Merit Decision or other decisions in this proceeding.

C. *The Eligibility Decision*

[232] Before delving into the analysis of this issue, there are several things to note about the Eligibility Decision. First, in describing the context, the Tribunal pointed out that the Merit Decision confirmed that "the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services and/or differentiated adversely in the provision of services, pursuant to section 5 of the *CHRA*" (Eligibility Decision at para 2). Next, the Tribunal described the steps Canada would take to implement the Tribunal's order and additional findings in 2017 CHRT 14 regarding Canada's narrow interpretation of Jordan's Principle. This led to amended orders in 2017 CHRT 35 which were not challenged.

[233] Second, and more importantly, at paragraph 17 of the Eligibility Decision, the Tribunal noted that neither the Tribunal nor the parties had provided a definition for ‘First Nations child’ until the Caring Society brought the motion leading to the Eligibility Decision. The Tribunal did note that the parties had been discussing this issue outside of the Tribunal process but had not reached a consensus on this issue. In the Interim Eligibility Decision the Tribunal concluded that this issue was best determined at a full hearing and it sought submissions on a wide spectrum of issues such as international law and the UNDRIP, discrimination cases under the *Indian Act*, Aboriginal law, human rights law, and constitutional law.

[234] Third, it is helpful to recall the parties’ positions with respect to eligibility and what the Eligibility Decision actually decided. Prior to the Eligibility Decision, the Applicant wished to restrict eligibility for Jordan’s Principle to “First Nations children living on reserve” and “First Nations children with ‘disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports’” (Interim Eligibility Decision at para 12). At the time of the Eligibility Decision the Applicant willingly expanded eligibility to (a) Registered First Nations children, living on or off reserve; (b) First Nations children who are entitled to be registered; and (c) Indigenous children, including non-status Indigenous children who ordinarily reside on reserve. In comparison, the Caring Society wanted Jordan’s Principle to apply to First Nations children beyond children with status that live on reserves. The Caring Society proposed three additional categories to the Tribunal. For the sake of simplicity, I will refer to the Caring Society’s additional three categories as the first, second, and third categories in the order that they were addressed by the Tribunal in the Eligibility Decision. The Tribunal made the following ruling regarding the first category:

> [211] The question is two-fold. The first part is the following:
>
> > Should First Nations children without *Indian Act* status who are recognized as citizens or members of their respective First Nations be included under Jordan's Principle?
>
> [212] The Panel, in light of the reasons outlined above, answers yes to this question…
>
> [213] The second part is the following:
>
> > If the previously noted First Nations children are included in the eligibility criteria, does it automatically grant them services or does it only trigger the second part of the process, namely 1) a case-by-case approach and 2) respecting the inherent right to self-determination of First Nations to determine their citizens and/or members before the child is considered to be a Jordan's Principle case?
>
> [214] The Panel believes that it is the latter…

[235] The following excerpts highlight the Tribunal's ruling on the second category:

> [272] The Panel pursuant to section 53 (2) of the *CHRA* orders the AFN, the Caring Society, the Commission, the COO, the NAN and Canada to include as part of their consultations for the order in section I, First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.
>
> [273] Further, Canada is ordered to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for *Indian Act* registration/status under S-3 implementation.

[236] The following passages highlight the Tribunal's ruling on the third category, which the Tribunal split into two categories:

> [274] This last section will deal with two additional categories:

> First Nations children without *Indian Act* status, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program.
>
> First Nations children without *Indian Act* status, residing off reserve, who have lost their connection to their First Nations communities due to other reasons.
>
> …
>
> [280] This being said, the Panel finds that First Nations children residing off reserve who have lost connection to their First Nations communities for other reasons than the discrimination found in this case fall outside of the claim before it. The claim was not focused on this at all until the 2019 motion and sufficient evidence has not been presented to support such a finding. As the Panel previously said, the Supreme Court of Canada stated in *Moore* that the remedy must flow from the claim.
>
> …
>
> [283] However, the Panel did not make findings in regards to the services First Nations children of Residential School and of Sixties Scoop survivors receive off-reserve who are not recognized as part of a First Nation community given that it was not advanced by the parties in their claim or arguments before this motion and insufficient evidence was presented.
>
> …
>
> [285] Given the lack of evidence in this motion, the Panel is not in a position to make findings let alone remedial orders for the two above categories at this time.

[237] In the end, the Tribunal only added the first and second categories of First Nations children who could be eligible for services under Jordan's Principle. The Tribunal also ordered the parties consult to generate potential eligibility criteria for Jordan's Principle. The parties were

to consider the Tribunal's rulings and establish a mechanism to identify citizens/members of First Nations as well as funding sources.

[238] The Applicant's arguments regarding the Eligibility Decision, which I address below, relate to one another and necessarily overlap. Ultimately, I find that the Tribunal's definition of the term 'First Nations child' falls within a range of possible outcomes which are defensible in respect of the facts and the law.

(1) Reasonableness

(a) *The Scope of the Tribunal's Jurisdiction & the Scope of the Complaint*

[239] The Applicant submits that the Tribunal exceeded its jurisdiction in making the Orders. Specifically, the decision falls outside the scope of the Complaint and the evidence by adding categories that the Caring Society and the AFN did not even ask for. The Applicant also submits that the Caring Society and AFN essentially challenged the provisions of the *Indian Act* and that the Tribunal had no jurisdiction to entertain such submissions.

[240] On the whole, the Respondents submit that creating additional categories and defining 'First Nations child' beyond the scope of the *Indian Act* is consistent with international law principles; complies with a human rights framework; respects First Nations' rights to self-government and self-determination; and ensures substantive equality.

[241] In my view, the inclusion of two additional categories of children is not beyond the Tribunal's jurisdiction or the scope of the Complaint. With respect to the Tribunal's jurisdiction under the *CHRA*, I adopt the same reasoning set out above in the section addressing the Compensation Decision. The Tribunal found that a definition of 'First Nations child' predicated on the *Indian Act* would perpetuate discrimination. In making this finding, it was not ruling on the validity of the *Indian Act*. It was within the general and remedial jurisdiction of the Tribunal to prevent further discrimination by adding additional categories for eligibility that extend beyond the *Indian Act*. As for the scope of the Complaint, there is a clear nexus between the Eligibility Decision and the original Complaint. The Complaint involved Jordan's Principle and the Tribunal addressed this aspect of the Complaint by creating two additional categories of children who are eligible for Jordan's Principle. Additionally, it was a live issue for the Tribunal to define the meaning of 'First Nations child' because the parties had not yet determined the scope of this term.

[242] Although not always stated, at their core, the parties' submissions and the Tribunal's decision centre on the *Indian Act*. This does not mean that that the Tribunal acted outside of its jurisdiction when creating new categories of eligibility, however. There is a difference between legally challenging the status provisions of the *Indian Act* and defining 'First Nations child' for the purposes of eligibility under Jordan's Principle. Just because the Tribunal extended eligibility for Jordan's Principle beyond the confines of the *Indian Act*, does not mean that the Tribunal acted outside its jurisdiction or that it determined that the status provisions were invalid.

[243] There are numerous examples within the record to support the position that the *Indian Act* was central to the underlying proceedings. The Complaint explicitly referred to discrimination of First Nations children ‘on reserve’. Likewise, both parties’ submissions and the Tribunal’s decisions about eligibility discussed children living on ‘reserve’ and children with ‘status’. These concepts are creatures of the *Indian Act*. There simply is no ‘reserve’ or ‘status’ system without the *Indian Act*.

[244] Additionally, at the Federal Court hearing, the Applicant discussed the affidavit of Dr. Gideon. Of course, Dr. Gideon’s affidavit was also before the Tribunal. With this affidavit, the Respondent wanted to demonstrate that Canada was taking a liberal view of the definition of ‘First Nations child’ for the purposes of Jordan’s Principle. Dr. Gideon’s affidavit makes numerous references to the *Indian Act* and the concepts of ‘reserve’ and ‘status’. Indeed, it is difficult, if not impossible, to not consider the terms ‘reserve’ and ’status’ without also considering the *Indian Act*.

[245] Another example of the Applicant’s awareness of the *Indian Act’s* effect on the Eligibility Decision can be found in its submissions. The Applicant submits that the definition it was employing at the time of the Eligibility Decision was not discriminatory. It included children registered or entitled to be registered under the *Indian Act* who had a connection to a reserve, even if not always resident on it, and children ordinarily resident on reserve even if they did not have *Indian Act* status (2020 CHRT 36 at paras 17-18). The Applicant also led evidence from Mr. Perron that First Nations children with *Indian Act* status living off reserve suffered due to

jurisdictional disputes. Conversely, there was no evidence related to non-status, off reserve children suffering discriminatory treatment.

[246] Canada's expanded categories are clearly informed by the *Indian Act* as they focus on status and residency on reserves. I acknowledge that these categories are more inclusive than Canada's original positions regarding eligibility and reflect a significant move forward. I recognize Canada's attempt in trying to eliminate discrimination within the context of not only the Complaint, the evidence, and the various decisions and rulings, but also within the existing legislative and constitutional constraints in which the parties operate.

[247] I am not persuaded, however, by the Applicant's submissions that the two additional categories are outside the scope of the Tribunal's jurisdiction, the Complaint, or the evidence before the Tribunal. It is true that there was evidence on the relationship between the *Indian Act* (including the status and reserve systems) and Canada's funding decisions. However, as I discuss below, there was also evidence that First Nations children, regardless of status or residency on reserves, suffer because of Canada's funding regime, which is predicated on and influenced by the *Indian Act*. I make this finding notwithstanding Canada's steps to expand eligibility**.**

[248] The Tribunal clearly contemplated the difficulties that arise when relying on concepts that originate from the *Indian Act*, such as 'status' and 'reserves':

> …The Panel believes it is an interpretation exercise to determine if using the *Indian Act* to determine eligibility criteria for Jordan's Principle furthers or hinders the Panel's substantive equality goal in crafting Jordan's Principle orders and the Panel's goal to eliminate discrimination and prevent similar practices from reoccurring (at para 177).

In this passage, the Tribunal implicitly acknowledges that a definition of ‘First Nations child’ that relies on the *Indian Act* will perpetuate the discrimination the Tribunal seeks to remedy.

[249] The Caring Society submitted, and the Respondents and intervener agreed, that the Tribunal reasonably concluded that ‘all First Nations children’ includes certain groups not recognized by the *Indian Act*. In expanding the definition to include the additional two categories, it prevented further discrimination. It was therefore reasonable not to exclude children solely due to the *Indian Act’s* second generation cut-off rule.

[250] I agree with the Respondents. The Eligibility Decision prevented future discrimination, which is consistent with the purpose of the Tribunal’s jurisdiction as previously referred to in paragraphs 125 to 128, above. There is no dispute that the Tribunal enjoys a large remedial jurisdiction and that this jurisdiction should be interpreted liberally in light of the quasi-constitutional nature of the *CHRA*. I also find that this purposive approach is consistent with jurisprudence outlining Canada’s relationship with First Nations peoples, most recently articulated in *R v Desautel*, 2021 SCC 17 [*Desautel*].

[251] Although the facts of *Desautel* are quite different from the present case, I am still mindful of the guidance the Supreme Court provided at paragraph 33 regarding the context of proceedings involving Indigenous people:

> …an interpretation of “aboriginal peoples of Canada” in s. 35(1) that includes Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation. The displacement of

> Aboriginal peoples as a result of colonization is well acknowledged:
>
> > Aboriginal peoples were displaced physically — they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.
> >
> > (*Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at pp. 139-40)
>
> By contrast, an interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk "perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers" (*R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139, at para. 53).

[252] The Tribunal's Eligibility Decision was clearly attempting to remedy past and future discrimination while being mindful not to "perpetuate historical injustice." This is evident when considering the scope of the evidence the Tribunal considered relating to the history of Indigenous-Crown relations.

[253] The first category acknowledges that there is a distinction between Indian status and First Nations citizenship. Presently, a First Nations child or person may not have *Indian Act* status, but they may be a member or citizen of their First Nation if that First Nation has control over its

membership and has enacted such a provision. At present, this is possible through section 10 of the *Indian Act*, which allows for First Nations control over membership. Indian status, however, remains within the purview of Canada. The Tribunal did not act outside its jurisdiction by extending Jordan's Principle eligibility to individuals without *Indian Act* status that are recognized by their First Nations as citizens and members. I agree with the AFN that it was open to the Tribunal to take a purposive approach in interpreting its home legislation and to accordingly award extended eligibility of Jordan's Principle to individuals without *Indian Act* status that are recognized by their First Nations as citizens and members.

[254] The respondents and intervener generally echo the submissions of the AFN and the COO that the *Indian Act* is a form of apartheid law that gives the government unilateral authority to determine who is legally an Indian. They submit that First Nation signatories to the Treaties never agreed that treaty benefits and remunerations would cease when a descendant lost their *Indian Act* status. These submissions are duly noted. However, I need not make specific pronouncements on these submissions as, in my view, the findings of the Tribunal are reasonable without regard to these submissions.

[255] The COO points to the *Act respecting First Nations Inuit and Métis children youth and families*, SC 2019 c 24 [*FNIMCYF Act*] which acknowledges Canada's commitment to respecting the UNDRIP and First Nations' right to self-government or self-determination in relation to child and family services (See *FNIMCYF Act* at preamble, s 8). The *FNIMCYF Act* similarly does not define 'Indigenous Child', 'First Nation', or 'First Nations child'. Rather, the statute creates space for First Nations to do it themselves. In Ontario, the *Child Youth and Family*

Services Act, 2017, SO 2017 c 14, Sched 1 [*Ont CYFS Act*] acknowledges the UNDRIP in its preamble and recognizes that a First Nations child's "band" or "community" is a band or community of which the child is a member or with which the child identifies (at s 2(4)). 'First Nations child' is not defined nor confined to the *Indian Act* definition. As the Tribunal recognized at paragraphs 224-226 of the Eligibility Decision, the *Ont CYFS Act* also has a mechanism to notify First Nations in the same manner as the *FNIMCYF Act*. As such, the Tribunal's reasoning is not without precedent.

[256] In addition, when viewed through the lens of the Complaint, the Merit Decision, and the Compensation Decision, the second category is not so remote as to not be part of the Complaint. The second category factors in that some First Nations children may become eligible for *Indian Act* status based on their parents' present or future eligibility or because of *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, SC 2017, c 25 [Bill S-3]. Bill S-3 amended the *Indian Act* to address sex-based discrimination and will temporarily increase the number status Indians in Canada.

[257] I also find the Eligibility decision reasonable because, in considering the third category, the Tribunal acknowledged that this category strayed beyond the Complaint. The Tribunal, citing *Moore*, was aware of the parameters of its jurisdiction and determined that the third category had no nexus to the Complaint.

[258] Overall, the Complaint was framed in terms of discrimination in relation to the *Indian Act*, reserves, and the status system. In arriving at its findings in the Eligibility Decision, the

Tribunal was cognizant of the scope of the Complaint and its broad remedial jurisdiction. The Eligibility Decision sought to prevent future discrimination, which is consistent with the purpose of the Tribunal's enabling statute. As such, the Tribunal's decision was reasonable.

(b) *Implications for Compensation Decision*

[259] At the hearing for these judicial review applications, the parties noted that the additional two categories affect the Compensation Decision. Canada submitted that these two categories now expand the eligibility of those entitled to compensation. On its face, they do, but I find that the Tribunal reasonably delved into the delicate issue of *Indian Act* status when it sought to cease discrimination. It was a bold approach but one that was within the jurisdiction of the Tribunal based on the Complaint and the evidence in the record.

[260] I am not convinced that the first category will automatically expand the eligibility of those entitled to compensation. It certainly has the potential to do so, but Canada would need to coordinate with First Nations, as set out in the Compensation Framework. First Nations will determine whether children are citizens or members. For various reasons, First Nations may recognize children as members or citizens or they may not. At this stage, it is premature for anyone to ascertain how First Nations will approach this category or determine how many children this will affect.

[261] Similarly, there is also no way to ascertain how many children will fit into the second category. This is particularly true given that it is difficult to know the impact of Bill S-3. However, the second category is still attempting to address the effect of the *Indian Act's* status

and reserve provisions on Canada's funding decisions. The Tribunal determined that these provisions still have the potential to discriminate against certain individuals. The two additional categories attempt to soften the effects that these provisions have on certain children and to give the parties some flexibility in how to work together to assess these complexities.

[262] I also note that the Compensation Framework itself contains provisions that place some limitations on whether certain categories are entitled to compensation for pain and suffering or for special compensation for wilful and reckless discrimination (see for example Articles 4.2.5.2 and 4.2.5.3). Again, this illustrates some restraint on the part of the Tribunal.

(c) *Alleged Lack of Evidence*

[263] The Applicant submits that there was no evidence for the Tribunal to make its order concerning the additional two categories. This is not accurate.

[264] In the Interim Eligibility Decision, the Tribunal had evidence of the continuing impact of the narrow interpretation of Jordan's Principle through the circumstances of SJ. That ruling clearly set forth that there was a denial of Jordan's Principle services simply because of the second generation cut-off rule (see paras 56-86). SJ did not have *Indian Act* status because one of her parents was registered under section 6(2) of the *Indian Act*.

[265] It is also important to note that SJ was not resident on reserve. As such, Canada's expanded categories at the time of the Eligibility Decision would not have captured SJ. The Applicant submits that there was no evidence before the Tribunal that children other than those

accounted for in its expanded categories experienced discrimination. SJ's story indicates otherwise. There is no reason to believe that SJ's circumstances are unique.

(d) *Non-Party First Nations*

[266] The Applicant also submits that the community recognition concept under the first category is unreasonable because it imposes obligations on non-party First Nations to determine which children are eligible within 48 hours of being made aware of a potential claim (2017 CHRT 35 at para 10). Additionally, the Tribunal avoided addressing the problems it created regarding community recognition and the *Indian Act's* second generation cut-off rule by instructing the parties to devise a system themselves. Finally, the Tribunal ignored the potential spillover effects of recent legislative efforts to address child and family services issues such as the *FNIMCYF Act*. I disagree with all of these submissions for the following reasons.

[267] First, the order only required the parties to consult with one another. There was no declaration that it was declaring the *Indian Act's* citizenship or membership requirements to be improper or unconstitutional. In accordance with its dialogic approach and the difficult role it has within the *CHRA*, the Tribunal sought to endorse the good faith discussions that the parties had embarked upon outside of the Tribunal's process.

[268] Second, in no way did the order affect the second generation cut-off rule in the *Indian Act*. There was simply an order for the parties to look at two additional categories of First Nations children who would be eligible for consideration under Jordan's Principle. Eligibility and challenges to the cut-off rule cannot be dealt with where there is no *Charter* challenge to

section 6(2) of the *Indian Act*. The Tribunal was aware of this (Eligibility Decision at para 176). The second generation cut-off rule, as questionable as it may be in light of First Nations' general opposition to the *Indian Act's* determination of status, remains unchallenged and in force.

[269] I also agree with CAP's submission that the Eligibility Decision required Canada to consult with the parties to develop eligibility criteria for First Nations children under Jordan's Principle, which led to a consent order. If Canada considered the consultation inadequate, it could have sought broader participation earlier. There is no evidence that it did or that any First Nation community is objecting to the purported burden of identification for categories of First Nations children.

(e) *Determining Complex Questions of Identity*

[270] Finally, the Applicant submits that the second category decides a complex question of identity that was not before the Tribunal and that Indigenous Peoples themselves do not agree on.

[271] In *Desautel*, the Supreme Court of Canada dealt with a section 35(1) Aboriginal rights claim of a non-citizen of Canada. The Court stated the following: "[w]hether a group is an Aboriginal people of Canada is a threshold question, in the sense that if a group is *not* an Aboriginal people, there is no need to proceed to the *Van der Peet* test… The threshold question is likely to arise only where there is some ground for doubt, such as where the group is located outside of Canada" (*Desautel* at para 20). The Court also found that no previous decision of the Supreme Court had interpreted the scope of the words "aboriginal peoples of Canada" in section

35(1) of the *Constitution Act, 1982*, being schedule B to the Canada Act 1982 (UK), 1982, c 11 (*Desautel* at para 21).

[272] Similar to the Supreme Court's approach in *Desautel*, I also find that the legal issue of the definition of who is a First Nations child and how that determination is made is ultimately left for another day (*Desautel* at para 32). The Eligibility Decision was not determining the legal effect of who is a First Nations child. Rather, it determined certain parameters to assist the parties in deciding who is eligible for Jordan's Principle and, consequently, compensation.

[273] I agree with Commission's submissions that the Eligibility Decision clarified the benefit at issue as being able to apply for services and have those requests considered on a case-by-case basis. In other words, First Nations children living off reserve will now have the opportunity *apply* for services pursuant to Jordan's Principle. This does not guarantee that all applications will be fulfilled and services will be provided. The Eligibility Decision only instructs Canada to let First Nations children "through the door" for the purposes of eligibility. Determining who may *apply* for services does not determine a complex question of identity that has legal consequences beyond the scope of eligibility for Jordan's Principle.

[274] Contrary to what the Applicant submits, the Eligibility Decision clearly left determinations of identity and citizenship to First Nations communities. I agree with the COO that it was appropriate for the Tribunal to make a decision that would allow First Nations to retain control over identity, membership, and citizenship, as the principles in *Desautel* provide. The COO points to Annex A of 2020 CHRT 36 which does not dictate anything to a First

Nation. Rather, that annex provides a funding mechanism for a First Nation that chooses to participate in the community recognition process. Furthermore, it leaves space for the First Nation to determine how it will do so.

[275] For all of these reasons, I disagree with the Applicant that the Eligibility Decision is unreasonable because it determined complex questions of identity.

(2) Eligibility Decision Conclusion

[276] Ultimately, the Eligibility Decision contains no reviewable error to permit the intervention of this Court. It is intelligible and rationale and the Tribunal worked within its jurisdiction to make the findings it did, taking into consideration the entire process that has developed since the Complaint was filed in 2007.

[277] The Eligibility Decision highlights the tension between nationhood, the *Indian Act*, and eligibility for program funding provided by the Applicant. Frankly, the parties are talking to each other about different issues. The Respondents properly highlight the colonial legislation's adverse impact on Indigenous peoples historically and today. They also highlight that Indigenous people possess inherent Aboriginal and Treaty Rights including the right to self-determination. These rights include the right to govern their citizens, including children and families. It is a holistic approach.

[278] On the other hand, the Applicant adopts a more limited and legalistic approach. It is fine to approach matters this way, but this approach, as a starting point, is fundamentally at odds with

how Indigenous parties may approach matters. It is also not conducive to early resolution of issues arising with First Nations. The multitude of rulings and orders confirms this.

[279] With that being said, Canada is to be commended for moving beyond its initial definition on eligibility. The Tribunal's remedial and dialogic approach can be credited for this improvement. Ultimately, however, the success rests upon true dialogue and discussion between Canada and the respondents. I encourage those discussions to continue for the benefit of future generations of First Nations children.

D. *Procedural Fairness*

[280] I am not persuaded that the Applicant was denied procedural fairness.

[281] As noted above, I have determined that the Tribunal did not change the nature of the Complaint in the remedial phase. The Tribunal, exercising extensive remedial jurisdiction under the quasi-constitutional *CHRA*, provided a detailed explanation of what had transpired previously and what would happen next in each ruling/decision (See e.g. 2016 CHRT 16 at para 161). In so doing, it was relying on a dialogic approach. Such an approach was necessary considering the scope of the discrimination and the corresponding efforts to remedy or prevent future discrimination. Most importantly, the Tribunal was relying on established legal principles articulated in *Chopra v Canada (AG)*, 2007 FCA 268 at para 37 and *Hughes 2010* at para 50 (Merit Decision at paras 468, 483). I do not agree that the Tribunal did not provide the parties with notice of matters to be determined.

[282] I also find that the Tribunal did not err in finding that discrimination is ongoing. The Tribunal retained jurisdiction to deal specifically with this issue from the Merit Decision onward. For example, in 2017 CHRT 14 at paragraphs 80 and 133, the Tribunal made the finding that discrimination is ongoing based on Canada's narrow interpretation of Jordan's Principle eligibility. The Tribunal made a similar finding in 2018 CHRT 4 at paragraph 389. These rulings were not challenged.

[283] I disagree that the Tribunal ought to have included the issue of whether the discrimination had ceased and given Canada a chance to make submissions on this point. As the parties moved along with the reporting requirements, the Tribunal did note that it was encouraged by Canada's compliance with some of its orders and findings, including the provision of increased funding. However, funding alone was not going to remedy discrimination (2018 CHRT 4 at paras 13, 105-107, 132-134, 222).

[284] I am persuaded by the Caring Society's submission that the Tribunal's finding of harm is supported by the "robust evidentiary record", which I have referenced throughout this decision. As a result, it was reasonable for the Tribunal to find that discrimination is ongoing, particularly in light of the fact that Canada never challenged this finding in previous Orders.

[285] The Applicant also submits that the Tribunal disregarded its right to procedural fairness by inviting the parties to make suggestions about "new categories" of victims for compensation. I find that the additional categories are not new, but are related to the issues presented by the *Indian Act*. The record shows that Canada had been relying on the *Indian Act* for its Jordan's

Principle eligibility determinations for some time. The *Indian Act's* concepts on 'status' and 'reserve' were squarely before the Tribunal and these terms necessarily affected the eligibility for Jordan's Principle in one way or another.

[286] With respect, the Applicant never raised any objections with the Tribunal's approach. A party alleging a breach of procedural fairness has an obligation to raise it before the Tribunal at the earliest opportunity. The Applicant, being a sophisticated litigant, should be aware of their obligation. For example, at paragraph 11 of the Compensation Decision, the Tribunal reiterated its earlier finding in 2018 CHRT 4 at paragraph 389, that First Nations children and families continue to suffer. The Applicant did not challenge this finding.

[287] The Applicant also submits that the Tribunal did not explain itself or provide reasons when it stated that any procedural unfairness to Canada is outweighed by the prejudice borne by First Nations children and their families who suffered and continue to suffer unfairness and discrimination. I disagree. From the Merit Decision onward there were findings made on the harm suffered by children and their families. The fact that the Tribunal did not directly state how that weighing occurred does not render the decision procedurally unfair. It can be inferred from the record and, specifically, the evidence related to the harms suffered by children as referenced in the Tribunal's numerous decisions and rulings.

[288] All parties received notice of issues that were under consideration. Where outstanding issues were before the Tribunal and further questions remained, it notified all parties in writing and provided them with an opportunity to provide written and/or oral submission. The

evidentiary record considered by the Tribunal and section 50(3)(e) of the *CHRA* empowers the Tribunal to decide procedural issues related to the inquiry. The Tribunal managed its remedial jurisdiction to ensure discrimination ceased and would not occur in the future.

[289] Since the Merit Decision, the issues of compensation and definitions related to Jordan's Principle were reserved by the Tribunal. I agree with the Caring Society and the AFN that Canada had every opportunity to seek a judicial review of that decision but chose not to. Nothing in the record suggests that the Tribunal limited the type or amount of evidence that the Applicant or any of the parties could adduce. Accordingly, I find that the Applicant was not treated unfairly.

[290] I also agree with the COO that the Tribunal appropriately considered the context, the rights, and interests of the parties when it crafted the decisions and its procedure. For example, in the Eligibility Decision, the Tribunal asked the parties to negotiate a mechanism that would implement the community eligibility decision on the ground. In 2020 CHRT 36 the Tribunal's order stemmed from the Tribunal's request that the parties negotiate an implementation plan for the Eligibility Decision.

[291] The Tribunal previously rejected the Applicant's suggestion that more or any negotiation has to occur before a remedy can be awarded (2018 CHRT 4 at paras 395-400).

[292] I also find that the Tribunal dealt fully and reasonably with the Applicant's claim of surprise with respect to the Compensation Decision. The AFN submits that it and the Caring

Society clearly demonstrated their intention from the date of their initial filing to pursue individual compensation. The AFN points to paragraph 21(3) of the statement of particulars submitted prior to the Merit Decision. The Tribunal also recognized this at paragraph 108 of the Compensation Decision.

[293] As set out above, the Tribunal provided advance notice of the questions it wished the parties to respond to prior to the Compensation Decision. If the Applicant thought that the process was unfair, this would have been the opportune time to raise those concerns. It did not.

[294] At paragraph 490 of the Merit Decision, the Tribunal provided advance notice that it was seeking input from the parties on the outstanding question of remedies. In addition, the Tribunal dealt directly with the Applicant's arguments about unfairness of the process (2018 CHRT 4 at paras 376-389). The Tribunal reminded the Applicant that there were three phases identified in the Merit Decision and that the ruling closed the immediate relief phase (2018 CHRT 4 at paras 385-388). This ruling was not challenged by the Applicant.

[295] In 2017 CHRT 14 the Tribunal also pointed out the process it employed to address the remedies ordered in the Merit Decision, which required additional information from the parties (at para 32).

[296] For all of these reasons I find that the Applicant was not denied procedural fairness. The Tribunal afforded all parties with a full picture of what was to be determined at each stage of the proceedings and sought submissions from the parties. There were no surprises.

VII. Some Thoughts on Reconciliation

[297] While noting that these applications for judicial review did not involve constitutional issues or section 35 Aboriginal rights, the parties and the Tribunal have discussed the concept of reconciliation throughout these proceedings. Prior to concluding, I find it necessary to pause and reflect on this concept and consider but a few of the many lessons that have arisen during these proceedings.

[298] In *Desautel*, the Supreme Court stated the following on reconciliation and negotiation:

> [30] In this Court's recent jurisprudence, the special relationship between Aboriginal peoples and the Crown has been articulated in terms of the honour of the Crown. As was explained by McLachlin C.J. and Karakatsanis J. in *Manitoba Metis*, at para. 67:
>
> > The honour of the Crown [. . .] recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies. Aboriginal peoples were here first, and they were never conquered; yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice…
>
> While the honour of the Crown looks back to this historic impact, it also looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, "mutually respectful long-term relationship"... The honour of the Crown requires that Aboriginal rights be determined and respected, and may require the Crown to consult and accommodate while the negotiation process continues... It also requires that the Crown act diligently to fulfill its constitutional obligations to Aboriginal peoples. [Citations omitted.]
>
> …

> [87] Negotiation has significant advantages for both the Crown and Aboriginal peoples as a way to obtain clarity about Aboriginal rights:
>
> > Negotiation . . . has the potential of producing outcomes that are better suited to the parties' interests, while the range of remedies available to a court is narrower. . . . The settlement of indigenous claims [has] an inescapable political dimension that is best handled through direct negotiation.
> >
> > (S. Grammond, *Terms of Coexistence, Indigenous Peoples and Canadian Law* (2013), at p. 139)
>
> Negotiation also provides certainty for both parties... As the Court said in *Clyde River*… at para. 24, "[t]rue reconciliation is rarely, if ever, achieved in courtrooms". [Citations omitted.]
>
> [Emphasis in Original.]

[299] In my view, the concept of reconciliation is, in essence, a continuation of the nation-building exercise of this young country in the sense that the foundational relationships between Indigenous people and the Crown continue to evolve. Reconciliation, as nation-building, can also result in the re-establishment, on a proper foundation, of broken or damaged relationships between Indigenous people and Canada in the manner suggested by the Supreme Court in its numerous judgments.

[300] Negotiations are also seen as a way to realize the goal of reconciliation. It is, in my view, the preferred outcome for both Indigenous people and Canada. Negotiations, as part of the reconciliation process, should be encouraged whether or not the case involves constitutional issues or Aboriginal rights. When there is good will in the negotiation process, that good will must be encouraged and fostered before the passage of time makes an impact on those

negotiations. As Pitikwahanapiwin (Chief Poundmaker), a nation-builder in his own right, so aptly said:

> We all know the story about the man who sat by the trail too long, and then it grew over, and he could never find his way again. We can never forget what has happened, but we cannot go back. Nor can we just sit beside the trail.

[301] In my view, the procedural history of this case has demonstrated that there is, and has been, good will resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the parties is unfinished. The parties must decide whether they will continue to sit beside the trail or move forward in this spirit of reconciliation.

VIII. Conclusion

[302] I find that the Applicant has not succeeded in establishing that the Compensation Decision is unreasonable. The Tribunal, utilizing the dialogic approach, reasonably exercised its discretion under the *CHRA* to handle a complex case of discrimination to ensure that all issues were sufficiently dealt with and that the issue of compensation was addressed in phases. The Tribunal ensured that the nexus of the Complaint, as discussed in the Merit Decision, was addressed throughout the remedial phases. Nothing changed. All of this was conducted in accordance with the broad authority the Tribunal has under the *CHRA*.

[303] I also find that the Applicant has not succeeded in establishing that the Eligibility Decision is unreasonable. The Tribunal was aware of its jurisdiction when the Caring Society asked the Tribunal to create three new categories for Jordan's Principle. The Caring Society claimed that the third category would prevent further discrimination based on *Indian Act* status.

The Tribunal reasonably noted the issues with Indian status within the scope of the proceedings. It concluded that only two of the proposed categories were tied to the scope of the Complaint and the proceedings. I find no error in this conclusion.

[304] Finally, the Applicant has not succeeded in establishing that it was denied procedural fairness. The record indicates that the Applicant was afforded numerous opportunities to challenge the various decisions but did not. The record also shows that the Applicant, as well as each party before the Tribunal, was afforded an opportunity to make submissions on any issues that the Tribunal requested. All of this was in accordance with the broad authority the Tribunal has under the *CHRA*. No one was taken by surprise.

[305] The Applicant has not sought costs in either of these two applications for judicial review and neither has CAP. All of the Respondents, aside from the Commission and Amnesty, seek their costs. In light of this, the Respondents, aside from the Commission and Amnesty, will file their respective written submissions on costs within 45 days of the Order below and the Applicant will file its written reply within 90 days of the Order below. The parties, of course, are encouraged to discuss this and to file a joint submission. In the event a joint submission is not filed, the matter of costs will be disposed of based on written submissions.

JUDGMENT in T-1559-20 and T-1621-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review concerning the Compensation Decision in T-1621-19 is dismissed.
2. The application for judicial review concerning the Eligibility Decision in T-1559-20 is dismissed.
3. The Respondents, aside from the Commission and Amnesty, will provide their submissions on costs within 45 days of the date of this Order. The Applicant will provide its submissions on costs within 90 days of this Order. The matter of costs will be dealt with in writing.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1559-20 AND T-1621-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v 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 AND CONGRESS OF ABORIGINAL PEOPLES
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 14-18, 2021
JUDGMENT AND REASONS:	FAVEL J.
DATED:	SEPTEMBER 29, 2021

APPEARANCES:

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David C. Nahwegahbow	FOR THE RESPONDENTS (ASSEMBLY OF FIRST NATIONS)
Stuart Wuttke Adam Williamson	FOR THE RESPONDENTS (ASSEMBLY OF FIRST NATIONS)
Brian Smith Jessica Walsh	FOR THE RESPONDENTS (CANADIAN HUMAN RIGHTS COMMISSION)
Maggie Wente Joel Morales	FOR THE RESPONDENTS (CHIEFS OF ONTARIO)

Stephen Aylward Justin Safayeni	FOR THE RESPONDENTS (AMNESTY INTERNATIONAL)
Akosua Matthews	FOR THE RESPONDENTS (NISHNAWBE ASKI NATION)
Andrew Lokan	FOR THE INTERVENER (CONGRESS OF ABORIGINAL PEOPLES)

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20220718

Docket: A-359-21

Citation: 2022 FCA 130

Present: **RENNIE J.A.**

BETWEEN:

**HER MAJESTY THE QUEEN
IN RIGHT OF SASKATCHEWAN
as represented by the ATTORNEY GENERAL
OF SASKATCHEWAN**

Appellant

and

**WITCHEKAN LAKE FIRST NATION
and HER MAJESTY THE QUEEN
IN RIGHT OF CANADA as represented by
the
ATTORNEY GENERAL OF CANADA**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 18, 2022.

REASONS FOR ORDER BY: RENNIE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20220718

Docket: A-359-21

Citation: 2022 FCA 130

Present: **RENNIE J.A.**

BETWEEN:

**HER MAJESTY THE QUEEN
IN RIGHT OF SASKATCHEWAN
as represented by the ATTORNEY GENERAL
OF SASKATCHEWAN**

Appellant

and

**WITCHEKAN LAKE FIRST NATION
and HER MAJESTY THE QUEEN
IN RIGHT OF CANADA as represented by
the
ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR ORDER

RENNIE J.A.

[1] The Federation of Sovereign Indigenous Nations [FSIN] seeks leave to intervene in the hearing of an appeal from a decision of the Federal Court (2021 FC 1074, *per* Favel J.)

dismissing a motion under Rule 215 of the *Federal Courts Rules*, S.O.R./98-106 by the Attorney General of Saskatchewan for summary judgment.

[2] In broad terms, and to provide some context for my disposition of this motion, in the underlying action Witchekan Lake First Nation [WLFN] claims that the *Saskatchewan Treaty Land Entitlement Framework Agreement* [Framework Agreement] includes an implied term requiring Saskatchewan to give it notice and an opportunity to select Crown lands to satisfy outstanding treaty land entitlement claims before making the lands available for public auction. WLFN also claims that Saskatchewan unreasonably denied requests it made under the Framework Agreement that lands that had previously been placed in auctions be made available for selection.

[3] The Federal Court dismissed the application on the basis that there may be other relevant evidence of the circumstances surrounding the Framework Agreement's negotiation that shed light on the scope of Saskatchewan's obligations under the Agreement. Saskatchewan has appealed the decision on the basis that under Rule 214 and binding jurisprudence, a response to a motion for summary judgment "shall not rely on what might be adduced as evidence at a later stage in the proceedings." Needless to say, in disposing of this motion and in describing the issues on appeal, I express no view on the merits of the appeal, nor should these reasons be construed as such.

[4] FSIN's interest arises from its status as the representative of the interests and rights of the 74 First Nations within Saskatchewan in the implementation of Treaties in Saskatchewan, as well

as its role in the drafting and finalization of the Framework Agreement with the Governments of Saskatchewan and Canada. FSIN submits that the issues raised on appeal regarding the Framework Agreement with the Governments of Saskatchewan and Canada have a direct impact on First Nations with prior settlements under the Framework Agreement as well as those currently under negotiation and that therefore they should be granted leave to intervene.

[5] The criteria governing whether or not leave to intervene should be granted have been considered in a number of decisions of a full panel of this Court (*Métis National Council and Manitoba Metis Federation Inc. v. Varley*, 2022 FCA 110, *Gordillo v. Canada (Attorney General)*, 2022 FCA 23; *Whapmagoostui First Nation v. McLean*, 2019 FCA 187; and *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3).

[6] While the jurisprudence identifies a number of considerations that may be relevant to the exercise of discretion whether to grant leave, one criteria is invariable; the intervention must be useful, in the sense that it will, in the language of Rule 109, "… assist the determination of a factual or legal issue." The requirement that submissions be useful requires, in turn, consideration of the issues on appeal, what the intervener proposes to say about those issues, whether those submissions assist in determining the issues in the proceeding, and how they are unique or different from the parties' arguments.

[7] FSIN has not demonstrated that it will bring a unique or different perspective to the legal issues on appeal than that of the parties. Indeed, the motion for leave to intervene demonstrates that the interests and perspectives of FSIN are identical to those of the respondent WLFN whom

it would support. The proposed intervener does not identify the nature of the arguments which it proposes to make and how those arguments would be unique or different from those of the respondent. The intervener says “FSIN will argue that the Federal Court decision was correct and that there are a number of unsettled issues raised within the Record which would suggest a trial of the issues is required.” As noted by the appellant, the motion record is silent on the substance of those issues, FSIN’s position on those issues, and how its position differs from that of the respondent. This concern is also reflected in the affidavit of Vice Chief Heather Bear filed in support of the motion. It simply speaks vaguely to FSIN’s ability to “bring a perspective to this Appeal”.

[8] I do not suggest that a motion for leave to intervene necessarily include a draft memorandum of fact and law of the arguments the intervener would make. While possibly helpful, to require a draft memorandum could impose a significant financial cost on a presumptive intervener, and is inconsistent with the guiding principles that the rules and procedures should extend access to justice, not impede it (Rule 3). However, the Court must have some indication of the substance of the intervener’s position, otherwise there is no background against which the utility requirement can be assessed.

[9] The purpose of an intervention is to advance the intervener’s own perspective on a legal issue and not simply to duplicate the argument or support the result desired by one of the parties. This Court has consistently required proposed interveners to show that their submissions are different from the parties (*Prophet River First Nation v. Canada (Attorney General),* 2016 FCA 120 [*Prophet River*]; *Canada (Environment and Climate Change) v. Ermineskin Cree Nation*,

2022 FCA 36 [*Ermineskin Cree Nation*]; *Gordillo v. Canada (Attorney General)*, 2020 FCA 198).

[10] In *Ermineskin Cree Nation*, Monaghan J.A. considered a motion to intervene similar to that presently before the Court. There, the Court observed, at paragraph 10:

> The proposed interveners suggest their perspective on these submissions will be useful because they have collectively negotiated and signed many IBAs in different provinces and on lands covered by different treaties and because they represent some First Nations with historical treaties and others without. Yet they do not explain how this experience will assist the Court or distinguishes them from Ermineskin, which also has negotiated and signed several IBAs. Moreover, Coalspur's memorandum of fact and law describes in some detail the purpose and prevalence of IBAs and the terms typically included in IBAs. To the extent relevant, the importance, purpose and content of IBAs appears to be adequately addressed by the respondents.

[11] Justice Monaghan's analysis applies equally here. Some precision is required, more than has been offered by the proposed intervener. The Court is being asked to make a leap of faith, and assume that the intervener will have something different or unique to say that will assist the Court. An intervention that is simply more of the same will not suffice, even if the intervener has an interest in the matter (*Prophet River* at para. 20). Here, FSIN has only given the Court some bones to chew on; some flesh is required.

[12] There are further problems with FSIN's motion. The principal basis of FSIN's intervention is that it wishes to intervene at trial and lead evidence. This argument presupposes both that the appeal is dismissed and that the trial judge grants FSIN leave to intervene. It invites speculation. Secondly, on the appeal itself FSIN proposes to make submissions "related to the associated impacts to all Saskatchewan First Nations." This is a matter of evidence which is

inadmissible on Rule 213 motions (*Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 at para. 21).

[13] There is yet another problem. Vice Chief Heather Bear was an affiant in support of WLFN's response to the motion for summary judgment. Vice Chief Heather Bear also made a subsequent reappearance, wearing a different hat as an affiant in this motion to intervene in support of FSIN. This reinforces the concern that the identity of interests and legal perspectives of the respondent and FSIN are identical.

[14] The motion for leave to intervene will therefore be dismissed.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-359-21
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF SASKATCHEWAN v. WITCHEKAN LAKE FIRST NATION *ET AL*.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RENNIE J.A.
DATED:	JULY 18, 2022

WRITTEN REPRESENTATIONS BY:

R. James Fyfe	FOR THE APPELLANT
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Melissa Nicolls	FOR THE RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA
Dusty T. Ernewein	FOR THE PROPOSED INTERVENER

SOLICITORS OF RECORD:

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Maurice Law Calgary, Alberta	FOR THE RESPONDENTS WITCHEKAN LAKE FIRST NATION
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA
McKercher LLP Saskatoon, Saskatchewan	FOR THE PROPOSED INTERVENER

Federal Court of Appeal | Cour d'appel fédérale

Date: 20210127

Docket: A-204-20

Citation: 2021 FCA 13

Present: **STRATAS J.A.**

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellants

and

THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI, REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 27, 2021.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20210127

Docket: A-204-20

Citation: 2021 FCA 13

Present: **STRATAS J.A.**

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellants

and

THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI, REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] On the eve of the hearing of this appeal, thirteen parties have brought six sets of motions to intervene:

- British Columbia Civil Liberties Association;

- Canadian Lawyers for International Human Rights and the Canadian Centre for Victims of Torture;

- David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund Inc. and West Coast Legal Education and Action Fund;

- HIV & AIDS Legal Clinic Ontario, HIV Legal Network, the Committee for Accessible AIDS Treatment and Health Justice Program (together, the Health Coalition);

- National Council of Canadian Muslims; and

- Rainbow Refugee Society and Rainbow Railroad.

For the reasons that follow, I dismiss the motions.

A. The test for intervention

[2] Rule 109 of the *Federal Courts Rules*, S.O.R./98-106 governs interventions in the Federal Court system. Two cases offered a test to determine intervention motions under Rule 109: *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 90, 103

N.R. 391 and *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253.

[3] This Court discussed the interaction of these two cases and the test in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3. It observed that *Pictou Landing* and *Rothmans, Benson & Hedges* express the test for intervention differently. But, in its view, they are not different in substance.

[4] That finding binds the Court. However, it has been difficult for some parties to implement because the phrasing of the test is different in each. So how should parties express the test?

[5] In responding to the intervention motions in this case, the appellants have attempted to come up with the right wording. They distill the combination of the wording of Rule 109, *Pictou Landing* and *Rothmans, Benson & Hedges* to three requirements. They have done quite well. All that is missing is the concept in Rule 109(2)(*b*) of the usefulness of the proposed intervention. It must be remembered that the legislative provision here, Rule 109, governs and any judge-made test in this area is just an explanation of the meaning of that rule: *Canada (Attorney General) v. Utah*, 2020 FCA 224 at paras. 26-28. Further, the test needs to incorporate this Court's holding that usefulness under Rule 109 resolves itself into four questions: *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164.

[6] Thus, the current test for intervention under Rule 109 is as follows:

I. The proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues. To determine usefulness, four questions need to be asked:

(a) What issues have the parties raised?

(b) What does the proposed intervener intend to submit concerning those issues?

(c) Are the proposed intervener's submissions doomed to fail?

(d) Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?

II. The proposed intervener must have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;

III. It is in the interests of justice that intervention be permitted.

[7] According to *Sport Maska*, this test must be applied in a "flexible" way. I take this to mean that the relative weight to be accorded to these requirements and the rigor with which they are to be applied can vary from case to case. *Sport Maska*'s mention of "flexibility" is not a licence for an anything-goes approach. A judge acting judicially is constrained by the legislative text of Rule 109 and the elements of the tests in *Pictou Landing* and *Rothmans, Benson & Hedges*, as combined in *Sport Maska*.

[8] *Sport Maska* does not say or even imply that a judge can rely on solely a subjective view of what is "in the interests of justice"—something that varies from judge to judge. Consistent with the rule of law, intervention motions must be determined by applying a reasonably stable, uniform legal standard, logically and rationally. Further, it must be remembered that many interveners are dedicated to advance causes—many political and some controversial. A judge that applies subjective views rather than law can create an apprehension of sympathy for the intervener's cause or a preference for a result in the case, undermining the appearance of impartiality essential to the maintenance of public confidence in the judiciary.

[9] Far from being a subjective, impressionistic concept, "the interests of justice" have been tied down in the case law by interpreting Rule 109 and its text, context and purpose. In doing this, the Court has developed a number of considerations that shed light on the meaning of "the interests of justice":

- Is the intervention consistent with the imperatives in Rule 3? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?

- Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?

- Has the proposed intervener been involved in earlier proceedings in the matter? For example, if the Federal Court acceptably rules that a particular party should be admitted as an intervener, that ruling will be persuasive in this Court.

- Will the addition of multiple interveners create the reality or an appearance of an "inequality of arms" or imbalance on one side?

The list of considerations is not closed.

[10] In substance, this test or close variants of it have been applied for some time now. Experience has shown that it, like the Rule it interprets, is balanced: although the test inquires into many things, some meet it, indeed sometimes quite easily.

[11] For example, recently by way of speaking order, I admitted a number of environmental advocacy groups into a case on statutory interpretation. Their proposed intervention was focused, respectful of the Court's schedule, relevant to the statutory interpretation issues already before the Court, pursued the proper way to interpret statutory provisions, and added a different, useful dimension to the Court's statutory interpretation task.

B. Applying the test for intervention

[12] None of the six intervention motions before the Court meet the test. A number of considerations drawn from the test, alone or in combination, lead the Court to dismiss them.

(1) Equality of arms and fairness

[13] This is one recognized consideration under the rubric of "the interests of justice".

[14] The six proposed interveners' submissions, if allowed, will support the respondents, three of which are powerful and experienced public interest litigants. Admitting all six into this appeal would create an imbalance: seven separately represented groups on one side and only one on the other. This cannot be countenanced: in deciding these intervention motions, the Court has to ensure that the appeal is fair and is seen to be fair.

[15] Intensifying the concern about fairness is the fact that the Court decides who intervenes. If the Court allows piles of interveners on one side of the debate, it creates the appearance that it wants a gang-up against one side: *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 at para. 11. And the concern is beyond just appearance. If "one side…[is] so numerous or dominant that its voices drown out the other side and prevent it from expressing itself adequately", fairness is called into question: *Gitxaala Nation v. Canada*, 2015 FCA 73 at para. 23.

[16] Thus, “equality of arms” before the Court matters when considering the interests of justice requirement: *Gitxaala Nation* at paras. 21-24; *Atlas Tube Canada ULC v. Canada (National Revenue)*, 2019 FCA 120, 2019 D.T.C. 5062 at para. 12; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373.

[17] This Court put it this way in *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para. 12:

> For example, in *Gitxaala Nation v. Canada*, 2015 FCA 73 at paragraphs 21-24, under the rubric of fairness (or what is “just” within the meaning of Rule 3), this Court paid attention to the principle of “equality of arms”. It noted that the appearance of fairness can be harmed by allowing too many interveners on one side of the case. A court that allows several interveners supporting one side of the case—especially those that have partisan leanings and advocate political positions—with none or very few on the other side, gives the appearance of a court-sanctioned gang-up against one side, an appearance that can be enhanced by the ultimate result and reasoning in the case. This is especially harmful in public law cases that should be decided on the basis of doctrine, not subjective impressions, aspirations, personal preconceptions, ideological visions, or freestanding policy opinions: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 at paragraphs 25-26.

[18] In this case, even if all six proposed interveners meet the test for intervention, the Court would have to pick and choose among the six and only allow a couple at most. Were it necessary to do so, it would base this on who best meets the test for intervention and, overall, who is most likely to assist the Court in its determination of the appeal. Another option might have been to require the proposed interveners to combine into a small number of groups and collaborate: *Teksavvy* at para. 18.

(2) Timeliness

[19] This is another recognized consideration under the rubric of "the interests of justice". The appellants raised it.

[20] All of the intervention motions were filed between December 3, 2020 and December 18, 2020. No one sought to expedite them. The last one was perfected January 12, 2020. The Registry has worked at a breakneck pace to prepare them for the Court's consideration. Just now, they have come before the Court. The hearing of the appeal has been set for February 23-24, 2021 and it will not be adjourned, especially since this appeal has been expedited and the Federal Court's judgment has been stayed: *UHA Research Society v. Canada (Attorney General)*, 2014 FCA 134. Between now and then, any interveners admitted into this appeal would have to file their memoranda of fact and law, the appellants would need to file a response, and the Court would be severely challenged to complete its already daunting preparations.

[21] Late interventions can disrupt the orderly progress of a matter: *ViiV Healthcare ULC v. Teva Canada Limited*, 2015 FCA 33, 474 N.R. 199 at para. 11. They can also cause prejudice: *Pictou Landing* at paras. 10, 32. As a result, intervention motions should be brought early: *Zaric* at para. 23; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 at paras. 27-29; *Ignace v. Canada (Attorney General)*, 2019 FCA 266 at para. 8. Bringing a motion early also shows that the proposed intervener monitors the area closely, has a keen interest in the area and is dedicated to it. In *Canadian Doctors*, the Court put it this way (at para. 28):

> [T]hose who have a valuable perspective to offer to an appeal court jump off the starting blocks when they hear the starter's pistol. Keen for their important viewpoint to be heard, soon after the notice of appeal is filed, they move quickly.

To the same effect, this Court has observed that "[t]hose really concerned about a proceeding, who have much to say about it, and who are concerned that no one else will say it, proceed quickly": *ViiV Healthcare ULC* at para. 11.

[22] Intervention is a privilege bestowed to the skilled and committed who will truly assist the determination of a real-life, concrete proceeding that is up and running. Interveners have no right to disrupt the interests of those with a direct stake in the proceeding who have lived it from the beginning, often at great cost. No intervener is so grand and important that the Court will admit it late into the proceedings, whatever may be the prejudice to others or to itself.

[23] There is no reason why these intervention motions could not have been brought earlier. The issues in this case have swirled about for many years: *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136. Ordinary members of the public—let alone dedicated observers of this area of law—became aware of the proceedings in the Federal Court long ago. The Federal Court's judgment (2020 FC 770, 448 D.L.R. (4th) 132) received enormous publicity, as did the appellants' intention to appeal. Anyone could have obtained the appellants' grounds of appeal in August 2020 and the respondents' grounds of cross-appeal in September 2020, would have noticed the order expediting the appeal in September 2020, and would have known the arguments on the merits of the appeal and the cross-appeal from the earlier submissions before the Federal Court and from the submissions on the stay motion in this Court.

In October 2020, this Court stayed the judgment of the Federal Court partly on the basis that prejudice would be minimized by expediting the appeal: 2020 FCA 181. All issues were known and on the table. Strangers seeking admission to these fast-moving proceedings could have acted quickly—and, given the impending hearing date, had to act quickly.

[24] In these circumstances, it is baffling why the proposed interveners did not move until December 2020, indeed in some cases well into that month. Yet, all of them fail to explain their lateness. In fact, some deny any lateness at all. Others just ignore the issue altogether.

[25] Where an intervention motion is late—and valid reasons sometimes exist—proposed interveners should candidly fess up, explain themselves, emphasize the importance of and critical need for their participation, and propose measures to minimize any prejudice: *Tsleil-Waututh Nation* at paras. 15 and 32. Here, however, owing to the degree of lateness, the Court doubts it would have accepted any explanation.

(3) Usefulness

[26] A proposed intervention must be useful. One critical element of usefulness is the addressing of the real, actual issues in the case, not new issues. Many of these proposed interveners intend to address new issues.

[27] At first instance, the issues in a proceeding are set by the originating document such as a statement of claim or notice of application, as explained by the arguments in the parties'

memoranda of fact and law: *Kattenburg* at para. 9. A proposed intervener, has no standing to amend that originating document, add new issues or reinvent the theory of the case. It is the parties' case, the case has been defined by them, and their case cannot be commandeered by others: *Kattenburg* at para. 34. Still less should it become a reference case on general issues of law not pleaded by the parties.

[28] The issues before an appellate court are found primarily in the notice of appeal, as explained by the arguments in the parties' memoranda of fact and law. A proposed intervener has no standing to amend the notice of appeal and add new issues.

[29] Some guidance as to the issues in play in the appellate court can also be found in the originating document that defined the issues in the first-instance court. After all, the appellate court might have to grant judgment in the action or application that was brought in the first-instance court. And whether a party actually pursued an issue that was pleaded in the first-instance court is also relevant to the assessment whether the issue is in play in the appellate court.

[30] Normally, parties cannot raise new issues in the appellate court: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. The same is true for interveners: *Canadian Doctors* at para. 19; *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686 at para. 17; *Teksavvy Solutions* at para. 11; *Kattenburg* at para. 9. As strangers to a proceeding they

have not brought, they have no right to change it. If they wish, they can seek to bring their own proceeding as a public interest litigant to prosecute the issues they want.

[31] This Court has spoken about proposed interveners who seek to add new issues in this way:

> In this Court, interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.
>
> To allow them to do more is to alter the proceedings that those directly affected—the applicants and the respondents—have cast and litigated under for months, with every potential for procedural and substantive unfairness.

(*Tsleil-Waututh Nation* at paras. 55-56; see also *Reference re subsection 18.3(1) of the Federal Courts Act, R.S.C. 1985, c. F-7*, 2019 FC 261, 437 C.R.R. (2d) 85 at para. 50.)

[32] In this area, the Court must be alert. Earnest and driven by their passion for their cause, some moving to intervene try to add new issues to a proceeding, sometimes deliberately, sometimes not. Thus, in considering a motion to intervene, the Court must gain a "realistic appreciation" of the "essential character" and "real essence" of both the issues in the proceeding and the issues the proposed intervener intends to raise: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50.

[33] In this case, the claim based on section 7 of the Charter in the notice of application in the Federal Court and the notice of appeal in this Court is precise and clear. Before the Court is a strong team of experienced and skilled counsel representing the respondents on the section 7

issues. The Court is satisfied that the respondents have truly covered the field, raising in a high-quality way all the relevant matters, with thorough and admirable reference to this evidentiary record. Were it otherwise or had the interveners moved to intervene before the Court was sure the issues were well-handled by both sides, this would be a factor in favour of allowing the interventions: *Zaric* at para. 18; *Ishaq* at para. 37. Therefore, further section 7 submissions, to the extent they are proper, are neither useful nor necessary to the Court.

[34] Four intervener groups raise section 15 of the Charter: David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund Inc. and West Coast Legal Education and Action Fund; the Health Coalition; National Council of Canadian Muslims; Rainbow Refugee Society and Rainbow Railroad.

[35] Here, once again, the Court is satisfied that the respondents have truly covered the field with thorough and admirable reference to the evidentiary record. The proposed interveners' submissions on these issues would be duplicative. They do not add insights or added dimensions to the existing issues.

[36] To some extent, the proposed interveners raise new section 7 arguments. For example, the British Columbia Civil Liberties Association submits that the principles of fundamental justice in section 7 must be interpreted in a way that incorporates various non-binding international instruments or incorporates the language of other sections of the *Charter*. These are new issues that were not raised at the Federal Court or in the originating documents before this Court. The submission fails to cite the lead authority on the interpretation of *Charter* provisions

and on the relevance of non-binding international instruments to that issue and, thus, it is not sufficiently useful: *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32.

[37] The section 15 claim made in the Federal Court was based only on discrimination against women and children, not other groups. Some of the proposed interveners raise other grounds of discrimination not previously argued, such as religion, disability and sexual orientation. These are new issues. While one can find some evidence relevant to the treatment of these groups in the record, the issue of discrimination against these groups was not briefed or argued at the Federal Court, has not been argued by any of the parties, and, for practical purposes, would be a new issue in this Court. It is open to these moving parties to seek standing as public interest litigants to bring their own proceeding on these bases.

[38] Some of the proposed interveners, aware of the jurisprudence prohibiting the introduction of new issues, have tried to clothe their section 15 arguments as section 7 arguments, using the concept of intersectionality and phrases such as "viewing the section 7 issues through a section 15 lens", approaches to Charter interpretation and application not raised by the parties to the case. Here, the essential character and real essence of what they are doing is to introduce section 15 grounds into the case that are new.

[39] David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund Inc. and West Coast Legal Education and Action Fund do not address the actual section 15 claim raised in this case, as they admit at paragraph 11 of their reply. They propose to submit that courts of first instance must always decide section 15 matters when they are raised before

them. This goes beyond the respondents' submission that the Federal Court had a discretion to decide the section 15 issue but should have exercised it. Thus, it is new. Also their interest in this issue is solely jurisprudential and thus, on some authorities, is insufficient to justify intervention: *Amnesty International Canada v. Canada (Minister of National Defence*), 2008 FCA 257, 383 N.R. 275 at paras. 6-7; *C.U.P.E. v. Canadian Airlines International Ltd.*, 2000 FCA 233, [2010] 1 F.C.R. 226 at paras. 11-12.

[40] As well, this submission is doomed to fail and cannot be entertained: *Kattenburg* at para. 9. Implicit in it is that issues under section 15 of the Charter stand above all other issues and so, unlike other issues, when raised, the Court must deal with them. The Supreme Court has unanimously rejected this: *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238. Section 15 does not enjoy "superior status in a 'hierarchy' of rights": *Gosselin* at para. 26. As well, this submission runs counter to the well-established proposition that courts have a discretion whether or not to deal with issues unnecessary to the outcome of the case: see, *e.g.*, *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2013] 1 F.C.R. 143 at paras. 65-66 and 68; *Defence Construction Canada v. Ucanu Manufacturing Corp.*, 2017 FCA 133, [2018] 2 F.C.R. 269 at paras. 47-52.

C. Conclusion and disposition

[41] The proposed interveners are high quality organizations. Their causes are important and worthy of attention and consideration. In the right case with the right kind of intervention, they can contribute much.

[42] However, the Court is not persuaded that they can enter this appeal at this late stage and that their participation would be useful to the Court's determination of the real issues genuinely in play.

[43] Intervention is not the only way groups such as these can participate. They are dedicated to their causes and remain free to offer their views and insights and other assistance to counsel for the respondents.

[44] Therefore, I will dismiss the motions.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-204-20
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION *ET AL*. v. THE CANADIAN COUNCIL FOR REFUGEES *ET AL*.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	JANUARY 27, 2021

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Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 39
Date: September 6, 2019
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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I. Introduction

> We believe that the Creator has entrusted us with the sacred responsibility to raise our families…for we realize healthy families are the foundation of strong and healthy communities. The future of our communities lies with our children, who need to be nurtured within their families and communities. (see 1996 report of the *Royal Commission on Aboriginal Peoples (RCAP), Gathering strength,* vol. 3, p. 10 part of the Tribunal's evidence record).

[1] **The Special Place of Children in Aboriginal Cultures**

> Children hold a special place in Aboriginal cultures (...) They must be protected from harm (…). They bring a purity of vision to the world that can teach their elders. They carry within them the gifts that manifest themselves as they become teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the elders young again with their joyful presence.
>
> Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations. (see *RCAP, Gathering strength* vol. 3, p. 21).

[2] This Panel recognizes the shame and the pain and suffering experienced by children, who were deprived of this vital right to live in their families and communities and, also the shame, pain and suffering, that their families and communities experienced as a result of colonization, racism and racial discrimination.

[3] This shame is not for you to bear, it is one for the entire Nation of Canada to bear, in the hope of rebuilding together and achieving reconciliation.

II. Context

[4] In *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 [the *Decision*], this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family

services, pursuant to section 5 of the *Canadian Human Rights Act,* RSC 1985 c H-6 (the *CHRA* or the *Act*).

[5] The Panel generally ordered Aboriginal Affairs and Northern Development Canada (AANDC), now Department of Indigenous Services Canada (DISC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians applicable in Ontario* (the *1965 Agreement*) to reflect the findings in the *Decision*. Indigenous and Northern Affairs Canada (INAC) was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[6] In the 2016 CHRT 2 *Decision*, at para. 485, the Panel wrote:

> Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in willfully or recklessly. Awards of compensation under each of those sections cannot exceed $20,000 under the statute.

[7] The Panel had outstanding questions for the parties in regards to compensation and deferred its ruling to a later date after its questions had been answered. Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long-term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[8] The Panel advised the parties it would address the outstanding questions on remedies in three steps.

> First, the Panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. […]
>
> Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring

> will be dealt with as a second step. Finally, the Panel will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*. (see 2016 CHRT 10 at, paras. 4-5).

[9] The Panel reiterated its desire to move on to the issue of compensation in a 2018 ruling and wrote as follows:

> 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. (see 2018 CHRT 4 at, para. 385).
>
> Parties will be able to make submissions on the process, clarification of the relief sought, duration in time, etc. (see 2018 CHRT 4 at, para. 386).
>
> Moreover, the Panel added that 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 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. (see 2018 CHRT 4 at, para. 387).

[10] The Panel also said:

> 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. (see 2018 CHRT 4 at, para. 388).

[11] In terms of the impacts of this case on First Nations children and their families the Panel added:

> 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. (see 2018 CHRT 4 at, para. 389).

[12] After having addressed other pressing matters in this case, the Panel provided clarification questions to the parties on the issue of compensation. The Panel allowed the parties to answer those questions, to file additional submissions and to make oral arguments on this issue. The purpose of this ruling is to make a determination on the issue of compensation to victims/survivors of Canada's discriminatory practices.

III. The Panel's summary reasons and views on the issue of compensation

[13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being $40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which will be discussed further below and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its *Decision* that the Federal First Nations child welfare program is negatively impacting First Nations children and families it undertook to serve and protect. The gaps and adverse

effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws.

[14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.

[15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada. The Panel has made numerous findings since the hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling. It is impossible for the Panel to discuss the entirety of the evidence before the Tribunal in a decision. However, compelling evidence exists in the record to permit findings of pain and suffering experienced by a specific vulnerable group, namely First Nations children and their families. While the Panel encourages everyone to read the 10 rulings again to better understand the reasons and context for the present orders, some ruling extracts are selected and reproduced in the pain and suffering, Jordan's Principle and Special compensation sections below for ease of reference in elaborating this Panel's reasons. The Panel finds the Attorney General of Canada's (AGC's) position on compensation unreasonable in light of the evidence, findings and applicable law in this case. The Panel's reasons will be further elaborated below.

IV. Parties' positions

[16] The Panel carefully considered all submissions from all the parties and interested parties and in the interest of brevity and conciseness, the parties' submissions will not be reproduced in their entirety.

[17] The First Nations Child and Family Caring Society of Canada (Caring Society) states that the evidence in this case is overwhelming: Canada knew about, disregarded, ignored or diminished clear, cogent and well researched evidence that demonstrated the FNCFS Program's discriminatory impact on First Nations children and families. Canada also ignored evidence-informed solutions that could have redressed the discrimination well before the complaint was filed, and certainly in advance of the hearings. Indeed, the Tribunal's findings are clear that Canada was reckless and was often more concerned with its own interests than the best interests of First Nations children and their families.

[18] The Caring Society submits that this case embodies the "worst case" scenario that subsection 53(3) was designed for, and is meant to deter. Multiple experts and sources, including departmental officials, alerted Canada to the severe and adverse effects of its FNCFS Program. Over many years, Canada knowingly failed to redress its discriminatory conduct and thus directly and consciously contributed to the suffering of First Nations children and their families. The egregious conduct is more disturbing given Canada's access to evidence-based solutions that it ignored or implemented in a piecemeal and inadequate fashion.

[19] The Caring Society further argues that the evidence is clear that the maximum amount of $20,000 in special compensation is warranted for every First Nations child affected by Canada's FNCFS Program and taken into out-of-home care since 2006. The Government of Canada willfully and recklessly discriminated against First Nations children under the FNCFS Program and it was not until the Tribunal's decision and subsequent compliance orders (2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14 (as amended by 2017 CHRT 35), 2018 CHRT 4 and 2019 CHRT 7) that Canada has slowly started to remedy the discrimination.

[20] As such, the Caring Society submits that Canada ought to pay $20,000 for every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 through to the point in time when the Panel determines that Canada is in full compliance with the January 26, 2016 *Decision*.

[21] Also, the Caring Society adds that every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care between 2006 and the point when the FNCFS Program is free from perpetuating adverse impacts is entitled to $20,000 in special compensation under subsection 53(3) of the *CHRA*. Canada is keenly aware that many of the discriminatory aspects of the FNCFS Program remain unchanged and until long-term reform is complete, First Nations children will continue to experience discrimination. Those children deserve to be recognized and acknowledged, and Canada's continuation of this conduct in this program should be denounced, to (in the words of Mandamin J.) "provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Johnstone*, 2013 FC 113 at, para. 115) in order to prevent continuation and recurrence of such discriminatory conduct in future, including generally in other programs.

[22] The Caring Society contends that from the moment that the House of Commons unanimously passed Motion 296, Canada knew that failing to implement Jordan's Principle would cause harm and adverse impacts for First Nations children. Nonetheless, Canada did not take meaningful steps to implement Jordan's Principle for nearly another decade, after this Tribunal's numerous decisions and non-compliance orders requiring it to do so. By failing to implement it and making the informed choice to deny the true meaning of Jordan's Principle, Canada knowingly and recklessly discriminated against First Nations children. The Caring Society submits that the evidence in this case supports an award for special compensation pursuant to subsection 53(3) of the *CHRA* for the victims of Canada's willfully reckless discriminatory conduct in relation to Jordan's Principle from December 2007 to November 2017.

[23] The Caring Society is of the view that the special compensation ordered for (i) each First Nations individual affected by Canada's FNCFS Program who, as a child, was been taken into out-of-home care, since 2006; and (ii) for every First Nations individual who, as a child, did not receive an eligible service or product pursuant to Canada's willful and/or reckless discriminatory approach to Jordan's Principle from December 2007 to November 2017, should be paid into a trust for the benefit of those children.

[24] The Caring Society is requesting an order similar to that granted by this Tribunal in 2018 CHRT 4: an order under section 53(2)(a) of the *CHRA* for the Caring Society, the Assembly of First Nations (AFN), the Commission, Chiefs of Ontario, Nishnawbe Aski Nation and Canada to consult on the appointment of seven Trustees. If the parties cannot agree on who the trustees should be, the seven trustees of the Trust would be appointed by order of the Tribunal. The mandate of the Trustees will be to develop a trust agreement in accordance with the Panel's reasons, outlining among other things: (i) the purpose of the Trust; (ii) who the beneficiaries are; (iii) how a beneficiary qualifies for a distribution; (iv) programs that will be eligible and in keeping with the objective of the Trust; (v) how decisions of the Board of Trustees shall be made; and (vi) how the Trust will be administered.

[25] The Caring Society further requests an order that the parties report back within three months of the Panel's decision, with respect to the progress of the appointment of the Trustees. The Caring Society believes that an in-trust remedy will provide a meaningful remedy for First Nations children and families impacted by the willfully reckless discriminatory impact of the FNCFS Program and Jordan's Principle. It enables persons who were victims of Canada's discriminatory conduct to access services to remediate, in part, the impacts of discrimination.

[26] The Caring Society supports AFN's request for compensation in relation to both pain and suffering (section 53(2)(e)) and willful and reckless discrimination (section 53(3)) of the *CHRA*. Certainly, the victims in this case have experienced pain and suffering, with some First Nations children losing their families forever and some First Nations children losing their lives. In addition, on a principled basis, the Caring Society agrees with the AFN's request for individual compensation. We also recognize that an individual compensation process will require special and particular sensitivities regarding the significant issues of consent, eligibility and privacy. Many of the victims of Canada's discriminatory conduct are children and young adults who are more likely to experience historical disadvantage and trauma.

[27] According to the Caring Society, any process that is put in place will need to adopt a culturally informed child-focused approach that attends to these realities. Such persons

may also have their own claims against Canada, whether individually or as part of a representative or class proceeding, and it is not possible for the parties to ascertain the views of all such potential claimants on individual compensation through the Tribunal's process. The Caring Society is also aware of the significant and complex assessment processes required to administer and deliver individual compensation. Best estimates suggest that an order for individual compensation for those taken into out-of-home care could affect 44,000 to 54,000 people. In terms of Jordan's Principle, after the Tribunal issued its May 26, 2017 Order, the number of approvals significantly increased (indeed, over 84,000 products/services were approved in fiscal year 2018-2019), and Canada's witness regarding Jordan's Principle has acknowledged that these requests reflected unmet needs.

[28] Regarding the Panel's question of "who should decide for the victims", the Caring Society respectfully advances that the Tribunal, assisted by all of the parties, is in the best position to decide the financial remedy at this stage of the proceeding. The Tribunal has experience in awarding financial compensation to victims of discrimination and has a sense, through a common-sense approach, of what is and what is not reasonable. Indeed, this Panel is expertly immersed in this case. It understands the FNCFS Program and Jordan's Principle, the impacts experienced by First Nations children and the importance of ensuring long-term reform. It has also demonstrated that the centrality of children's best interests in decision-making which is essential to justly determining how the victims of discrimination in this case ought to be compensated.

[29] The victims' rights belong to the victims. While the Caring Society supports the request made by the AFN, the Caring Society's request for an in-trust remedy does not detract or infringe on victims' rights to directly seek compensation or redress in another forum. It is for this reason that the Caring Society respectfully seeks an order under subsection 53(3) that Canada pay an amount of $20,000 as compensation, plus interest pursuant to s. 53(4) of the *CHRA* and Rule 9(12) of the Canadian Human Rights Tribunal Rules of Procedure, for every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 until long-term reform is in place and for every First Nations child who did not receive an eligible service or product pursuant

to Canada's discriminatory approach to Jordan's Principle since December 12, 2007 to November 2017.

[30] The Assembly of First Nations (AFN) is requesting an order for compensation to address the discrimination experienced by vulnerable First Nations children and families in need of child and family support services on reserve.

[31] The AFN submits that the Panel stated in the main decision: "Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Residential Schools system is one of the darkest aspects of Canadian history….the effects of Residential Schools continue to impact First Nations children, families and communities to this day"(see 2016 CHRT 2 at, para. 412).

[32] The AFN submits the pain and suffering of the victimized children and families is significant according to the Affidavit of Dr. Mary Ellen Turpel-Lafond affirmed April 3, 2019, and it is also directly linked to the Respondent's discriminatory practice. Based on the circumstances in this case, the AFN seeks on behalf of individual First Nations children and families the maximum compensation available under s. 53(2)(e) and 53(3) of the *CHRA*, on a per individual basis for any pain and suffering. Given the voluminous evidentiary record before the Tribunal in this matter, and the particular experience to date this Panel has had presiding over this matter, as well as the Panel's expertise under the *CHRA*, the AFN believes the Tribunal is the appropriate forum to address individual compensation given the unique circumstances of this case and based on an expert panel advisory.

[33] Individuals subjected to the Respondent's discriminatory practice experienced a great deal of pain and suffering and should receive compensation, in particular those who were apprehended as a result of neglect. The AFN notes that some individuals were apprehended as a result of abuse and access to prevention programs may have prevented such abuse. Thus, in these circumstances a need for a case-by-case approach becomes apparent thereby lending credibility to the AFN's suggested approach to establishing an expert panel to address individual compensation. With respect to the evidence, the Tribunal is empowered to accept evidence of various forms, including

hearsay. Direct evidence from each individual impacted by the Respondent's discriminatory practice is not necessarily required to issue an award for pain and suffering. Therefore, the Tribunal could find that evidence from some individuals could be used to determine pain and suffering of a group.

[34] The AFN has been mandated by resolution following a vote by Chiefs in Assembly to pursue compensation for First Nations children and youth in care, or other victims of discrimination, and to request the maximum compensation allowable under the *Act* based on the fact that the discrimination was wilful and reckless, causing ongoing trauma and harm to children and youth, resulting in a humanitarian crisis (see Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6, 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System).

[35] The AFN submits that compensation be awarded to each sibling, parent or grandparent of a child or youth brought into care as a result of neglect or medical placements resulting from the Respondent's discriminatory practice, and that such compensation be the maximum allowable under the *Act*.

[36] The AFN submits no further evidence is required from the AFN or other parties to support and award the maximum compensation to the victims of discrimination as requested, but that the Tribunal can rely on its findings to date.

[37] Both the Caring Society and the AFN submit it would be a cruel process to require children to testify about their pain and suffering. Moreover, requiring each First Nations child to testify before the Tribunal is inefficient and burdensome.

[38] The AFN further submits that the effects of the Respondent's discriminatory practices are real and they are significant. As the Panel found, the needs of First Nations children and families were unmet in the Respondent's provision of child and family services which the AFN submits has caused pain and suffering for which compensation ought to be awarded. The discrimination as found by the Panel was occurring across Canada.

[39] The AFN recognizes that the payment of compensation to the victims of discrimination may be a significant endeavor, considering the large number of individuals and time period. An independent body, such as the Commission, could facilitate the compensation scheme and payments. Whichever body is tasked with issuing the compensation, such body will require timely, accurate and all relevant records from the Respondent. Provisions will need to be adopted to protect the victims from unscrupulous money lenders and predatory businesses. Finally, a notice plan may facilitate connecting individuals who are entitled to compensation payments.

[40] The AFN's remedial request suggests that an expert panel be established and mandated to address individual compensation to the victims of the Respondent's discriminatory practice as an option. This function can be carried out by the Canadian Human Rights Commission should they elect to take on this task. If so, the Respondent should be ordered to fund their activities.

[41] Additionally, the AFN states that the request for compensation to be paid directly to the victim of the Respondent's discrimination is not unprecedented, and in fact many parallels can be drawn from the Indian Residential School Settlement Agreement (IRSSA). Parallels such as the Common Experience Payment (CEP) and its surrounding processes, as well as the Independent Assessment Process (IAP), provide guidance in how a body issuing payments could be established to address individual compensation with respect to First Nations children and families discriminated against and victimized in this case.

[42] The AFN also submits that its National Chief and Executive Committee work in collaboration with the Caring Society to ensure the administration and disbursement of any payments to victims of discrimination come from funds other than the awards to the victims, so that no portion of the quantum awarded be rolled back or claimed by lawyers or legal representatives for assisting the victims.

[43] Overall, the AFN is interested in establishing a remedial process that may include both monetary and non-monetary remedies under a process overseen by an independent body. Given the potential for conflicts of interest in such a process, there would be a need to ensure matters dealt with in the remedial process are free from the influence of the

parties, in particular Canada. In the IRSSA, the IAP process was isolated from the outside litigation amongst the parties for this reason.

[44] The proposed remedial process to be overseen by the requested independent body would be non-adversarial in nature, which is another hallmark from the IRSSA that the AFN submits could be carried over in this case. Also, it could be based on an application process that is designed to be streamlined and efficient.

[45] The AFN advances that it is aware of the proposed class proceeding filed in Federal Court last month. Currently, the class action is in the beginning stages and is uncertified, and the nature of the action is very similar to the case at hand. The AFN questions the accuracy of paragraph 11 of the statement of claim which reads mid-paragraph: “No individual compensation for the victims of these discriminatory practices has resulted or will result from the Tribunal decision”. It would appear the claimant is anticipating that no individual compensation will result in this case before the Tribunal. In response, the AFN and the other parties have planned all along that compensation was a long-term remedy that should be addressed after the interim and mid-term relief was addressed. The parties are currently carrying out that plan. The AFN submits the Panel ignore that particular submission.

[46] The Chiefs of Ontario (COO) did not make written submissions on the issue of compensation. In their oral submissions, the COO advised it is content with the other parties’ requests for compensation.

[47] The Nishnawbe Aski Nation’s (NAN) goal is to ensure First Nations children receive compensation for the discrimination found by this Tribunal. The NAN is in support of the remedies sought by the Caring Society.

[48] The AGC, relying on a number of cases, makes several arguments that will not be reproduced in their entirety. Rather, given that the Panel considered all of them, it is appropriate to summarize them here and for the same above-mentioned reasons.

[49] The Attorney General of Canada (AGC) submits that remedies must be responsive to the nature of the complaint made, and the discrimination found: that means addressing

the systemic problems identified, and not awarding monetary compensation to individuals. Awarding compensation to individuals in this claim would be inconsistent with the nature of the complaint, the evidence, and this Tribunal's past orders. In a complaint of this nature, responsive remedies are those that order the cessation of discriminatory practices, redress those practices, and prevent their repetition.

[50] Moreover, the AGC states that the C*HRA* does not permit the Tribunal to award compensation to the complainant organizations in their own capacities or in trust for victims. The complainants are public interest organizations and not victims of the discrimination; they do not satisfy the statutory requirements for compensation under the *Act*. A class action claim seeking damages for the same matters raised in this complaint, on behalf of a broader class of complainants and covering a broader period of time, has already been filed in Federal Court (see T-402-19).

[51] The AGC submits this is a Complaint of Systemic Discrimination. In its 2014 written submissions, the Caring Society acknowledged that this is a claim of systemic discrimination, with no individual victims as complainants and little evidence about the nature and extent of injuries suffered by individual complainants. The Caring Society stated that it would be an "impossible task" to obtain such evidence. The absence of complainant victims and the assertion that it would be "impossible" to obtain victims' evidence strongly indicate that this is not an appropriate claim in which to award compensation to individuals. The AFN appears to also acknowledge that this is a claim of systemic discrimination: it alleges that the discriminatory practice is a perpetuation of systemic discrimination and historic disadvantage.

[52] Also, the AGC argues, that complaints of systemic discrimination are distinct from complaints alleging discrimination against an individual and they require different remedies. Complaints of systemic discrimination are not a form of class action permitting the aggregation of a large number of individual complaints. They are a distinct form of claim aimed at remedying structural social harms. This complaint is advanced by two organizations, the AFN and the Caring Society who sought systemic changes to remedy discriminatory practices. It is not a complaint by individuals seeking compensation for the

harm they suffered as a result of a discriminatory practice. The complainant organizations were not victims of the discrimination and they do not legally represent the victims.

[53] Additionally, the AGC contends the Canadian Human Rights Commission considers this to be a complaint of systemic discrimination. Then Acting-Commissioner, David Langtry, referred to it as such in his December 11, 2014 appearance before the Senate Committee on Human Rights. In discussing how the Commission allocates its resources, he specifically named this complaint as an example of a complaint of systemic discrimination that merited significant involvement on the part of the Commission.

[54] Furthermore, the AGC submits the evidence of the systemic nature of the complaint is found in the identity of the complainants, the language of the complaint, the Statement of Particulars, and the nature of the evidence provided to the Tribunal. The Tribunal's previous orders in this matter, clearly indicate that the Tribunal also regards this claim as a complaint of systemic discrimination.

[55] Likewise, the AGC adds that in their initial complaint to the Canadian Human Rights Commission, the complainants allege systemic discrimination. The framing of the complaint is important. In the *Moore v. British Columbia (Education),* 2012 SCC 61, [*Moore*] case, the Supreme Court of Canada determined that remedies must flow from the claim as framed by the complainants. In the complainants' joint statement of particulars, they also indicated that this is a claim of systemic discrimination.

[56] Besides, the AGC argues that claims by individual victims provide details of the harms they suffered as a result of the discriminatory practice. If this were a claim alleging discrimination against an individual or individuals, there would be evidence of the harm they suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation. No such evidence exists in this case. With respect to child welfare practices, there is very little evidence in the record regarding the impact of the discriminatory funding practice on individuals, particularly regarding causation, that is, evidence of the link between the discriminatory practices and the harms suffered. The AFN acknowledges that awards for pain and suffering require an evidentiary basis outlining the effects of the discriminatory practice on the individual victims.

[57] According to the AGC, this Tribunal has only awarded compensation to individuals in claims of systemic discrimination where they were complainants and where there was evidence of the harm they had suffered. In this claim, the Tribunal lacks the strong evidentiary record required to justify awarding individual remedies. An adjudicator must be able to determine the extent and seriousness of the alleged harm in order to assess the appropriate compensation and the evidence required to do so has not been provided in this claim. The AGC submits further that no case law supports the argument that compensation to individuals can be payable in claims of systemic discrimination without at least one representative individual complainant providing the evidence needed to properly assess their compensable damages.

[58] Moreover, the AGC advances that neither of the tools available to the Tribunal to address the deficiency in evidence are appropriate in the circumstances. The Tribunal is entitled to require better evidence from the parties, and to extrapolate from the evidence of a group of representative complainants. However, there are no representative individual plaintiffs in this complaint and no evidence regarding their experiences from which to extrapolate on a principled and defensible basis. The Tribunal's ability to compel further evidence is also not helpful as the Caring Society has stated that it would be an impossible task to obtain such evidence, and would be inconsistent with the fundamental nature of the complaint. Compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court in Canada (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62).

[59] The AGC adds that the Commission's submissions on compensation indicate that this Tribunal declined to award compensation in claims where it would have been impractical to have thousands of victims testify, acknowledging that it could not award compensation "en masse" (*Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para. 991, although other aspects of this decision were judicially reviewed, the Tribunal's refusals to award compensation for pain and suffering, or special compensation for wilful and reckless discrimination, were not).

[60] In making its findings, the Tribunal reproduced passages from another pay equity case that had reached similar conclusions: *Public Service Alliance of Canada v. Canada (Treasury Board),* 1998 CanLII 3995 (CHRT) at paras. 496-498. The *Canada Post* case involved roughly 2,800 victims. The Treasury Board case involved roughly 50,000 victims.

[61] The AGC further contends that the Complaint is not a class action and the remedies claimed by the parties resemble the sort of remedies that may be awarded by a superior court of general jurisdiction rather than a Tribunal with a specific and limited statutory mandate. A class action claim addressing the subject matter of this complaint has been filed in the Federal Court.

[62] Also, the AGC submits that in *Moore v. British Columbia (Education),* 2012 SCC 61, [*Moore*], the B.C. Human Rights Tribunal permitted the complainant to lead evidence regarding systemic issues in a complaint of discrimination against an individual, in that case an individual with dyslexia who claimed discrimination on the basis he was denied access to education. The B.C. Tribunal relied on that evidence to award systemic remedies. However, the Supreme Court of Canada concluded that the systemic remedies are too far removed from the "complaint *as framed by the Complainant*" (para. 61 [emphasis in original]). The Supreme Court upheld the individual remedies but set aside all of the systemic orders because the remedy must flow from the claim. According to the AGC, while the situation is reversed in this case, the same principle applies. The complainants framed this complaint as one of systemic discrimination and are now bound by that choice. Remedies in this case must be systemic, particularly because there is insufficient evidence to determine appropriate compensation, if any, for individuals. The AGC adds that the lack of evidence of harm suffered by individuals, and the apparent impossibility of obtaining it, clearly indicates that this is not an appropriate claim in which to award individual compensation.

[63] The AGC adds that the *Act* does not permit complaints on behalf of classes of complainants, nor does it permit remedies to be awarded to those same classes. Section 40(1) of the *Act* permits individuals or groups of individuals to file a complaint with the Commission while s.40(2) of the *Act* specifically empowers the Commission to decline to consider complaints, such as this, that are filed without the consent of the actual victims.

The lack of an equivalent provision in the *Act* indicates that Parliament chose not to permit class action-style complaints, and it certainly did not grant the Tribunal jurisdiction or provide the tools needed to deal with class complaints.

[64] Furthermore, the AGC adds that given its lack of jurisdiction, the Tribunal should not rely on principles from class action jurisprudence. Québec's Tribunal des droits de la personne, whose statute is similar to the *Act*, addressed the relationship between class actions and human rights in the civil law context in *Commission des droits de la personne et des droits de la jeunesse c. Québec (Procureur général),* 2007 QCTDP 26 (CanLII). The case concerned a settlement agreement reached by Quebec, the Quebec Commission, and the teachers' union. The parties encouraged the Tribunal to rely on class actions principles and to approve the agreement despite opposition from a group of young teachers who felt the deal was disadvantageous to them. The Tribunal declined to do so, noting that a "class action is an extraordinary procedural vehicle that breaks with the principle that no one can argue on behalf of another. That recourse can be exercised only with the prior authorization of the court." (para. 105). The Tribunal rejected the suggestion that class actions principles could apply in the human rights context, noting that in class actions the judge serves an important role in protecting "absent members" (para. 109). Without these procedural protections, the tribunal process should not be used to dispossess victims of their rights in the dispute. The Tribunal also concluded that the procedural mechanism of class actions is legislative, and can only be exercised where statutory conditions are met and therefore cannot be transplanted into Tribunal proceedings without legislative authority.

[65] The AGC also argues that while not binding on this Tribunal, the Quebec Tribunal's reasoning is compelling. Class action principles do not apply to human rights complaints and should not be injected into them without legislative authority. Where courts are empowered to consider class proceedings, they are equipped with the tools necessary to do so. For example, Rule 334 of the Federal Court Rules, which governs class proceedings in the Federal Court, empowers judges to review and certify class proceedings, dictates the form for a certification order, provides a process for opting out of the class and modifies other processes under the Rules to accommodate class

proceedings. The Rule notably requires a class representative, a person who is qualified to act as plaintiff or applicant under the rules. In the absence of such a provision, the Canadian Human Rights Tribunal is not empowered to address class complaints or to treat complaints that purport to be on behalf of unidentified individual complainants like a class claim.

[66] Furthermore, according to the AGC, The Tribunal does not have jurisdiction to award individual compensation in complaints of systemic discrimination, particularly where, as here, there are no individual complainants. The terms of the *Act* and the jurisprudence of both this Tribunal and the Federal Courts clearly indicate that paying compensation to the complainant organizations or to non-complainant victims would exceed the Tribunal's jurisdiction. Compensation can only be paid where there is evidence of harm suffered by complainant individuals and should only be paid where it advances the goal of ending discriminatory practices and eliminating discrimination.

[67] The AGC contends there is no legal basis for compensating the Complainants. The Tribunal was created by the *Act* and its significant powers to compensate victims of discrimination can only be exercised in accordance with the *Act*. The Tribunal's task is to adjudicate the claim before it. Its inquiry must focus on the complaint and any remedies ordered must flow from the complaint. The requirements of s. 53(2)(e) or 53(3) must be satisfied for the Tribunal to award compensation under the *Act*.

[68] In regards to pain and suffering, the AGC adds that section 53(2)(e) of the *Act* grants the Tribunal jurisdiction to award up to $20,000 to "the victim" of discrimination for any pain and suffering they experienced as a result of the discriminatory practice. However, the complainant organizations are not victims of the discrimination and did not experience pain and suffering as a result of it. The evidence presented to the Tribunal by the complainants did not speak to "either physical or mental manifestations of stress caused by the hurt feelings or loss of respect as a result of the alleged discriminatory practice." (*Canada (Attorney General) v. Hicks*, 2015 FC 599 at, para. 48). Organizations cannot experience pain and suffering and there is, therefore, no need to "redress the effects of the discriminatory practices'' (*Closs v. Fulton Forwarders Incorporated and Stephen Fulton*, 2012 CHRT 30 at, para. 84) with regards to the complainants. Redressing

the discrimination found was necessary in this case, but the Tribunal's previous orders accomplished this goal.

[69] In regards to pain and suffering, the AGC adds that for discrimination to be found to be willful and reckless, and therefore compensable under s. 53(3) of the *Act,* evidence is required of a measure of intent or of behavior that is devoid of caution or without regard to the consequences of that behavior. Compensation for willful and reckless discrimination is justified where the Tribunal finds that a party has failed to comply with Tribunal orders in previous matters intended to prevent a repetition of similar events from recurring. As with compensation for pain and suffering, compensation for willful and reckless discrimination can only be paid to "victims" of discrimination. The complainant organizations were not victims of willful and reckless discrimination. Furthermore, there is no evidence of a consistent failure to comply with orders.

[70] The AGC submits this claim raises novel issues. There were no orders requiring the Government to address these issues before the Tribunal's first decision in this matter. The Tribunal's decisions in this matter since 2017 are based on the findings and reasoning of the initial decision and are intended to: "provide additional guidance to the parties" (2017 CHRT 14 at, para. 32). They do not demonstrate that Canada has acted without caution or regard to the consequences of its behavior. Concerns about the adequacy of the Government's response to studies and reports in the past do not provide a basis for awarding compensation under s. 53(3). Canada's funding for child welfare services has consistently changed to address shifts in social work practice and the increasing cost of providing family services. Examples of these changes include the redesign of the funding formula to add an additional funding stream for prevention services and Bill C-92 currently before the House of Commons. Since the AGC's submissions, Bill C-92 received Royal assent.

[71] The AGC argues this Tribunal understands the limitations of its remedial jurisdiction. In its decisions in this matter, the Tribunal has shown a nuanced understanding of both its powers and of the limitations of its remedial jurisdiction. The Tribunal should follow its own guidance in deciding the issue of compensation in this case. In 2016 CHRT 2, the Tribunal concluded that its remedial discretion must be exercised

reasonably and on a principled basis considering the link between the discriminatory practice and the loss claimed, the particular circumstances of the case and the evidence presented. In reaching its conclusion, it stated that the goal of issuing an order is to eliminate discrimination and not to punish the government.

[72] Moreover, in 2016 CHRT 16, in declining to order the Government to pay to transfer recordings of the Tribunal hearings into a publicly accessible format at the request of the Aboriginal Persons Television Network (the “APTN”), the Tribunal acknowledged the importance of the link between the discriminatory practice and the loss claimed. The AGC submits that while the Tribunal was respectful of the APTN's mission and recognized the public interest in the recordings, the fact that APTN was neither a party nor a victim meant that the remedial request was not linked to the discrimination and was, therefore, denied.

[73] Also, according to the AGC, the Federal Court of Appeal has recognized that structural and systemic remedies are required in complaints of systemic discrimination. In Re: *C.N.R. and Canadian Human Rights Commission,* 1985 CanLII 3179 (FCA) [*C.N.R.*], the Court found that compensation is limited to 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”.

[74] The AGC further submits that remedies in claims of systemic discrimination should seek to prevent the same or similar discriminatory practices from occurring in the future in contrast with remedies for individual victims of discrimination which seek to return the victim to the position they would have been in without the discrimination. As human rights lawyers Brodsky, Day and Kelly state in their article written in support of this complaint: “where the breach of a human rights obligation raises structural or systemic issues --- such as longstanding policy practices that discriminate against Indigenous women - the underlying violations must be addressed at the structural or systemic level" (Gwen Brodsky, Shelagh Day & Frances Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies” (2017) 6:1 Can J Hum Rts 1 at p. 18).

[75] The AGC also argues that any compensation must be paid directly to victims of the discrimination. There is no legal basis for the Caring Society's requests that compensation

for willful and reckless discrimination be paid into a trust fund that will be used to access services including: language and cultural programs, family reunification programs, counselling, health and wellness programs, and education programs. Compensation is only payable to victims under the terms of the *Act* and paying compensation to an organization on behalf of individual victims could bar that individual from vindicating their own rights before the Tribunal and obtaining compensation. It may also prejudice their recovery in a class action claim as any damages awarded to the victims would be offset against the compensation already awarded to the organization by the Tribunal.

[76] Furthermore, the AGC contends that compensation is inappropriate in claims alleging breaches of Jordan's Principle in light of the fact there is no basis to award compensation under the *Act* to either the complainant organizations or non-complainant individuals for alleged breaches of Jordan's Principle. As the Commission notes in its submissions, where Canada has implemented policies that satisfactorily address the discrimination, no further orders are required.

[77] The AGC submits there is no basis to find that the government discriminated willfully or recklessly in this claim. The Tribunal in the Johnstone decision, relied on by the Caring Society, justified its award of compensation under s. 53(3) of the *Act* by pointing to disregard for a prior Tribunal decision that addressed the same points and the government's reliance on arbitrary and unwritten policies, among other things, neither of which are the case here.

[78] According to the AGC, the Tribunal has asked whether the expert panel proposed by the AFN is feasible and legal or whether it would be more appropriate for the parties to form a committee (potentially including COO and NAN) to refer individual victims to the Tribunal for compensation. The AGC submits neither of these proposals is feasible or legal. The Tribunal cannot delegate its authority to order remedies to an expert panel and it would not be appropriate to ignore the nature of the complaint by awarding compensation to victims who are not complainants in a claim of systemic discrimination. There are no individual complainants in this claim and little evidence of the harm suffered by victims from which the Tribunal can extrapolate. It would also offend the general objection against awarding compensation to non-complainants in human rights matters.

[79] The Caring Society requests that compensation be paid in to an independent trust similar to the ones established under the IRSSA and the AFN is requesting payment of compensation directly to victims and their families. The AGC says the Tribunal should not, and is not permitted in law, to take either of the approaches proposed by the complainants. As the Tribunal question notes, the Indian Residential Schools settlement is the result of agreement between the parties in settling a class action and the independent trust was not imposed by a Court or tribunal.

[80] Finally, according to the AGC, compensation cannot be paid to victims or their families through this process because there are no victims or family-member complainants in this claim.

[81] The Commission while not making submissions on the remedies sought made helpful legal arguments on the issue of compensation and in response to the AGC's legal position on this issue which will be summarized here. The Commission agrees that any award of financial compensation to victims must be supported by evidence. However, it is important to remember that s. 50(3)(c) of the *CHRA* expressly allows the Tribunal to "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be available in a court of law." As a result, in making decisions under the *CHRA*, it is open to the Tribunal to rely on hearsay or other information, alongside any direct testimony from the parties, victims or other witnesses (emphasis ours).

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

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

[84] According to the Commission, the Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA*.

[85] Like all remedies under the *CHRA*, awards for pain and suffering must be tied to the evidence, be proportionate to the nature of the infringement, and respect the wording of the statute. Among other things, this requires that awards for pain and suffering fit within the $20,000 cap set out in s. 53(2)(e) of the *CHRA*. At the same time, as the Ontario Court of Appeal has cautioned in the context of equivalent head of compensation under the Ontario Human Rights Code, "… Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the [*Code*] by effectively setting a "licence fee" to discriminate" (*Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520, para. 59).

[86] The Commission adds that the Court of Appeal noted in *Lemire v. Canada (Human Rights Commission),* 2014 FCA 18, [*Lemire*], the wording of s. 53(3) of the *CHRA* does not require proof of loss by a victim. In the context of the former hate speech prohibition under the *CHRA*, awards of special compensation for wilful or reckless conduct were said to compensate individuals identified in the hate speech for the damage "presumptively caused" to their sense of human dignity and belonging to the community at large.

[87] Additionally, the Commission argues that sections 53(2)(e) and 53(3) of the *CHRA* each allow the Tribunal to order that a respondent pay financial compensation to the "victim of the discriminatory practice."

[88] Also, the Commission advances the argument that in most human rights proceedings, there is one complainant who is also the alleged victim of the discriminatory practice. However, this is not always the case. The *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[89] In light of this potential under the *CHRA*, the Commission submits that it is within the discretion of the Tribunal to award financial remedies to victims of discriminatory practices, and to determine who those victims are – always having regard to the evidence before it. For example, if the specific identities of victims are known to the Tribunal, it might order payments directly to those victims. If the Tribunal does not have evidence of the specific identities of the victims, but has enough evidence to believe that the parties would be capable of identifying them, it might make orders that (i) describe the class of victims, (ii) give the parties time to collaborate to identify the victims, and (iii) retain the Tribunal's jurisdiction to oversee the process.

[90] The Commission further submits that in *Canadian Human Rights Commission v. Canada (Attorney General),* 2010 FC 1135 (CanLII) at paras. 61 and 67, aff'd 2011 FCA 202 (CanLII) [*Walden*], the Federal Court (i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[91] The Commission notes that in questions posed to the parties regarding compensation, the Panel Chair appears to have raised concerns about having the Tribunal order the creation of a panel that would effectively be making decisions about appropriate remedies under the *CHRA*. With the greatest of respect to the AFN, the Commission shares those concerns. Parliament has assigned the responsibility of deciding

compensation to the specialized Tribunal, created under the *CHRA*. Nothing in the statute authorizes the Tribunal to sub-delegate that responsibility to another body. Without statutory authority, any sub-delegation of this kind would likely be contrary to principles of administrative law.

[92] The Commission further notes that in her questions, the Panel Chair asked if it might instead be preferable to have an expert panel do the preliminary work of identifying victims, and present their circumstances to the Tribunal for determination. If the Tribunal is inclined to go in this direction, the Commission simply observes that the Tribunal's remedial powers only allow it to make orders against the person who infringed the *CHRA* here, Canada. As a result, any order regarding an expert panel should not purport to bind the Commission or any other non-respondent to participate on an expert panel.

[93] Speaking only for itself, the Commission has concerns that it would not have sufficient resources to allow for timely and effective participation in an expert panel procedure of the kind under discussion. An order that allows for the Commission's participation, but does not require it, would allow the Commission to consider the resource implications of any process that may be put in place, and advise at that time of its ability to participate.

V. The Tribunal's authority under the *Act* and the nature of the claim

[94] The Tribunal's authority to award remedies such as compensation for pain and suffering and special damages for wilful and reckless conduct is found in the *CHRA* characterized by the Supreme Court of Canada on numerous occasions, to be quasi-constitutional legislation (see for *example Robichaud v. Canada (Treasury Board),* 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at pp. 89-90 [*Robichaud*]*; Canada (House of Commons) v. Vaid*, 2005 SCC 30 (CanLII) at para. 81; and *Canada* (*Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53 (CanLII) at para. 62 [*Mowat*]).

> The principle that the *CHRA* is paramount was first enunciated in the *Insurance Corporation of British Columbia v. Heerspink* 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, 158, and further articulated by the *Supreme*

Court of Canada in Winnipeg School Division No. 1 v. Craton 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156 where the court stated:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended or appealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. (at p. 577) (see also 2018 CHRT 4 at, para. 29).

It is through the lens of the *CHRA* and Parliament's intent that remedies must be considered (…) (see 2018 CHRT 4 at, para. 30).

> It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the *Act*. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the *Act* are obtained. Applying a purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134; and, in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 at, paras. 25 and 55), (see also 2016 CHRT 2 at, para. 469).

[98] Moreover, the Tribunal's broad remedial discretion is to be exercised on a principled and reasonable basis, taking into account the circumstances of the case, the link between the discriminatory practices and the losses claimed, and the evidence presented. (see *Tanner v. Gambler First Nation,* 2015 CHRT 19 at para. 161 (citing *Chopra v. Canada (Attorney General),* 2007 FCA 268 (CanLII), at para. 37); and *Hughes v. Elections Canada,* 2010 CHRT 4 at para. 50).

[99] When the Tribunal analyzes the claim, it reviews the complaint and also the elements contained in the Statement of Particulars in accordance with rule 6(1)d) of the Tribunal's rules of procedure (see *Lindor c. Travaux publics et Services gouvernementaux Canada*, 2012 TCDP 14 at para. 4, Translation).

[100] In fact, when the Tribunal examines the complaint, it does so in light of the principles above mentioned and in a flexible and non-formalistic manner:

> "Complaint forms are not to be perused in the same manner as criminal indictments". (*Translation, see Canada (Procureur général) c. Robinson,* [1994] 3 CF 228 (CA) cited in *Lindor* 2012 TCDP 14 at para. 22).

> « Les formules de plainte ne doivent pas être scrutées de la même façon qu'un acte d'accusation en matière criminelle. »

[101] Furthermore, this Tribunal has determined that the complaint is but one element of the claim, a first step therefore, the Tribunal must look beyond the complaint form to determine the nature of the claim:

> Pursuant to Rule 6(1) of the Tribunal's Rules of Procedure (03-05-04) (the "Rules"), each party is to serve and file a Statement of Particulars ("SOP") setting out, among other things,
>
> (a) the material facts that the party seeks to prove in support of its case; (b) its position on the legal issues raised by the case (...) (see *Kanagasabapathy v. Air Canada*, 2013 CHRT 7, at para. 3).
>
> It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway,* 2017 CHRT 6 at para. 9 [*Casler*]; see also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:
>
> > . . [I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the *Act*. … As the Tribunal stated in *Gaucher*, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement".
>
> (…)
>
> As explained in *Gaucher* and *Casler*, cited above, the complaint filed with the Commission only provides a synopsis; it will essentially become clearer during the course of the process. The conditions for the hearing are defined in the Statement of Particulars. (see also *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 at, paras. 13 and 36).

[103] It is useful to look at the claim in this case which in this case includes the complaint, the Statement of Particulars and the specific facts of the case to respond to the AGC's argument that this is a systemic claim and not suited for awards of individual remedies.

[104] The complaint form in this case alleges that: ''the formula drastically underfunds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures''. These services are vital to ensuring the First Nations children have the same chance to stay safely at home with support services as other children in Canada (see Complaint form at, pages 2-3).

[105] The Panel already found in past rulings that it is the First Nations children who suffer and are adversely impacted by the underfunding of prevention services within the federal funding formula. The Panel considered the claim including the complaint, Statement of Particulars as well as the entire evidentiary record, arguments, etc. to arrive at its findings. As exemplified by the wording above, the complaint specifically identifies First Nations children and the AFN and the Caring Society advanced the complaint on their behalf.

[106] Furthermore, the Statement of Particulars of the Caring Society and the AFN of January 29, 2013: "request pain and suffering and special compensation remedies under section 53(2) (e) of the *CHRA* and (f)…'' (see page 7 at para. 21 reproduced below):

> Relief requested:
>
> Pursuant to sections 53(2)(d), (e) and (f), requiring compensation and special compensation in the form of payment of one hundred and twelve million dollars into a trust fund to be administered by FNCFCS and to be used to: (a) As compensation, subject to the limits provided in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989 and thereby experienced pain and suffering;

[107] In this case, the fact that there is no section 53 (2) (f) in the *CHRA* but rather a paragraph 3 is a small error that does not change the nature of the requested remedies. Moreover, this error was later corrected in the Caring Society's final submissions.

[108] It is clear from reviewing the Complainants' Statement of Particulars that they were seeking compensation from the beginning and also before the start of the hearing on the merits. The Tribunal requests parties to prepare statements of particulars in order to detail the claim given that the complaint form is short and cannot possibly contain all the elements of the claim. It also is a fairness and natural justice instrument permitting parties to know their opponents' theory of the cause in advance in order to prepare their case. Sometimes, parties also present motions seeking to have allegations contained in the Statement of Particulars quashed in order to prevent the other party from presenting evidence on the issue.

[109] The AGC responded to these compensation allegations and requests both in its updated Statement of Particulars of February 15, 2013 demonstrating it was well aware that the complainants the Caring Society and the AFN were seeking remedies for pain and suffering and for special compensation for individual children as part of their claim.

[110] As shown by the AGC's position on the relief requested by the Complainants:

> With respect to the relief sought in paragraphs 21(2), 21(3) (insofar as the relief requested in 21(3) seeks the establishment of a trust fund to provide compensation to certain unnamed First Nations persons for pain and suffering and for certain services) and 21(5) of the Complainants Statement of particulars, the requested relief is beyond the jurisdiction of the Tribunal (...) No compensation should be awarded under section 53(2)(e) of *Canadian Human Rights Act* as neither Complainant meet the definition of victim within the section. In the alternative, any compensation awarded under s.53(2)(e) should be limited to a maximum of $40,000 (calculated as follows: the maximum available, $20,000, multiplied by the number of Complainants, two, equals $40,000). (See AGC particulars at page 15, para. 64 and 66).

[111] The Panel finds this demonstrates that the AGC was fully aware that compensation remedy for victims/survivors who were not the Complainants was part of the Complainants' claim before the Tribunal. Moreover, it admitted that compensation was an issue to be determined by the Tribunal in a Consultation Protocol signed in these proceedings by all parties and by Minister Jane Philpott, as she then was, on behalf of Canada:

> WHEREAS, the Tribunal retained jurisdiction to ensure the implementation of its Decision, and subsequently directed that implementation be done in three steps, namely: (1) immediate relief; (2) mid to long term relief; and (3) compensation, and has reserved its ruling regarding the Complainants' motion for an award against Canada in relation to the costs of its obstruction of the Tribunal's process in relation to document disclosure and production (see Consultation Protocol, signed March 2, 2018 at page. 2)
>
> The Tribunal has directed that the implementation of its *Decision* be done in three steps, namely: (1) immediate relief, (2) mid to long term relief and (3) compensation. Canada commits to consult in good faith with the Complainants, the Commission and Interested Parties on all the three steps, to the extent of their respective interests and mandates. (see Consultation Protocol, signed March 2, 2018 at, para. 4, page. 7)

VI. Victims under the *CHRA*

[112] Nothing in the *Act* suggests that the Tribunal lacks jurisdiction and cannot order remedies benefitting victims who are not Complainants. The Panel disagrees with the AGC's argument and interpretation including of section 40 paras. (1) and (2) summarized above. Section 40 (1) and (2) is reproduced here:

> 40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.
>
> Consent of victim
>
> (2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

[113] This wording suggests that complaints on behalf of victims made by representatives can occur and the Commission has the discretion to refuse to deal with the complaint if the victim does not consent.

[114] In this case, the Commission referred the complaint to the Tribunal and does not oppose the remedy sought on behalf of victims.

[115] Consequently, the Panel agrees with the Commission that the *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[116] Additionally, the Federal Court of Appeal's decision in *Singh (Re),* [1989] 1 F.C. 430 at 442, discussed the meaning of the term victim where the Court stated:

> The question as to who is the "victim" of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect. That effect is by no

> means limited to the alleged "target" of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences that are sufficiently direct and immediate to justify qualifying as a "victim" thereof persons who were never within the contemplation or intent of its author.

[117] The Tribunal has already distinguished complainants from victims who are not complainants within the *CHRA* framework:

> On the third ground, I am satisfied that the proceeding will have an impact on the interests of PIPSC's members. PIPSC is the bargaining agent for the Complainants and non-complainant Medical Adjudicators who may be deemed as "victims" under the *CHRA* and entitled to compensation. On this basis alone, I find that PIPSC has an interest in this phase of the proceeding. (see *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada),* 2011 CHRT 19 at, para. 25).

[118] This speaks against the AGC's argument that the Tribunal cannot make awards to individuals that are not complainants and to the other AGC's argument that the Tribunal has no jurisdiction to award remedies for a "group" of victims represented by an organization.

[119] In *Walden,* both the Tribunal's liability and remedy decisions were judicially reviewed, unsuccessfully in the case of the former and successfully in the latter. The remedy matter was referred back on two issues to be resolved: one involving compensation for pain and suffering; and the other, involving compensation for wage loss including benefit. The parties have negotiated a settlement on the pain and suffering component and have asked the Tribunal for a Consent Order disposing of this issue (see *Walden v. Canada (Social Development),* 2011 CHRT 19 (CanLII), at para. 3).

[120] While the end result in that case was a consent order on pain and suffering remedies, the Tribunal could not make orders that would fall outside its jurisdiction under the *Act*.

[121] The AGC relies also on a Federal Court case to support its position that compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights

complaints, as recognized by the Federal Court in *Canada* (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62.

[122] The Panel disagrees with the AGC's interpretation and application of the Federal Court decision to our case. The analysis, the factual matrix and the findings from the Federal Court are different from the case at hand. The Panel finds it does not support the AGC's position to bar the Tribunal from awarding compensation to non-complainant victims in this case.

[123] This case was always about children as exemplified by the claim written in the complaint and in the Statement of Particulars and the Tribunal's decisions. Moreover, the AGC is aware that the Tribunal views this case as being about children. What is more, the Panel agrees that AFN and the Caring Society filed the complaint on behalf of a representative group who are identifiable by specific characteristics if not by name. Furthermore, the Panel believes it is important to consider the nature of this case where the victims/survivors are part of a group composed of vulnerable First Nations children.

[124] While there are other forums available for filing representative actions, the AFN stated that Tribunal was carefully chosen in this case due to the nature of the claim, but, also due to the means of redress available under the *CHRA* for members of a vulnerable group on whose behalf the AFN has advanced a case of discrimination contrary to the *Act*.

VII. Pain and suffering analysis

[125] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *CHRA*). In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General),* 2010 FC 1135 (CanLII) at paras. 61 and 67, aff'd 2011 FCA 202 (CanLII) [*Walden*]). In determining the present motions, this is the situation in which the Panel finds itself. (see 2017 CHRT 14 (CanLII) at para. 27), (see 2019 CHRT 7 at, para. 47). Therefore, in the

presence of sufficient evidence and a remedy that flows from the claim, the Tribunal may make the orders it finds appropriate.

[126] In a recent Tribunal decision, *Lafrenière v. Via Rail Canada Inc.,* 2019 CHRT 16, at para. 193 Member Perreault wrote about the pain and suffering award under section 53(2)(e) of the *CHRA*:

> However, $20,000 is the maximum that may be awarded under the legislation and it is usually awarded by the Tribunal in more serious cases, i.e. when the scope and duration of the Complainant's suffering from the discriminatory practice justify the full amount.

[127] The Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA (*see *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 [*Jane Doe*], at para. 29, citing (among others): *Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 10 at para. 115*; and Alizadeh-Ebadi v. Manitoba Telecom Services Inc*., 2017 CHRT 36 at para. 213).

[128] Furthermore, "when someone endures pain and suffering, there is no amount of money that can remove that pain and suffering from the Complainant. Moral pain related to discrimination (…) varies from one individual to another. Psychological scars often take a long time to heal and can affect a person's self-worth. From the point of view of the person that suffered discrimination, large amounts of money should be granted to reflect what they lived through and to provide justice. This being said, when evidence establishes pain and suffering an attempt to compensate for it must be made. (…) However, $20,000 is the maximum amount that the Tribunal can award under section 53(2)(e) and the Tribunal only awards the maximum amount in the most egregious of circumstances" (see *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 10 at, para. 115 recently cited in *Jane Doe,* at, para. 29).

[129] The pain and suffering remedy sought as part of this ruling is found at para. 53 (2)(e) of the *CHRA*. Section 53 (2) reads as follows:

> Complaint substantiated

> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (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.

[130] Section 53 imposes a logical requirement for any award of remedies that is, the remedy should flow from a finding that the complaint is substantiated. If this is the case, an array of remedies is available to the victim of the discriminatory practice. The wording of section 53(2) is unambiguous and allows the victim of the discriminatory practice to obtain any remedies listed in section 53 as the member or panel finds appropriate: ‘’(..) and include in the order any of the following terms that the member or panel considers appropriate’’. It is clear that the language of the *CHRA* does not prevent awards of multiple remedies even if systemic remedies have been ordered.

[131] The AGC's argument that systemic discrimination requires systemic remedies is correct. However, the AGC's argument that it precludes other awards of remedies as the Panel deems appropriate in light of the facts and the evidence before the Tribunal is incorrect.

[132] The way to determine the issue is to look at the Statute first:

> The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; see also *Rizzo & Rizzo Shoes Ltd*. (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para. 21, see also *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 at, para. 12).

[133] The special nature of human rights legislation is also taken into account in its interpretation:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the *Act* must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (see *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, at, p. 1134) cited in 2015 CHRT 14 at, para. 13).

[134] Consequently, analyzing the specific facts of the case and weighing the accepted evidence in the Tribunal record is of paramount importance. Indeed, the Federal Court of Appeal recently described the exercise of statutory interpretation:

> To discern the meaning of "compensate", the Board is therefore required to conduct an exercise in statutory interpretation. For the interpretation to be reasonable, the Board is obliged to ascertain the intent of Parliament by

> reading paragraph 53(2)(e) in its entire context, according to the grammatical and ordinary meaning of its text, understood harmoniously with the object and scheme of the *Act*. The Board must also be mindful that human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect. (see *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 at, paras. 23).

[135] The proper legal analysis is fair, large and liberal and must advance the *Act*'s objective and account for the need to uphold the human rights it seeks to protect. As mentioned above, one should not search for ways and means to minimize those rights and to enfeeble their proper impact.

[136] The AGC relies on the *Moore* case to support its assertion that individual remedies cannot be awarded in a systemic case. However, the Panel disagrees with the AGC's interpretation of this case.

[137] The Supreme Court decision in *Moore* did not say that both systemic and individual remedies cannot be awarded to victims of discriminatory practices rather it emphasizes the need for the remedy to be connected to the claim and the need for an evidentiary basis to make orders. The case of Jeffery Moore was a complaint of individual discrimination where the Tribunal went beyond the claim and made findings of systemic discrimination. This is the issue discussed by the Supreme Court which described the case as follows:

> This case is about the education of Jeffrey Moore, a child with a severe learning disability who claims that he was discriminated against because the intense remedial instruction he needed in his early school years for his dyslexia was not available in the public-school system. Based on the recommendation of a school psychologist, Jeffrey's parents enrolled him in specialized private schools in Grade 4 and paid the necessary tuition. The remedial instruction he received was successful and his reading ability improved significantly.

[138] Jeffrey's father, Frederick Moore, filed a human rights complaint against the School District and the British Columbia Ministry of Education alleging that Jeffrey had been discriminated against because of his disability and had been denied a "service (…) customarily available to the public", contrary to s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (*Code*). (see *Moore* at paras. 1-2).

[139] Additionally, the Supreme Court discussed the remedy as follows: ‘’But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centered on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether Jeffrey was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission’’. (see *Moore* at paras. 64).

[140] The case at hand on the contrary, is one of systemic racial discrimination as admitted by Canada in its oral and written submissions on compensation and, also a case where the Tribunal found that the system caused adverse impacts on First Nations children and their families.

[141] It is worth mentioning that the *Decision* on the merits begins with this important finding: “**This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.**” (see 2016 CHRT 2, at para. 1, emphasis added).

[142] In claiming there is no evidence in the record to support compensation to individual victims who are not a complainant in this case, the Panel finds that the AGC does not consider section 50 (3)(c) of the *CHRA*: “(c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law”. The only limitation in relation to evidence is found at section 50 (4) of the *CHRA*, the member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

[143] The word “may” suggests that this limitation is imposed or not at the discretion of the Member or Panel.

[144] The Panel finds it is unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it. The AGC in making its submissions does not consider the Tribunal's findings in 2016 accepting numerous findings in reliable reports as its own. The AGC omits to consider the Tribunal's findings of the children's suffering in past and unchallenged decisions in this case.

[145] In *Canada (Social Development) v. Canada (Human Rights Commission*), 2011 FCA 202 at para. 73 [*Walden* FCA], as mentioned by the Commission, the Federal Court (i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[146] The Panel does not accept that a systemic case can only prompt systemic remedies. As mentioned above, nothing in the *CHRA* prohibits the Tribunal's discretion to order systemic remedies along with individual remedies if the complaint is substantiated and the evidence supports it.

[147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case.

[148] As it will be discussed below, the evidence is sufficient to make a finding that each child who was unnecessarily removed from their home, family and community has suffered. Any child who was removed and later reunited with their family has suffered during the time of separation.

[149] The use of the “words unnecessarily removed” account for a distinction between two categories of children: those who did not need to be removed from the home and those who did. If the children are abused sexually, physically or psychologically those children have suffered at the hands of their parents/caregivers and needed to be removed from their homes. However, the children should have been placed in kinship care with a family member or within a trustworthy family within the community. Those First Nations children suffered egregious and compound harm as a result of the discrimination by being removed from their extended families and communities when they should have been comforted by safe persons that they knew. This is a good example of violation of substantive equality.

[150] The Panel believes that in those situations only the children should be compensated and not the abusers. The Panel understands that some of the abusers have themselves been abused in residential or boarding schools or otherwise and that these unacceptable crimes of abuse are condemnable. The suffering of First Nations Peoples was recognized by the Panel in the *Decision*. However, not all abused children became abusers even without the benefit of therapy or other services. The Panel believes it is important for the children victims/survivors of abuse to feel vindicated and not witness financial compensation paid to their abusers regardless of the abusers' intent and history.

[151] Additionally, the Panel also recognizes that the suffering can continue for life for First Nations children and their families even when families are reunited given the gravity of the adverse impacts of breaking families and communities.

[152] Besides, there is sufficient evidence before the Tribunal to make findings of pain and suffering experienced by victims/survivors who are the First Nations children and their families.

[153] Throughout all the *Decision* and rulings, references were made to First Nations children and their families. The Panel did not focus on the complainants when analyzing the adverse impacts. The Panel analyzed the effects/impacts of the discriminatory practices on First Nations children and clearly expressed this. The findings focused on the agencies’ abilities to deliver services and most importantly, the First Nations children, their

families and their communities who are the victims/survivors of the discriminatory practices. First Nations children and families are referenced continuously throughout the *Decision*. The *Decision* starts with: "**This decision concerns children.** More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities" (para. 1, emphasis added).

[154] Furthermore, an analysis of the Tribunal's findings makes it clear that the Tribunal's orders are aimed at improving the lives of First Nations children and that the First Nations children and families are the ones who suffer from the discrimination. The Tribunal made findings of systemic racial discrimination and agrees this case is a case of systemic racial discrimination. The Panel also made numerous findings of adverse impacts toward First Nations children and families, adverse impacts that cause serious harm and suffering to children: the two are interconnected. While a finding of discrimination and of adverse impacts may not always lead to findings of pain and suffering, in these proceedings it clearly is the case. A review of the 2016 CHRT 2 and subsequent rulings demonstrates this. There is no reason not to accept that both coexist in this case. The individual rights that were infringed upon by systemic racial discrimination warrant remedies alongside systemic reform already ordered by the Tribunal (see 2016 CHRT 2, 10, 16 and 2017 CHRT 7, 14, 35 and 2018 CHRT 4).

[155] Also, the Tribunal has already made numerous findings relating to First Nations children and their families' adverse impacts and suffering in past rulings. Some of these findings can be found in the compilation of citations below:

> The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts **perpetuate the historical disadvantage and <u>trauma suffered</u> by Aboriginal people,** in particular as a result of the Residential Schools system (see 2016 CHRT 2 at, para. 459). (…)
>
> **The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to**

remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves (see 2016 CHRT 2 at, para. 467).

Overall, AANDC's method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective**. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon**, including a denial of adequate child and family services, by the application of AANDC's FNCFS Program, funding formulas and other related provincial/territorial agreements (see 2016 CHRT 2 at, para. 393).

As will be seen in the next section, **the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.** (see 2016 CHRT 2 at, para. 394).

The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC's FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that **these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.** (see 2016 CHRT 2 at, para. 404).

The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.

[…]

To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this (...) (see 2016 CHRT 2 at, para. 411).

In the spirit of reconciliation, the Panel also acknowledges the suffering caused by Residential Schools. Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Resident Schools system is one of the darkest aspects of Canadian history. As will be explained in the following section, the effects of Residential Schools continue to impact First Nations children, families and communities to this day (see 2016 CHRT 2 at, para. 412).

Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless (…) With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity (see 2016 CHRT 2 at, para. 425).

Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma. (see 2016 CHRT 2 at, para. 426).

(…) On that point, the Panel would like **to stress how important it is to address the issue of mass removal of children today.** While Indigenous communities may have different views on child welfare, there is no evidence that they oppose actions to stop removing the children from their Nations. Indeed, it would be somewhat surprising if they did as it would amount to a colonial mindset. In any event, assertions from Canada on this point do not constitute evidence and do not assist us in our findings. Moreover, Indigenous communities have obligations to their children such as keeping them safe in their homes whenever possible. While there may be different views from one Nation to another, surely the need to keep the children in their communities as much as possible is the same (see 2018 CHRT 4 at, para. 62).

This being said, the Panel fully supports Parliament's intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament's goal (see *Daniels v. Canada (Indian Affairs and Northern Development*, [2016] 1 SCR 99), and commends it for adopting this approach. The Panel ordered that the

specific needs of communities be addressed and this involves consulting the communities. However, the Panel did not intend this order to delay addressing urgent needs. It foresaw that while agencies would have more resources to stop the mass removal of children, best practices and needs would be identified to improve the services while the program is reformed, and ultimately child welfare would reflect what communities need and want, and the best interest of children principle would be upheld. It is not one or the other; it is one plus the other. (see 2018 CHRT 4 at, para. 66).

This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under policy. While the necessity to account for public funds is certainly legitimate it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it.

There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings (see 2018 CHRT 4 at, para. 121).

Ms. Lang's evidence, over a year after the *Decision*, establishes the fact that aside from discussions, no data or short-term plan was presented to address this matter. **The focus is on financial considerations and not the best interests of children nor addressing liability and preventing mass removals of children** (see 2018 CHRT 2 at, para. 132).

The Panel finds (…) There is a real need to make further orders on this crucial issue to **stop the mass removal of Indigenous children, and to assist Nations to keep their children safe within their own communities** (…) (see 2018 CHRT 4 at, para. 133).

It is important to remind ourselves that this is about children experiencing **significant negative impacts on their lives**. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the *Decision* at paras. 341-347), (see also 2018 CHRT 4 at, para. 166).

Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the *Decision* and rulings. **It incentivizes the removal of children** rather than assisting communities to stay together. (see 2018 CHRT 4 at, para. 230).

> It is important to look at this case in terms of bringing Justice and not simply the Law, especially with reconciliation as a goal. **This country needs healing and reconciliation and the starting point is the children and respecting their rights.** If this is not understood in a meaningful way, in the sense that it leads to real and measurable change, then, the TRC and this Panel's work is trivialized and unfortunately t**he suffering is born by vulnerable children** (see 2018 CHRT 4 at, para. 451).

VIII. The Evidence in the Tribunal record

[156] In order to respond to the AGC's argument that there is a lack of evidence in the record to support a pain and suffering remedy, a review of some relevant elements of the evidence before this Tribunal follows:

> Mr. Dufresne: Why did you file the complaint?
>
> DR. BLACKSTOCK: I filed the complaint as a last resort. I -- I'm one of those people that believes that you have to try and work towards solutions first. And we did that not only once but we did that twice over a period of many years. We got to the place of documenting the inequality. In my view there was consensus that that inequality existed. We talked about and I believe with the respondent agreed with the harms to children that were a result of not taking action, that being there growing numbers of children in care and hardships for families, and the unequal access of services or the denial of services to children.
>
> We developed solutions to that, first in the National Policy Review and secondly in the Wen:de reports. We even in the Wen:de reports took the time to present those results to central authorities in October of 2005, and nothing had changed remarkably at the level of the child. We felt that there was no other alternative than to bring a human rights complaint. And even as we brought it, I was very hopeful that that would be incentive enough for the respondent to take the action needed on behalf of the children, but we find ourselves here today. (See Testimony of Dr. Cindy Blackstock, StenoTran transcripts February 28, 2013, page 3, lines 17-25 and page 4, lines 1-19 vol 4).

[157] Dr. Blackstock testified before the Tribunal and the Panel finds her testimony to be reliable and to speak to the issue of harm suffered by First Nations children as a result of the discrimination.

[158] Mr. Dubois is the Executive Director, Touchwood Agency and has a Bachelor of Social Work degree from the University of Calgary and also testified before the Tribunal:

> (…) MR. DUBOIS: I raised the issue with Indian Affairs.
>
> MR. POULIN: Why?
>
> MR. DUBOIS: Because I wanted to get away from just being limited to having to -- it was a situation where you kind of -- **you had to break up a family under Directive 20-1 before you could provide the services. It's only when you took a child into care that you could start to rebuild the family.** I wanted to be proactive. And this goes back to our history as a First Nations people, including my history where, you know, having to endure boarding school, like my dad, my late father was in boarding school, and the damage it did to us or the interference that back then that the church had on our family systems, so I wanted to **get away from that. Like having lived that experience, we don't need more interference. We don't need more -- for lack of a better word, wreaking havoc on our families. I come with the frame of mind that our families need healing and I, as a trained professional, and others out there in Saskatchewan and the other agencies, you know, like there has to be a different way to do child welfare other than breaking families up. We want to heal. We need to heal.** We have to do things differently, which is why when I referenced the SDM it was really appealing to me because it focuses on our strengths, you know, it builds on what we are and what we have. (see Testimony of Derald Richard Dubois, April 8, 2013, StenoTran transcript at, pp. 60-61 lines 7-24; 1-11, vol 9). See also testimony of Mr. Derald Richard Dubois, StenoTran transcripts April 8, 2013, at p.2, line 19 to p. 129, line 12 (April 8, 2013); p. 1, line 14 to p. 85, line 11 (April 9, 2013) vol 9).

[159] Mr. Dubois who is a child welfare professional refers to the Federal funding formula Directive 20-1 that was found discriminatory by this Panel causing significant adverse impacts to First Nations children and their families. What is more, he testifies of one of the worst of those adverse impacts being the unnecessary removal of children from their homes, families and communities.

[160] This is a reliable and powerful testimony that exemplifies the pain and suffering and harm done to First Nations children, families and communities as a result of the racial and systemic discrimination that is perpetuating historical wrongs.

[161] The Panel finds that unnecessarily removing a child from their family and community is a serious harm causing great suffering to that child, the family and the community.

[162] There is also evidence of harm/suffering to First Nations children and families in several reports forming part of the evidentiary record already considered and relied upon by the Panel in arriving to its findings of adverse impacts in the 2016 *Decision*. The Wen:de we are coming to the light of day, 2005 report (Wen:de) was filed into evidence before the Tribunal. The AGC had the opportunity to make submissions on this report and the Panel made findings on the reliability of this report. Moreover, the Tribunal accepted the findings in Wen:de as its own findings (See *Decision* 2016 CHRT 2 at, para. 257): "The Panel finds the NPR and Wen:De reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program" in a piecemeal fashion.

[163] Additionally, Canada was part of this study and fully aware of its findings and impact of its practices on First Nations children which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in the 2005 year of the report which will also be revisited in the wilful and reckless section below. The Panel had reviewed all the Wen:de reports before accepting it as its own and included some references of those findings in the *Decision*. The following additional findings support the issue of compensation for pain and suffering of children and their families and inform the Panel in drafting its orders:

> Secondary analysis of the Aboriginal data in CIS-98 revealed that although Aboriginal children were less likely to be reported to child welfare authorities for physical or sexual violence they were twice as likely to experience neglect (Blackstock, Trocme & Bennett, 2004). When researchers unpacked neglect by controlling for various care giver functioning and socio-demographic factors – they determined that the **key drivers of neglect for First Nations children were poverty, poor housing, and substance misuse** (Trocme, Knoke & Blackstock, 2004). It is important to note that two of these three factors are arguably outside of the domain of parental influence – poverty and poor housing. As they are outside of the locus of control of parents is unlikely that parents will be able to redress these risks in the absence of social investments targeted to poverty reduction and housing

> improvement. **The limited ability for parents to influence the risk factors can mean that their children are more likely to stay in care for prolonged periods of time. This is particularly a concern in regions where statutory limits on the length of time a child is being put in care are being introduced. If parents alone cannot influence the risk and there are inadequate social investments to reduce the risk – children can be removed permanently.** The **third factor, substance misuse, is within the personal domain for change but requires access to services.** Overall, CIS- 98 results suggest **that targeted and sustained investments in neglect focused services that specifically consider substance misuse, poverty and poor housing would likely have a positive impact on the safety and well-being of these children.** (emphasis ours).

[164] The Panel finds that First Nations children and families are harmed and penalized for being poor and for lacking housing. Those are circumstances that are most of the time beyond the parents' control.

[165] The Wen:de report goes on to say that:

> (...) providing an adequate range of neglect focused services is likely more complicated on reserve than off reserve due to existing service deficits within the government and voluntary sector. A study conducted by the First Nations Child and Family Caring Society in 2003 found that First Nations children and families receive very limited benefit from the over 90 billion dollars in voluntary sector services provided to other Canadians annually. Moreover, there are far fewer provincial or municipal government services than off reserve. This means that First Nations families are less able to access child and family support services including addictions services than their non-Aboriginal counterparts (Nadjiwan & Blackstock, 2003). Deficits in support services funding were also found in the federal government allotment for First Nations child and family services (MacDonald & Ladd, 2000.) **This report found that the federal government funding for least disruptive measures (a range of services intended to safely keep First Nations children who are experiencing or at risk of experiencing child maltreatment safely at home) is inadequately funded. When one considers the key drivers resulting in First Nations children entering care (substance misuse, poverty and poor housing) and couples that with the dearth in support services, unfavorable conditions to support First Nations families to care for their children emerges** (see Wen:de at, pp.13-14) (emphasis ours).
>
> Although there has been no longitudinal studies exploring the experiences of Aboriginal children in care throughout the care continuum (from report to continuing custody), data suggests that Aboriginal children are much more likely to be admitted into care, stay in care and become continuing custody

wards. It is possible that the over representation of Aboriginal children in child welfare care is a result of the structural risk factors (poverty, poor housing and substance misuse) not being adequately addressed through the provision of targeted least disruptive measures at both the level of the family and community. The lack of service provision may result in minimal changes to home conditions over the period of time the child remains in care and thus it is more likely the child will not return home (see Wen:de pp.13-14).

The lack of services, opportunities and deplorable living conditions characterizing many of Canada's reserves has led to mass urbanization of Aboriginal peoples (…)

Funding First Nations have made a direct connection between the state of children's health and the colonization and attempted assimilation of Aboriginal peoples: The legacy of dependency, cultural and language impotence, dispossession and helplessness created by residential schools and **poorly thought out federal policies continue to have a lasting effect.** - **Substandard infrastructure and services have been made worse by federal-provincial disagreements over responsibility.**

The most profound impact of the lack of clarity relating to jurisdiction results in what **many commentators have suggested are gaps in services and funding –resulting in the suffering of First Nations children.** As articulated by McDonald and Ladd in their comprehensive Joint Policy Review (prepared for the Assembly of First Nations and DIAND): First Nations agencies are expected through their delegation of authority from the provinces, the expectation of their communities, and by DIAND, to provide a comparable range of services on reserve with the funding they receive through Directive 20.1. The formula, however, provides the same level of funding to agencies regardless of how broad, intense or costly, the range of services is (see Wen:de at, pp.90-91).

The issues raised by FNCFS providers demonstrate the tangible effects of funding limitations on the ability of agencies to address the needs of children. **Without funding for provision of preventative services many children are not given the service they require or are unnecessarily removed from their homes and families.** In some provinces the option of removal is even more drastic as children are not funded if placed in the care of family members. The limitations placed on agencies quite clearly jeopardize the well-being of their clients, Aboriginal children and families. As a society we have become increasingly aware of the social devastation of First Nations communities and have discussed at length the importance of healing and cultural revitalization. **Despite this knowledge, however, we maintain policies which perpetuate the suffering of First Nations communities and greatly disadvantage the ability of the next generation to effect the necessary change.** (see Wen:de at, p.93).

[166] The Supreme Court of Canada found that the removal of a child from a parent's custody affects the individual dignity of that parent:

> In *Godbout v. Longueuil,* La Forest J. held that: …the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to **enjoy individual dignity and independence**… choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.
>
> Although the liberty to choose where one resides is clearly not an inalienable right, it may be considered **a strong argument that children should only be forced to leave their family homes in the most extreme circumstances. This is not the case here as Aboriginal children are removed from their homes in far greater numbers than non-Aboriginal children for the purposes of receiving services.**
>
> **Alternatively, it may be argued that placement of children in care, due to lack of services, amounts to an infringement of the parent's right to security of the person, under s.7.** (see Wen:de at, pp.96-97) (emphasis ours).

[167] According to the Supreme Court of Canada, the removal of a child from a parent's custody adversely impacts the psychological integrity of that parent causing distress, in *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46.

> The Supreme Court of Canada found the right to security of the person encompasses psychological integrity and may be infringed by state action which causes significant emotional distress:
>
> Moreover, it was held that the **loss of a child constitutes the kind of psychological harm** which may found a claim for breach of s.7. Lamer J., for the majority, held: **I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent**…As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.
>
> The Court went on to state that there are circumstances where loss of a child will not found a prima facie breach of s.7, including when a child is sent to prison or conscripted into the army. Clearly, these circumstances can be distinguished from the removal of a child from his/her home due to the

> government's failure to provide adequate funding and services (see Wen:de at, pp.96-97) (emphasis ours).
>
> **The federal funding formula, directive 20-1, impacts a very vulnerable segment of our society, Aboriginal children.** The protection of these children from state action, infringing on their most fundamental rights and freedoms, is clearly in line with the spirit of ss.7 and 15 of the Charter. Research conducted on the issue of child welfare plainly shows differentiation in the quality of services provided on and off reserve and to aboriginal and non-aboriginal children. This type of differentiation is unacceptable in a society that prides itself on protection of the vulnerable. (Wen:de at, pp.96-97) (emphasis ours).

[168] Furthermore, compelling evidence in other reports filed in evidence also discusses the psychological damage, pain and suffering endured by First Nations children and their families:

> WE BEGIN OUR DISCUSSION of social policy with a focus on the family because it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centres around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life. (see RCAP, vol. 3, at, p. 8).
>
> **Many experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging, in and of itself…. The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart.** Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The Native child is placed in a position of triple jeopardy (see RCAP, Gathering strength, vol. 3, at, pp. 23-24).

[169] The Panel finds there is absolutely no doubt that the removal of children from their families and communities is traumatic and causes great pain and suffering to them:

> At our hearings in Kenora, Josephine Sandy, who chairs Ojibway Tribal Family Services, explained what moved her and others to mobilize for change:

> Over the years, I watched the pain and suffering that resulted as non-Indian law came to control more and more of our lives and our traditional lands. I have watched my people struggle to survive in the face of this foreign law.
>
> **Nowhere has this pain been more difficult to experience than in the area of family life**. I and all other Anishnabe people of my generation have seen the pain and humiliation created by non-Indian child welfare agencies in removing hundreds of children from our communities in the fifties, sixties and the seventies. My people were suffering immensely as we had our way of life in our lands suppressed by the white man's law.
>
> **This suffering was only made worse as we endured the heartbreak of having our families torn apart by non-Indian organizations created under this same white man's law.**
>
> **People like myself vowed that we would do something about this. We had to take control of healing the wounds inflicted on us in this tragedy.**
>
> Josephine Sandy Chair, Ojibway Tribal Family Services Kenora, Ontario, 28 October 1992,
>
> (see RCAP, Gathering strength, vol. 3, at, p. 25) (emphasis ours).

[170] Another report filed in evidence supports the existence of pain and suffering of First Nations children and their families. Several experiences of massive loss have disrupted First Nations families and have resulted in identity problems and difficulties in functioning. In 1996, more than 10% of Aboriginal children (age 0-14) were not living with their parents. see p. 7 Joint National policy review (NPR) exhibit filed into evidence. Akin to the Wen:de report, the Tribunal accepted the findings in the NPR as its own findings (see 2016 CHRT 2 at, para. 257). Additionally, Canada was part of this study and fully aware of its findings which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in 2000, year of the report. This will also be discussed later.

[171] More recently, the Panel made findings that support the findings for pain and suffering of First Nations children and their families when the families are torn apart:

> Ms. Marie Wilson, one of the three Commissioners for the TRC mandated to facilitate truth-telling about the residential school experience and lead the country in a process of ongoing healing and reconciliation, swore an affidavit that was filed into evidence in the motions' proceedings. **She affirms that**

she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard. (see 2018 CHRT 4 at, para. 122).

Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. **The day they remember most vividly was the day they were taken from their home**. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system. (see 2018 CHRT 4 at, para. 123).

Ms. Wilson affirms that they, (the TRC), intentionally centered their 5 first calls to Action specifically on child welfare. This was to shed a focused and prominent light on the fact that **the harms of residential schools happened to children, that the greatest perceived damage to them was their removal from their home and family; and that the legacy of residential schools is not only continuing but getting worse, with increasing numbers of child apprehensions through the child welfare system**. (see 2018 CHRT 4 at, para. 124).

In addition to the Legacy calls to action pertaining to child welfare, she explains that they also articulated child welfare goals in the subsequent Reconciliation section. Call to Action 55 underscores the importance of creating and tracking honest measurements of the numbers of Indigenous children still apprehended and why, and the support being provided for them, based on comparative spending in prevention and care. (see 2018 CHRT 4 at, para. 125).

According to Ms. Wilson, it is imperative that the child welfare system, which is driving Indigenous children into foster care at disproportionate rates, be immediately addressed. **She has learned firsthand that children who are severed from their families will forever carry with them a lasting and detrimental sense of loss, along with other negative issues that may change the course of their lives.** (see 2018 CHRT 4 at, para. 126).

The Panel has made findings on this issue in the *Decision* and we echo Ms. Wilson's call to action to immediately address the causes that drive Indigenous children into foster care. (see 2018 CHRT 4 at, para. 127).

[172] The Panel received Ms. Wilson's evidence in 2017-2018 and has relied upon it in its ruling. The ruling was accepted by Canada in its submissions following receipt of an advanced confidential copy of the ruling and the Panel included Canada's submissions and the Panel's comments in the ruling:

> Finally, on the same day, the AGC (…) **indicated that Canada is fully committed to implement all the orders in this ruling and understands that its funding approach needs to change, which includes providing agencies the funding they need to meet the best interests and needs of First Nations children and families.**
>
> The Panel is delighted to read Canada's commitment and openness. This is very encouraging and fosters hope to a higher degree (see 2018 CHRT 4 at, paras. 449-450).

[173] This was reiterated later on, as part of a consultation protocol with all parties in this case and signed by Minister Jane Philpott as she then was (see Consultation Protocol signed March 2, 2018).

[174] Moreover, Canada has accepted the TRC's report authored by the 3 Commissioners including Ms. Wilson, and undertook to implement all 94 calls to action (see 2018 CHRT 4 at, para. 61). It is unlikely that Canada would accept the recommendations yet not the findings that led to those recommendations.

[175] What is more, the Panel believes that the highly credible TRC Commissioner like other adults referred to above speak on behalf of children and voice the harm and suffering endured by First Nations children who are vulnerable and need not testify before this Tribunal for the Panel to make a determination of their suffering of being unnecessarily removed from their homes and the harms caused as a result of the systemic and racial discrimination.

[176] Furthermore, as mentioned above, the Tribunal has already recognized the need and importance for First Nations children, communities and Nations for urgent action to eliminate the removal of First Nations children from their families and communities as a result of the discrimination and Canada's part in remedying it in the March 2, 2018 Consultation protocol signed by Minister Philpott:

> To address what the Tribunal in paragraph 47 of the February 1st Ruling refers to as the "mass removal of children". As the Tribunal states: "There is urgency to act and prioritize the elimination of the removal of children from their families and communities". (Consultation protocol signed March 2, 2018 at, section d, page 5)
>
> To promote substantive equality for First Nations children, families and communities on reserves and in the Yukon in the delivery of child and family services, particularly in light of their higher level of needs because of historical disadvantages suffered by First Nations families, children and communities as a result of the legacy of colonialism and Indian Residential Schools. (Consultation protocol at, section g, page 5).

[177] Also, to the question what if the child was unnecessarily removed as a result of multiple factors and not solely because of Canada's actions? The Panel answers that while the Panel acknowledges that child welfare issues are multifaceted and may involve the interplay of numerous underlying factors (see for example, 2016 CHRT 2 *Decision* at, para. 187) this does not alleviate Canada's responsibility in the suffering of First Nations children and their families who bore the adverse impacts of Canada's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program.

[178] Moreover, the Panel found that in this case we are in a unique constitutional context namely, Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act*, 1867. Furthermore, Canada, is in a fiduciary relationship with Aboriginal Peoples. What is more, Canada has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, the Panel found that more has to be done by Canada to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children (see 2016 CHRT 2 *Decision* at, para. 427).

[179] This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples. Also, the Panel found that Canada provides a service through the FNCFS Program and other related provincial/territorial agreements and method of funding the FNCFS Program and related provincial/territorial

agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

[180] Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner (see 2016 CHRT 2 *Decision* at, paras. 111; 113; 349).

[181] The Panel already found the link between the removal of children and Canada's responsibility in numerous findings including the following: "Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren't funded, and all these children are being put into care." (see 2016 CHRT 2 *Decision* at, para. 197).

[182] The pain and suffering caused by the unnecessary removal of First Nations children and their families and Canada's role is at least reasonably quantifiable to $20,000. While it is the maximum compensation allowed under section 53 (2) (e) of the *CHRA,* it is not much in comparison to the egregious harm suffered by the First Nations children and their families as a result of the racial discrimination and adverse impacts found in this case. Other pain and suffering caused by other actors could potentially be sought in other forums. The Panel's role is to quantify as best as possible the appropriate remedy to compensate victims/survivors as part of these proceedings with the evidence available.

[183] Furthermore, the AGC relies also on the *Public Service Alliance of Canada v. Canada Post Corporation* case (see 2005 CHRT 39 at para. 991) to suggest that the Tribunal cannot award remedies for pain and suffering to the non-complainant victims "en masse". The *Canada Post* case made a finding that there was a lack of evidence before the Tribunal and that there was no systemic case. This is different from this case where there is sufficient evidence to support findings of systemic discrimination and findings of suffering borne by the victims/survivors in this case, the First Nations children and their families.

[184] The evidence is ample and sufficient to make a finding that each First Nations child who was unnecessarily removed from their home, family and community has suffered. Any child who was removed and later reunited with their family has suffered during the time of separation and from the lasting effects of trauma from the time of separation.

[185] The evidence is ample and sufficient to make a finding that each parent or grandparent who had one or more children under her or his care who was unnecessarily removed from their home, family and community has suffered. Any parent or grandparent if the parents were not caring for the child who had one or more children removed from them and later reunited with them has suffered during the time of separation. The Panel intends to compensate one or both parents who had their children removed from them and, if the parents were absent and the children were in the care of one or more grandparents, the grandparents caring for the children should be compensated. While the Panel does not want to diminish the pain experienced by other family members such as other grandparents not caring for the child, siblings, aunts and uncles and the community, the Panel decided in light of the record before it to limit compensation to First Nations children and their parents or if there are no parents caring for the child or children, their grandparents.

[186] The Panel also recognizes that the suffering can continue even when families are reunited given the gravity of the adverse impacts of breaking apart families and communities.

[187] The Panel addressed the adverse impacts to children throughout the *Decision*. The Panel found a connection between the systemic racial discrimination and the adverse impacts and that those adverse impacts are harmful to First Nations children and their families. All are connected and supported by the evidence. The Panel acknowledged this suffering in its unchallenged *Decision*. It did not have individual children who testified to the adverse impacts that they have experienced nevertheless the Panel found that they did suffer those adverse impacts and found systemic racial discrimination based on sufficient evidence before it. The adverse impacts identified in the *Decision* and suffered by children and their families were found to be the result of the systemic racial discrimination in Canada's FNCFCS Program, funding formulas, authorities and practices.

[188] The Panel need not hear from every First Nations child to assess that being forcibly removed from their homes, families and communities can cause great harm and pain. The expert evidence has already established that. The *CHRA* regime is different than that of a Court where a class action may be filed. The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not (see section 50 (3) (c) of the *CHRA*). We are talking about the mass removal of children from their respective Nations. (see 2018 CHRT 4 at, paras. 47, 62, 66, 121, and 133). The Tribunal's mandate is within a quasi-constitutional statute with a special legislative regime to remedy discrimination. This is the first process to employ when deciding issues before it. If the *CHRA* and the human rights case law are silent, it may be useful to look to other regimes when appropriate. In the present case, the *CHRA* and human rights case law voice a possible way forward. The novelty and unchartered territory found in a case should not intimidate human rights decision-makers to pioneer a right and just path forward for victims/survivors if supported by the evidence and the Statute. As argued by the Commission, sufficiency of evidence is a material consideration.

[189] Furthermore, the impracticalities and the risk of revictimizing children outweigh the difficulty of establishing a process to compensate all the victims/survivors and the need for the evidence presented of having a child testify on how they felt to be separated from their family and community.

[190] The Panel rejects the AGC's argument that there is no evidence of harm the victims suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation.

[191] The evidence is sufficient to establish a connection between the systemic racial discrimination and the First Nations children who did not receive services or did receive services that were inadequate and harmful. This was all explained in the *Decision* and it is now too late to challenge those findings. The children should not be penalized because the Panel had outstanding questions concerning compensation which prompted further submissions from the parties.

[192] Finally, on this point, the Panel rejects the assertion made by the AGC that there is no evidence permitting the Panel to determine the extent and seriousness of the harm in order to assess the appropriate compensation for the individual victims. Furthermore, the AGC's argument that there is no evidence of pain and suffering from children and families as a result of the discrimination is simply not true. This is a similar assertion that Canada has made on the evidence to prove the complaint on its merits. In fact, such a conclusion by Canada is concerning to say the least. It also raises questions from this Panel. The harm done to First Nations children who are vulnerable and to families and communities is precisely why the Panel issued numerous rulings requesting immediate action. This Panel recognizes, as described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special circumstances. This is also recognized by all levels of Courts in Canada and was discussed in this Panel's *Decision* on the merits 2016 CHRT 2 at, para. 346:

> A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII) at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 75 [*Baker*]). As explained by Professor Nicholas Bala:
>
> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators (see 2016 CHRT 2 at, para. 346).
>
> Child welfare services, or child and family services, are services designed to protect children and encourage family stability. Hence the best interest of the child is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children (2016 CHRT 2 at, para. 3).

[193] This is where the urgency of remedying systemic racial discrimination comes from. It is clearly expressed in the Panel's rulings. Removing children from their homes, families, communities and Nations destroys the Nations' social fabric leading to immense

consequences, it is the opposite of building Nations. That is trauma and harm to the highest degree causing pain and suffering.

[194] The Panel's urging Canada to act on a number of occasions was not expressed without a reason. It was for the reason that this case is about children and there is urgency to act and the Panel understood it.

[195] In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 69-71 [*Baker*] an appeal against deportation based on the position of Baker's Canadian born children, the Supreme Court held procedural fairness required the decision-maker to consider international law and conventions, including the United Nations' *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the UNCRC). The Court held the Minister's decision should follow the values found in international human rights law.

[196] The AGC should not be allowed to avoid this principle in Canada, a country who professes to uphold the best interest of the child and who signed and ratified the *Convention on the Rights of the Child* (see 2016 CHRT 2 at, para. 448). Also, the *CHRA* is a result of the implementation of international human rights principles in domestic law (see the *Decision* at paras. 437-439).

[197] The Panel agrees that remedies **under section 53 (2) (e) of the *Act*** are not to punish the Respondent however, they serve the purpose to deter the authors of discriminatory practices to continue or to repeat the same patterns. They are also some form of vindication for the victims/survivors reminding society that there is also a price to fostering inequalities which is a strong component of justice leading to some measure of healing for victims/survivors.

IX. Organizations cannot receive compensation and do not represent victims argument

[198] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that

they are able and wish to have, are First Nations children (see 2017 CHRT 14 at, para. 116).

[199] The Panel sees no merit in accepting the AGC's argument that if the Tribunal finds it has jurisdiction to award remedies under section 53 (2) (e) the AFN and the Caring Society should be awarded the remedies and not the First Nations children. This contradicts the AGC's own argument that acknowledges that the AFN and the Caring Society are organizations not victims (see para. 110 above).

[200] In a previous ruling, the Panel discussed the AFN and the Caring Society's roles in representing First Nations children's rights:

> To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials (see 2017 CHRT 14 at, para. 118).

[201] However, it is true that the Complainants do not have a legal representation mandate given by each First Nations child and parent living on reserve to seek remedy on their behalf at the Tribunal. What they do have is a resolution from the Chiefs in Assembly of the AFN mandating the AFN to seek remedies for Members of First Nations who are represented by their elected First Nations Chiefs. Some First Nations Peoples may disagree to have the AFN or others to advocate on their behalf and request individual remedies in front of the Tribunal, this is their right and the Panel believes they should be able to opt-out. The opting-out possibility will form part of the compensation process discussed below.

[202] This being said, for those who would accept, the Panel finds that the AFN mandated by resolution by Chiefs of First Nations should be able to speak on behalf of their children and voice their needs and seek redress for compensation which should go directly to victims/survivors following a culturally safe and independent process, protecting sensitive information and privacy with the option to opt-out. The Panel believes also that

the COO and the NAN should be able to speak on behalf of their children and voice their needs and seek redress for compensation. Also, the Caring Society directed by Dr. Cindy Blackstock has worked tirelessly for numerous years to represent the best interest of children with an Indigenous lens and has invaluable expertise to assist the Panel and the parties in this process.

[203] This being said the Panel does not believe that it has jurisdiction to create another Tribunal to delegate its responsibilities under the *CHRA* to it. The compensation process will be discussed below.

X. The right to exercise individual rights, class action and victims' identification

[204] The Panel believes that individuals have the right to exercise their individual rights and for those who choose to do so, they should be able to opt-out from receiving the compensation ordered in this ruling.

[205] The Panel also notes that the class action has not yet been certified by the Federal Court. Moreover, the possibility of a future certified class action and, if successful, orders made for punitive damages remedies under the Charter amongst other things being offset by the capped remedies orders under the *CHRA* made by this Tribunal is not a convincing argument to refrain from awarding compensation in these proceedings. Additionally, the Tribunal's orders below do not cover years 1991 to 2005. The Tribunal's orders below also cover First Nations children and First Nations parents or grandparents.

[206] The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy the discrimination and if applicable as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors in this case.

[207] In regards to identification of victims/survivors, as explained by the Caring Society, some of the children can be identified by the Indian Registry and following a process agreed upon by the parties who wish to participate. Therefore, their identities are not

impossible to obtain and are readily available contrary to the situation in the *C.N.R*. case from the Federal Court of Appeal that the AGC relies upon. The AGC argues the Court concluded that compensation for individuals is not an appropriate remedy in complaints of systemic discrimination. The AGC added the Court found that compensation is limited to 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". Again, this is not the case here.

[208] The Panel finds this is a case where it is appropriate to compensate victims/survivors since the systemic racial discrimination and the adverse impacts found by the Panel in its *Decision*, subsequent rulings and this ruling, caused serious harm to victims/survivors. While the task to identify all the individuals is a complex one, it is not impossible given the Indian Registry and the Jordan's Principle process and records.

XI. Class actions and representative of the victims

[209] On one hand, the AGC contends the Tribunal is not the right forum to deal with class actions and on another hand it uses some of the class action criteria to support its position that there is no representative of the group of victims before the Tribunal. With respect, the AGC cannot have it both ways. Accepting the proposition that the Tribunal is not the right forum for class actions in light of its statute requires one to look at what can be done under the statute and not impose the class action criteria to the Tribunal process. While it can be useful to look at class action requirements, the rules of statutory interpretation require the Tribunal to first look at the *CHRA* given that its jurisdiction is derived from it. In addition, the *CHRA* is quasi-constitutional in nature which would supersede any law conflicting with the *CHRA*. If the *CHRA* is silent on an issue, the Tribunal can then use a number of useful tools at its disposition.

[210] In any event, even proof by presumption of facts, provided that such presumptions are sufficiently serious, precise and concordant, applies to class actions (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211,

1996 CanLII 172 (SCC) at, para. 132). More so in front of a Human Rights Tribunal allowed to receive any type of evidence under the *Act.*

XII. Jordan's Principle remedies

[211] There is no doubt that Jordan's Principle has always been part of the claim from the complaint to the Statement of Particulars to the presentation of evidence and the Tribunal's findings and orders. This question was answered and cannot be revisited.

[212] In sum, in honor and memory of Jordan River Anderson, Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living (see 2017 CHRT 35 at, para. 135,1.B.i.).

[213] Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy. (see 2017 CHRT 35 at, para. 135,1.B.ii.).

[214] What is more, the Panel rejects the AGC's argument that compensation is inappropriate in Jordan's Principle cases since the Tribunal already ordered Canada to retroactively review the cases that were denied. The retroactive review of cases ensures the child receives the service if not too late and eliminates discrimination. It does not account for the suffering borne by children and their parents while they did not receive the service.

[215] On the issue of there being no basis in the *Act* to award compensation to complainant organizations or non-complainant individuals under Jordan's Principle, the Panel applies the same reasoning outlined above. On the argument advanced by Canada that when it has implemented policies that satisfactorily address discrimination no further orders are required, the Panel also relies on its reasons above where it says that systemic

and individual remedies can co-exist if the evidence in the specific case supports it and is deemed appropriate by the Panel.

[216] Also, the Panel ordered the use of a broad definition of Jordan's Principle that applies to all First Nations services across all services. It is worth mentioning that many Jordan's Principle cases involve vulnerable children who experience mental and/or physical disabilities. We will return to this right after a review of the purpose of the *CHRA* below:

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

[217] In the same vein with this principle, the *Covenant on the Rights of Persons with Disabilities,* adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 signed by Canada on March 30th, 2007 and ratified by Canada on March 11, 2010, in its Preamble mentions:

> Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person. (see *Grant* at paras. 103-104). Moreover, article 1 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at. 71 (1948), which provides that all human beings are born free and equal in dignity and in rights.

[218] The concept of objective appreciation of dignity when vulnerable mentally disabled persons who are not always in a position to appreciate their own self-dignity or breach there of as been recognized by the Supreme Court of Canada:

> Having regard to the manner in which the concept of personal "dignity" has been defined, and to the principles of large and liberal construction that apply to legislation concerning human rights and freedoms, I believe that s. 4 of the *Charter* addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself.

(…)

> In the case before us, it appears to me that the majority of the Court of Appeal properly pointed out that, in considering the situation of the mentally disabled, the nature of the care that is normally provided to them is of fundamental importance. We cannot ignore the fact that the general objective of the services provided at the Hospital goes beyond meeting the patients' primary needs (see *Commission des droits de la personne v. Coutu*, 1995 CanLII 2537 (QC TDP), [1995] R.J.Q. 1628 (H.R.T.), at pp. 1652-53). This is apparent from, inter alia, the legislator's intention (see *An Act respecting health services and social services*, R.S.Q., c. S-4.2) and the fact that there is a certain level of social consensus concerning what sort of support services are required in order for the needs of these people to be met.
>
> This being said, the fact that some patients have a low level of awareness of their environment because of their mental condition may undoubtedly influence their own conception of dignity. As Fish J.A. observed, however, when we are dealing with a document of the nature of the Charter, it is more important that we turn our attention to an objective appreciation of dignity and what that requires in terms of the necessary care and services. In the case at bar, I believe that the trial judge's findings of fact indicate, beyond a shadow of a doubt, that, although the discomfort suffered by the patients of the Hospital was transient, it constituted interference with the safeguard of their dignity, a right guaranteed by s. 4 of the Charter, despite the fact that, as the trial judge noted, these patients might have had no sense of modesty. (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, paras. 105 and 107-108), [*Public Curator*].

[220] Furthermore, the Supreme Court found that disrupting services was an interference of the service recipients' dignity and causing them a moral prejudice under rules of civil liability and under the Charter:

> Moreover, the pressure that the appellants wanted to bring to bear on the employer inevitably involved disrupting the services and care normally provided to the patients of the Hospital, and necessarily involved intentional interference with their dignity (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, para. 124) [*Public Curator*].

[221] While this is not a class action or a civil liability or Charter case, the principle can be applied here to support the finding that the disruption of services offered to a vulnerable group of peoples, in this case First Nations children and families, amounts to a breach of

their dignity applying the objective appreciation of dignity principle. Under the *CHRA* this would be covered under section 53 (2) (e). This reasoning also applies to First Nations children and families in the case of the removal of a child from the home, family and community.

[222] What is more, the Tribunal has already made findings in past rulings in regards to gaps, delays and denials of essential services to First Nations children under Jordan's Principle and also its connection to child welfare, some of them are reproduced here:

> **Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues** (see *Decision* at para. 356) (…) (see 2017 CHRT 14, at para. 78).
>
> The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: **that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve.** The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program (see 2016 CHRT 2 at, para. 369).
>
> Another medical related expenditure identified as a **concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist** (see Gaps in Service Delivery to First Nation Children and Families in BC Region at pp. 2-3). (see 2016 CHRT 2 at, para. 372).
>
> In the Panel's view, **it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and**

well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in **service gaps, delays and denials** for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need (see 2016 CHRT 2 at, para. 381).

More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made (see 2016 CHRT 2 at, para. 382).

AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements **have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves.** Non-exhaustively, the **main adverse impacts** found by the Panel are:

(…) **The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children** (see 2016 CHRT 2 at, para. 458).

In January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact amongst a group of young children and youth. This information was contained in a July 2016 detailed proposal aimed at seeking funding for an in-community mental health team as a preventative measure (see 2017 CHRT 7 at, para. 8).

The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16). The Panel acknowledges how inappropriate this response is in such circumstances and the additional suffering it must have caused (See 2017 CHRT 7 para. 9).

Tragically, in February 2017, two other youths aged 11 and 21 took their own lives in NAN communities of Deer Lake and

Kitchenuhmaykoosib Inninuwug (see affidavit of Sol Mamakwa, February 13, 2017, at para. 5) (See 2017 CHRT 7 para. 10).

The Panel would like to acknowledge and extend our condolences to the families and communities of these youths and to all those who have lost children in similar tragic circumstances (See 2017 CHRT 7 para. 11).

The loss of our children by suicide in Nishnawbe Aski Nation (NAN) has created untold pain and despair for families, communities and all of our people. Health Canada's commitment "to establish a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative funding" establishes an important route for our communities in crisis to access Jordan's Principle funds (See 2017 CHRT 7 Annex A letter Re: Choose Life Pilot Working Group, dated March 22, 2017 from Nishnawbe Aski Nation Grand Chief Alvin Fiddler to Dr. Valerie Gideon, Assistant Deputy Minister Regional Operations First Nations and Inuit Health Branch Health Canada).

At the October 30-31, 2019 hearing (October hearing), Canada' witness, Dr. Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, admitted in her testimony that the Tribunal's May 2017 CHRT 14 ruling and orders on **Jordan's Principle definition and publicity measures caused a large jump in cases for First Nations children**. In fact, from July 2016 to March 2017 there were approximately 5,000 Jordan's Principle approved services. **After the Panel's ruling, this number jumped to just under 77,000 Jordan's Principle approved services in 2017/2018. This number continues to increase. At the time of the October hearing, over 165 000 Jordan's Principle approved services have now been approved under Jordan's Principle as ordered by this Tribunal. This is confirmed by Dr. Gideon's testimony and it is not disputed by the Caring Society. Furthermore, it is also part of the new documentary evidence presented during the October hearing and now forms part of the Tribunal's evidentiary record. Those services were gaps in services that First Nations children would not have received but for the Jordan's Principle broad definition as ordered by the Panel.** In response to Panel Chair Sophie Marchildon's questions, Dr. Gideon also testified that **Jordan's Principle is not a program, it is considered a legal rule by Canada.** This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018 at exhibit 4, at page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

No sun-setting of Jordan's Principle. Jordan's Principle is a legal requirement not a program and thus there will be no sun-setting of

Jordan's Principle (…) There cannot be any break in Canada's response to the full implementation of Jordan's Principle (see 2019 CHRT 7 at, para. 25).

The Panel is delighted to hear that **thousands of services have been approved since it issued its orders. It is now proven, that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable. While there is still room for improvement, it also fosters hope.** We would like to honor Jordan River Anderson and his family for their legacy. We also acknowledge the Caring Society, the AFN and the Canadian Human Rights Commission for bringing this issue before the Tribunal and for the Caring Society, the AFN, the COO, the NAN, and the Canadian Human Rights Commission for their tireless efforts. We also honor the Truth and Reconciliation Commission for its findings and recommendations. Finally, the Panel recognizes that while there is more work to do to eliminate discrimination in the long term, Canada has made substantial efforts to provide services to First Nations children under Jordan's Principle especially since November 2017. Those efforts are made by people such as Dr. Gideon and the Jordan's Principle team and the Panel believes it is noteworthy. This is also recognized by the Caring Society in an April 17, 2018 letter filed in the evidence (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at Exhibit A). This is not to convey the message that a colonial system which generated racial discrimination across the country is to be praised for starting to correct it. Rather, it is recognizing the decision-makers and the public servants' efforts to implement the Tribunal's rulings hence, truly impacting the lives of children. (see 2019 CHRT 7 at, para. 26).

The Panel finds the outcome of S.J.'s case is unreasonable. The coverage under Jordan's Principle was denied because S.J.'s mother registered under 6(2) of the *Indian Act* and could not transmit status to her in light of the second-generation cut-off rule. This is the main reason why S.J.'s travel costs were refused. The second reason is that it was not deemed urgent by Canada when in fact the situation was not assessed appropriately. Finally, no one seems to have turned their minds to the needs of the child and her best interests. There is no indication that a substantive equality analysis has been employed here. Rather a bureaucratic approach was applied for denying coverage for a child of just over 18 months (Canada's team described the child has being 1 year and a half old, see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, email chain at Exhibit F), who has been waiting for this scan from birth. This type of bureaucratic approach in Programs was linked to discrimination in the *Decision* (see at, paras. 365-382 and 391) (see 2019 CHRT 7 at, para. 73).

[223] All the above findings support a finding that First Nations children and their families experienced pain and suffering and a breach of their dignity as a result of gaps, delays and denials of essential services.

[224] Other evidence in the record further exemplifies that delays, gaps and denials cause real harm and suffering to the Frist Nations children and their families:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline at 30 degrees in order to alleviate the respiratory distress that resulted from her condition. AANDC, Jordan's Principle Chart Documenting Cases, October 6, 2013 (see HR, Vol 15, tab 422, p 2).
>
> MR. WUTTKE: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that correct?
>
> MS BAGGLEY: Well, it said the summer of 2008.
>
> MR. WUTTKE: Okay.
>
> MS BAGGLEY: "Tomatoe/tomato".
>
> MR. WUTTKE: Between half a year and three quarters of a year?
>
> MS BAGGLEY: Yes, yes.
>
> MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?
>
> MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons. (see Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).

[225] The Panel finds there is sufficient evidence in the record as demonstrated above to justify findings that pain and suffering of the worst kind warranting the maximum compensation under section 53 (2) (e) of the *CHRA* is experienced by First Nations children and families as a result of Canada's approach to Jordan's Principle that led to the Tribunals' rulings in this case.

[226] First Nations children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them. The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.

XIII. Special compensation: wilful and reckless

[227] The special compensation remedy sought as part of this ruling is found at para. 53 (3) of the *CHRA*:

> (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.

[228] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

[228A] The Tribunal in *Duverger v. 2553-4330 Québec Inc. (Aéropro),* 2019 CHRT 18 (CanLII), recently reiterated this Panel's legal reasons on the special compensation, Member Gaudreault wrote:

> In the decision rendered in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 (CanLII) [*Family Caring Society*], at paragraph 21, members Sophie Marchildon, Réjean Bélanger and Edwards P. Lustig addressed the special compensation provided under subsection 53(3) of the *CHRA*:

> The Federal Court has interpreted this section as being a ". . .punitive provision intended to provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Johnstone,* 2013 FC 113 (CanLII), at para. 155, aff'd 2014 FCA 110 (CanLII) [*Johnstone* FC]). A finding of wilfulness requires "(…) the discriminatory act and the infringement of the person's rights under the *Act* is intentional" (*Johnstone* FC, at para. 155). Recklessness involves ". . .acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (*Johnstone FC*, at para. 155), (see *Duverger* at para. 293).

[229] The objective of the *CHRA* is to remedy discrimination (*Robichaud* at para. 13). As opposed to remedies under section 53 (2) (e) which are not meant to punish the author of the discrimination, as mentioned above, the Federal Court in *Johnstone* found that section 53 (3) of the *CHRA* is a punitive provision.

[230] In order to be wilful or reckless, "…some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168 (CanLII), at para. 33). Again, the award of the maximum amount under this section should be reserved for the very worst cases. (see *Grant* at, para. 119).

[231] The Panel finds that Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families both in regard to the child welfare program and Jordan's Principle. Canada was aware of the discrimination and of some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the Wen:de report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunal's orders. As the Panel already found in previous rulings, Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.

[232] When looking at the issue of wilful and reckless discriminatory practice, the context of the claim is important. In this case we are in a context of repeated violations of human rights of vulnerable First Nations children over a very long period of time by Canada who has international, constitutional and human rights obligations towards First Nations

children and families. Moreover, the Crown must act honourably in all its dealings with Aboriginal Peoples:

> First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (Wewaykum at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in Haida Nation, at paragraph 17:
> Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": Delgamuukw, supra, at para. 186, quoting Van der Peet, supra, at para. 31, (see *Decision* 2016 CHRT 2 at, para. 95).

[233] In light of Canada's obligations above mentioned, the fact that the systemic racial discrimination adversely impacts children and causes them harm, pain and suffering is an aggravating factor than cannot be overlooked.

[234] The Panel finds it has sufficient evidence to find that Canada's conduct was wilful and reckless resulting in what we have referred to as a worst-case scenario under our *Act*.

[235] What is more, many federal government representatives of different levels were aware of the adverse impacts that the Federal FNCFS Program had on First Nations children and families and some of those admissions form part of the evidence and were referred to in the Panel's findings. A review of the Panel's findings contained in the *Decision* and rulings supports this.

[236] The Panel rejects Canada's position that the reports in the evidentiary record and findings cannot lead to a finding of wilful and reckless conduct by this Tribunal's findings because they were improving the services over time. Wen:de specifically cautioned against a piecemeal implementation of the recommendations and that is precisely what Canada did. This was also explained in the *Decision.*

[237] In addition, the Tribunal already made findings about Canada's conduct and awareness of the adverse impacts to First Nations children and their families in past

rulings. Although too numerous to reproduce them entirely in this ruling, some are above mentioned and some will be mentioned here and those findings cannot be challenged now:

> In another presentation, AANDC describes Directive 20-1 as “broken”:
>
> **The current system is BROKEN, i.e. piecemeal and fragmented**
>
> **The current system contributes to dysfunctional relationships, i.e. jurisdictional issues (at federal and provincial levels), lack of coordination, working at cross purposes, silo mentality**
>
> […]
>
> **The current program focus is on protection (taking children into care) rather than prevention (supporting the family)**
>
> […]
>
> **Early intervention/prevention has become standard practice in the provinces/territories, numerous U.S. states, and New Zealand**
>
> **INAC CFS has been unable to keep up with the provincial changes**
>
> **Where prevention supports are common practice, results have demonstrated that rates of children in care and costs are stabilized and/or reduced**
>
> (Annex, ex. 35 at pp. 2-3 [Putting Children and Families First in Alberta presentation]) (see 2016 CHRT 2 at, para. 270).
>
> Putting Children and Families First in Alberta presentation touts prevention as the ideal option to address these problems at page 4:
>
> **Early prevention and child-centered outcomes are the missing pieces of the puzzle for FN children and families living on reserve**
>
> **Early prevention supports the agenda for improving quality of life for children and families thereby leading to improved outcomes in the areas of early childhood development, education, and health** (see 2016 CHRT 2 at, para. 271).
>
> Finally, the Putting Children and Families First in Alberta presentation states at page 5:
>
> The facts are clear:

Wen:De Report - Early intervention/prevention is KEY

[…] (see 2016 CHRT 2 at, para. 272).

[238] The above citations were presentations prepared by staff in the Federal Government supporting the fact that they were well aware of what needed to be done to stop the systemic racial discrimination and that prevention is a key component. This being said, while Canada increased prevention funds, it applied an insufficient and piecemeal approach and the Panel also found this in the *Decision.*

[239] First Nations agencies have been lobbying Canada since 1998 to change the system (see 2016 CHRT 2 at, para. 272). Ten years later, in a 2018 CHRT 4 ruling, the Tribunal had to order Canada to fund prevention services:

> Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. **Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the *Decision* and rulings**. **It incentivizes the removal of children rather than assisting communities to stay together** (see 2018 CHRT 4 at, para. 230).

[239A] All this time Canada knew the benefit of prevention services to keep children safe within their homes and families yet it did not sufficiently fund and reform the system to foster this shift.

> This is contrary to the Tribunal's order to provide services based on need, which requires Canada to obtain each First Nation agency and First Nation's specific needs. Finally, allowing those agencies that confirm they lack capacity to keep the budget funds from year to year instead of returning them could potentially assist in addressing the issue. As far as other agencies that do have capacity are concerned, **Canada is unilaterally deciding for them and delaying prevention services and least disruptive measures under a false premise. Proceeding in this fashion is harming children** (see 2018 CHRT 4 at para. 143).
>
> The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services. (see 2018 CHRT 4 at, para. 161).

> **The Panel finds it problematic that again, Canada's rationale is based on the funding cycle not the best interests of children, and not on being found liable under the *CHRA*.** Moreover, there is a major problem with Budget 2016 being rolled out over 5 years. The Panel did not foresee it would take that long to address immediate relief. Leaving the highest investments for years 4 and 5, the Panel finds it does not fully address immediate relief (see 2018 CHRT 4 at para. 146).
>
> This being said, the Panel is encouraged by the steps made by Canada so far on the issue of immediate relief and the items that needed to be addressed immediately, However, we also find Canada not in full-compliance of this Panel's previous orders for least disruptive measures/prevention, small agencies, intake and investigations and legal costs. Additionally, at this time, the Panel finds there is a need to make further orders in the best interest of children (see 2018 CHRT 4 at para. 195).

[240] The Panel made numerous findings on the need for prevention services to reverse the removal of First Nations children from their homes, families and communities:

> Furthermore, several jurisdictional issues were identified as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In this regard, the evaluation noted that a common implementation challenge for FNCFS Agencies was the need for specialized services at the community level (for example, Fetal Alcohol Spectrum Disorder assessments, therapy, counselling and addictions support). **Moreover, the evaluation found of key importance the availability and access to supportive services for prevention. According to the evaluation, these services are not available through AANDC funding, though they are provided by other government departments and programs either on reserve or off reserve** (see AANDC Evaluation of the Implementation of the EPFA in Alberta at pp. 16-18, 21-24) (see 2016 CHRT 2 at, para. 286).
>
> Difficulties based on remoteness were also identified as a main challenge in Saskatchewan and Nova Scotia. One third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner. In Nova Scotia, where there is only one FNCFS Agency with two offices throughout the province, the evaluation noted it can take two to three hours to reach a child in the southwestern part of the province. On the other hand, the provincial model is structured so that its agencies are no more than a half-hour away from a child in urgent need. In extreme cases, the Nova Scotia FNCFS Agency has had to rely on the provincial agencies for assistance. According to the evaluation, because of these issues the province of Nova Scotia has recommended that AANDC provide funding to

support a third office in the southwestern part of the province (see AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia at pp. 35-36) (see 2016 CHRT 2 at, para. 291).

AANDC's Departmental Audit and Evaluation Branch also performed its own evaluation of the FNCFS Program in 2007 (see Annex, ex. 14 [2007 Evaluation of the FNCFS Program]). The findings and recommendations of the 2007 Evaluation of the FNCFS Program reflect those of the NPR and Wen:De reports. Of note, at page ii, the 2007 Evaluation of the FNCFS Program makes the following findings:

Although the program has met an increasing demand for services, it is not possible to say that is has achieved its objective of creating a more secure and stable environment for children on reserve, nor has it kept pace with a trend, both nationally and internationally, towards greater emphasis on early intervention and prevention.

The program's funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care and Program expenditures because it has had the effect of steering agencies towards in-care options - foster care, group homes and institutional care because only these agency costs are fully reimbursed (see 2016 CHRT 2 at, para. 273).

(…) correct the weakness in the First Nations Child and Family Services Program's funding formula, which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. Well-being and safety of children must be agencies' primary considerations in placement decisions (see 2016 CHRT 2 at, para. 274).

In a September 11, 2009 response to questions raised by the Standing Committee on Aboriginal Affairs and Northern Development, Deputy Minister Michael Wernick described the EPFA as an "…approach that will result in better outcomes for First Nation children" (Annex, ex. 36). Mr. Wernick's response indicates AANDC's awareness of the impacts that the structure and funding for the FNCFS Program under Directive 20-1 has on the outcomes for First Nations children (see 2016 CHRT 2 at, para. 276).

However, as the 2008 Report of the Auditor General of Canada, the 2009 Report of the Standing Committee on Public Accounts, the 2011 Status Report of the Auditor General of Canada, and the 2012 Report of the Standing Committee on Public Accounts pointed out, while the EPFA is an improvement on Directive 20-1, it still relies on the problematic assumptions regarding children in care, families in need, and population levels to determine funding. Furthermore, many provinces and the Yukon remain under Directive 20-1 despite AANDC's commitment to transition those jurisdictions to the EPFA (see 2016 CHRT 2 at, para. 278).

> Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve (see 2016 CHRT 2 at, para. 461).

[241] One of the most tragic and worst-case scenarios in this case and in the Jordan's Principle context is one of unreasonable delays in providing prevention and mental health services as exemplified in the situation in the Nation of Wapekeka. This delay was intentional and justified by Canada according to financial and administrative considerations. It was devoid of caution and without regard for the serious consequences on the children and their families. Some extracts of the Panel's findings are reproduced here:

> The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16) (see 2017 CHRT 14 at, para. 89).
>
> While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle (see 2017 CHRT 14 at, para. 90).
>
> Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death

> situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see Transcript of Cross-Examination of Ms. Buckland at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16). (see 2017 CHRT 14 at, para. 91).
>
> If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay was part of the process, as there was no clarity surrounding what the process actually was [see "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (Affidavit of Robin Buckland, January 25, 2017, Exhibit F, at p. 3); see also Transcript of Cross-Examination of Ms. Buckland at p. 82, lines 1-12] (see 2017 CHRT 14 at, para. 92).
>
> More significantly, Ms. Buckland's comments suggest the focus of Canada's Jordan's Principle processing remains on Canada's administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan's Principle. The Panel finds Canada's new Jordan's Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process. (see 2017 CHRT 14 at, para. 93).
>
> The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the *Decision* (see 2017 CHRT 14 at, para. 94).

[242] The evidence and findings above support the finding that Canada was aware of the discrimination adversely impacting First Nations children and families in the contexts of child welfare and/or Jordan's Principle and therefore, Canada's conduct was devoid of caution and without regard for the consequences on First Nations children and their parents or grandparents which amounts to a reckless conduct compensable under section 53 (3) of the *CHRA*. The Panel finds that Canada's conduct amounts to a worst-case scenario warranting the maximum compensation of $20,000 under the *Act*.

[243] The AFN filed affidavit evidence on the Indian Residential School Settlement Agreement (IRSSA) as part of these proceedings and the Panel opted to adopt a similar approach in determining the remedies to victims/survivors in this case so as to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped at $20,000 under the *CHRA*. The dispositions of the IRSSA found in Mr. Jeremy Kolodziej's affidavit affirmed on April 4, 2019 and reproduced below illustrate the rationale behind the lump sum payment to those victims/survivors who attended Residential School:

> "CEP" and "Common Experience Payment" mean a lump sum payment made to an Eligible CEP Recipient in the manner set out in Article Five (5) of this Agreement;
>
> 5.02 Amount of CEP
>
> The amount of the Common Experience Payment will be:
>
> (1) ten thousand dollars ($10,000.00) to every Eligible CEP Recipient who resided at one or more Indian Residential Schools for one school year or part thereof; and
>
> (2) an additional three thousand ($3,000.00) to every eligible CEP Recipient who resided at one or more Indian Residential Schools for each school year or part thereof, after the first school year; and (3) less the amount of any advance payment on the CEP received
>
> Recommendations
>
> 1.0 To ensure that the full range of harms are redressed, we recommend that a lump sum award be granted to any person who attended an Indian Residential School, irrespective of whether they suffered separate harms generated by acts of sexual, physical or severe emotional abuse.
>
> The Indian Residential School Policy was based on racial identity. It forced students to attend designated schools and removed them from their families and communities. The Policy has been criticized extensively. The consequences of this policy were devastating to individuals and communities alike, and they have been well documented. The distinctive and unique forms of harm that were a direct consequence of this government policy include reduced self-esteem, isolation from family, loss of language, loss of culture, spiritual harm, loss of a reasonable quality of education, and loss of kinship, community and traditional ways. These symptoms are now commonly understood to be "Residential School Syndrome." Everyone who attended residential schools can be assumed to

> have suffered such direct harms and is entitled to a lump sum payment based upon the following:
>
> 1.1 A global award of sufficient significance to each person who attended Indian Residential Schools such that it will provide solace for the above losses and would signify and compensate for the seriousness of the injuries inflicted and the life-long harms caused.
>
> 1.2 An additional amount per each additional year or part of a year of attendance at an Indian Residential School to recognize the duration and accumulation of harms, including the denial of affection, loss of family life and parental guidance, neglect, depersonalization, denial of a proper education, forced labour, inferior nutrition and health care, and growing up in a climate of fear, apprehension, and ascribed inferiority.
>
> **As attendance at residential school is the basis for recovery, a simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. (emphasis ours).**

[244] The Panel believes that the above rationale is applicable in this case. As for the process, it needs to be discussed further as it will be explained in the next section.

XIV. Orders

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.

Compensation for First Nations children and their parents or grandparents in cases of unnecessary removal of a child in the child welfare system

[245] The Panel finds there is sufficient evidence and other information (see section 50 (3) (c) of the *CHRA*), in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4) resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse were unnecessarily apprehended and placed in care outside of their homes, families and communities and especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting

them to remain safely in their homes, families and communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA.* Canada is ordered to pay $20,000 to each First Nations child removed from their home, family and community between **January 1, 2006** (date following the last Wen:de report as explained above) until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agree on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

[246] The Panel believes there is sufficient evidence and other information to find that even if a First Nations child has been apprehended and then reunited with the immediate or extended family at a later date, the child and family have suffered during the time of separation and that the trauma outlasts the time of separation.

[247] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4) resulted in harming First Nations parents or grandparents living on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse had their child unnecessarily apprehended and placed in care outside of their homes, families and communities and, especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to keep their child safely in their homes, families and communities. Those parents or grandparents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*.

[248] Canada is ordered to pay $20,000 to each First Nations parent or grandparent of a First Nations child removed from their home, family and community between **January 1, 2006** and until the earliest of the following options occurs: the Panel informed by the

parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agree on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below. This order applies for each child removed from the home, family and community as a result of the above-mentioned discrimination. For clarity, if a parent or grandparent lost 3 children in those circumstances, they should get $60,000, the maximum amount of $20,000 for each child apprehended.

Compensation for First Nations children in cases of necessary removal of a child in the child welfare system

[249] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4) resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of abuse were necessarily apprehended from their homes but placed in care outside of their extended families and communities and therefore, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their extended families and communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations child removed from their home, family and community from **January 1, 2006** until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agree on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

Compensation for First Nations children and their parents or grandparents in cases of unnecessary removal of a child to obtain essential services and/or experienced gaps, delays and denials of services that would have been available under Jordan's Principle

[250] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4) resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out-of-home care were denied services and therefore did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35 (for example, mental health and suicide preventions services, special education, dental etc.). Finally, children who received services upon reconsideration ordered by this Tribunal and children who received services with unreasonable delays have also suffered during the time of the delays and denials. All those children above mentioned experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations child removed from their home and placed in care in order to access services and for each First Nations child who was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[251] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings (2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4) resulted in harming First Nations parents or grandparents living on reserve or off reserve who, as a result of a gap, delay and/or denial

of services were deprived of essential services for their child and had their child placed in care outside of their homes, families and communities in order to receive those services and therefore, did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35. Those parents or grandparents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nations parent or grandparent who had their child removed and placed in out-of-home care in order to access services and for each First Nations parent or grandparent who's child was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[252] It should be understood that the pain and suffering compensation for a First Nations child, parent or grandparent covered under the Jordan's Principle orders cannot be combined with the other orders for compensation for removal of a child from a home, a family and a community rather, the removal of a child from a home is included in the Jordan's Principle orders.

[253] The Panel finds as explained above there is sufficient evidence and other information in this case to establish on a balance of probabilities that Canada was aware of the discriminatory practices of its child welfare program offered to First Nations children and families and also of the lack of access to services under Jordan's Principle for First Nations children and families. Canada's conduct was devoid of caution and without regard for the consequences experienced by First Nations children and their families warranting the maximum award for remedy under section 53(3) of the *CHRA* for each First Nations child and parent or grandparent identified in the orders above.

[254] Canada is ordered to pay $20,000 to each First Nations child and parent or grandparent identified in the orders above for the period between **January 1, 2006** and until the earliest of the following options occurs: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children

from their homes, families and communities as a result of the discrimination found in this case has ceased and effective and meaningful long-term relief is implemented; the parties agreed on a settlement agreement for effective and meaningful long-term relief; the Panel ceases to retain jurisdiction and beforehand amends this order for all orders above except Jordan's Principle orders given that the Jordan's Principle orders are for the period between **December 12, 2007** and **November 2, 2017** as explained above and, following the process discussed below.

[255] The term parent or grandparent recognizes that some children may not have parents and were in the care of their grandparents when they were removed from the home or experienced delays, gaps and denials in services. The Panel orders compensation for each parent or grandparent caring for the child in the home. If the child is cared for by two parents, each parent is entitled to compensation as described above. If two grandparents are caring for the child, both grandparents are entitled to compensation as described above.

[256] For clarity, parents or grandparents who sexually, physically or psychologically abused their children are entitled to no compensation under this process. The reasons were provided earlier in this ruling.

[257] A parent or grandparent entitled to compensation under section 53 (2) (e) of the *CHRA* above and, who had more than one child unnecessarily apprehended is to be compensated $20,000 under section 53 (3) of the *CHRA* per child who was unnecessarily apprehended or denied essential services.

XV. Process for compensation

[258] The Panel in considering access to justice, efficiency and expeditiousness has opted for the above orders to avoid a case-by-case assessment of degrees of pain and suffering for each child, parent or grandparent referred to in the orders above. As stated by the NAN, there is no perfect solution on this issue, the Panel agrees. The difficulty of the task at hand does not justify denying compensation to victims/survivors. In recognizing that the maximum of $20,000 is warranted for any of the situations described above, the case-

by-case analysis of pain and suffering is avoided and it is attributed to a vulnerable group of victims/survivors who as exemplified by the evidence in this case have suffered as a result of the systemic racial discrimination. Some children and parents or grandparents may have suffered more than others however, the compensation remedies are capped under the *CHRA* and the Panel cannot award more than the maximum allowed even if it is a small amount in comparison to the degree of harm and of racial discrimination experienced by the First Nations children and their families. The maximum compensation awarded is considered justifiable for any child or adult being part of the groups identified in the orders above.

[259] This type of approach to compensation is similar to the Common Experience Payment compensation in the IRSSA outlined above. The Common Experience Payment recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The CEP compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language, culture, etc. (see Affidavit of Mr. Jeremy Kolodziej's dated April 4 2019 at, para. 10).

[260] The Panel prefers AFN's request that compensation be paid to victims directly following an appropriate process instead of being paid in a fund where First Nations children and families could access services and healing activities to alleviate some of the effects of the discrimination they experienced. The Panel is not objecting to a trust fund per se, rather it objects that the compensation be paid in a trust fund to finance services and healing activities in lieu of financial compensation as suggested by the Caring Society. Such meaningful activities should be offered by Canada however, not in replacement of financial compensation to victims/survivors. Financial compensation belongs to the victims/survivors who are the ones who should be empowered to decide for themselves on how best to use this financial compensation.

[261] However, the Panel also acknowledges the Caring Society's argument that it is not appropriate to pay $40,000 to a 3-year-old. Therefore, there is a need to establish a process where the children who are under 18 or 21 years old have the compensation paid to them secured in a fund that would be accessible upon reaching majority.

[262] In terms of Jordan's Principle, many children who were denied services and who are still living with their parents could have the compensation funds administered by their parents or grandparents until the age of majority.

[263] For all the other children who have no parents, grandparents or responsible adult family members and who are underage, a trust fund could be an option amongst others that should be part of the discussions referred to below.

[264] Special protections for mentally disabled children and parents or grandparents who abuse substances that may affect their judgment should be considered in the process.

[265] It would be preferable that the social benefits of victims/survivors not be affected by compensation remedies. This can form part of the process for compensation discussions.

[266] The possibility for individual victims/survivors to opt-out should form part of this compensation process.

[267] Given that the parties and interested parties in this case are all First Nations except the Commission and the AGC and, that they all have different views on the appropriate definition of a First Nations child in this case, it is paramount that this form part of the discussions on the process for compensation. The Panel reiterates that it recognizes the First Nations human rights and Indigenous rights of self-determination and self-governance.

[268] If a trust fund and/or committee is proposed, it may be valuable to also include non-political members on the trust fund and/or committee such as adult victims/survivors, Indigenous women, elders, grandmothers, etc.

[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 grandparents. 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. 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.

[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.

XVI. Interest

[271] Pursuant to section 53(4) of the *Act*, the Complainants seek interest on any award of compensation made by the Tribunal.

[272] Section 53(4) allows for the Tribunal to award interest at a rate and for a period it considers appropriate:

> (4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[273] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

[274] Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[275] As such, the Panel grants interest on the compensation awarded, at the current Bank of Canada rate, as follows:

[276] The compensation for pain and suffering and special compensation includes an award of interest for the same periods covered in the above orders. This approach was used by the Tribunal in the past (see for example, *Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 20 at, para. 21).

XVII. Retention of jurisdiction

[277] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
September 6, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: September 6, 2019

Date and Place of Hearing: April 25 and 26, 2019
Gatineau, Québec

Appearances:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C. and Max Binnie, counsel for the Respondent

Maggie Wente, counsel for the Chiefs of Ontario, Interested Party

Akosua Matthews and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 14
Date: May 26, 2017
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

Outline

I. Motions for immediate relief related to Jordan's Principle

[1] Jordan River Anderson of the Norway House Cree Nation was born with a serious medical condition. Because of a lack of available medical services in his community, Jordan's family turned to provincial child welfare care in order for him to get the medical treatment he needed. After spending the first two years of his life in hospital, Jordan could have gone to a specialized foster home close to his medical facilities in Winnipeg. However, for two years, Indigenous and Northern Affairs Canada ("INAC"), Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs. Ultimately, Jordan remained in hospital until he passed away, at the age of five, having spent his entire life in hospital.

[2] In recognition of Jordan, Jordan's Principle provides that where a government service is available to all other children, but a jurisdictional dispute regarding services to a First Nations child arises between Canada, a province, a territory, or between government departments, the government department of first contact pays for the service and can seek reimbursement from the other government or department after the child has received the service. It is a child-first principle meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them. On December 12, 2007, the House of Commons unanimously passed a motion that the government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

[3] The Complainants and Interested Parties (with the exception of Amnesty International) have each brought motions challenging, among other things, Canada's implementation of Jordan's Principle in relation to this Panel's decision and orders in *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 ("the *Decision*"). Canada and the Commission filed submissions in response to the motions. The motions were heard from March 22 to 24, 2017 in Ottawa. As with the hearing on the merits, the hearing of these motions was broadcasted on the Aboriginal Peoples Television Network.

[4] This ruling deals specifically with allegations of non-compliance and related requests for further orders with respect to Jordan's Principle. Other aspects of the parties' motions not dealt with in this ruling will be determined as part of a separate ruling.

II. Findings and orders with respect to Jordan's Principle to date

[5] In the *Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases. Furthermore, the Canada's approach to Jordan's Principle cases was aimed solely at inter-governmental disputes between the federal and provincial government in situations where a child had multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (not just those with multiple disabilities). As a result, INAC was ordered to immediately implement the full meaning and scope of Jordan's Principle (see the *Decision* at paras. 379-382, 458 and 481). The *Decision* and related orders were not challenged by way of judicial review.

[6] Three months following the *Decision*, INAC and Health Canada indicated that they began discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. They anticipated it would take 12 months to engage First Nations, the provinces and territories in these discussions and develop options for changes to Jordan's Principle.

[7] In a subsequent ruling (2016 CHRT 10), this Panel specified that its order was to immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term. We noted there was already a workable definition of Jordan's Principle, which was adopted by the House of Commons, and saw no reason why that definition could not be implemented immediately. INAC was ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). The Panel further

indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at paras. 30-34). Again, the ruling and related orders were not challenged by way of judicial review.

[8] Thereafter, INAC indicated that it took the following steps to implement the Panel's order:

- It corrected its interpretation of Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- It corrected its interpretation of Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[9] It also stated it would engage in discussions with First Nations, the provinces and the Yukon on a long-term strategy. Furthermore, INAC indicated it would provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case.

[10] While the Panel was pleased with these changes and investments in working towards enacting the full meaning and scope of Jordan's Principle, it still had some outstanding questions with respect to consultation and full implementation. In 2016 CHRT 16, the Panel requested further information from INAC with respect to its consultations on Jordan's Principle and the process for dealing with Jordan's Principle cases. Further, INAC

was ordered to provide all First Nations and First Nations Child and Family Services Agencies ("FNCFS Agencies") with the names and contact information of the Jordan's Principle focal points in all regions.

[11] Finally, the Panel noted that INAC's new formulation of Jordan's Principle once again appeared to be more restrictive than formulated by the House of Commons. That is, INAC was restricting the application of the principle to "First Nations children on reserve" (as opposed to all First Nations children) and to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." The Panel ordered INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. In order for the Panel to assess the full impact of INAC's formulation of Jordan's Principle, it also ordered INAC to explain why it formulated its definition of the principle as only being applicable to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (see 2016 CHRT 16 at paras. 107-120). This third ruling was also not challenged by way of judicial review.

III. Canada's further actions in relation to Jordan's Principle

[12] In response to the present motions, Canada states that its definition of Jordan's Principle now applies to all First Nations children and is not limited to those residing on reserve or normally resident on reserve. It also applies to all jurisdictional disputes, including those between federal government departments.

[13] According to Canada, its revised interpretation of Jordan's Principle aims to ensure that anytime a need for a publicly-funded health, education or social care service or support for a First Nations child is identified, it will be met. Any jurisdictional issues that might arise will be dealt with after ensuring the need is met. New processes have been created so that the services needed for any Jordan's Principle case are not delayed due to case conferencing or policy review. Urgent cases are addressed within 12 hours; other cases within 5 business days; and, complex cases which require follow-up or consultation with others within 7 business days.

[14] Canada states it has also taken the necessary steps to ensure the requisite funding and human resources are available to implement the expanded definition of Jordan's Principle. In this regard, it has undertaken new policy initiatives to improve health and social service needs for First Nations children. According to Canada, the Child-First Initiative (the "CFI") supports the expanded application of Jordan's Principle by providing mechanisms for Canada to prevent or resolve jurisdictional disputes and gaps, before they occur. Canada submits the CFI identifies First Nations children at risk, through enhanced service coordination, and provides a source of funds to meet children's needs in cases where those needs cannot be met through existing publically available programs. Canada also points to the 2016/17 First Nations and Inuit Health Branch regional operation plan as supporting the correct interpretation of the application of Jordan's Principle. That plan calls for $64 million for First Nations mental health programs and services in Ontario, in addition to regular mental health programs.

[15] In addition, Canada submits that it is also focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available and given an opportunity to get involved and share their views.

[16] Finally, Canada states that while Jordan's Principle cannot fund everything, firm lines regarding what is recoverable are not being drawn. Any publicly-funded service that is available to other Canadian children is eligible under Jordan's Principle and has been covered when brought forward.

IV. Analysis

[17] The Complainants and the Interested Parties believe Canada has failed to comply with the Panel's orders to date, or certain aspects of those orders. Generally, each of their respective submissions focused on a different aspect of the complaint and made requests for immediate relief orders related to that focus. Based on statements made in their submissions and at the hearing, the Complainants and the Interested Parties are generally supportive of each other's positions and requested orders.

[18] The Commission believes that, despite a number of positive and encouraging developments, Canada is not yet in full compliance with this Panel's orders and, therefore, it is open to the Panel to provide additional clarification and/or guidance with respect to its orders.

[19] With respect to Jordan's Principle, the First Nations Child and Family Caring Society of Canada (the "Caring Society") and the Commission request that additional orders be made in relation to the definition of the principle, the dissemination of that definition to the public and stakeholders, and the process for dealing with Jordan's Principle cases and the tracking of those cases.

[20] The Assembly of First Nations (the "AFN") was originally concerned about its lack of involvement in Health Canada's Jordan's Principle activities given it has an Engagement Protocol with the First Nations and Inuit Health Branch. Health Canada has since invited the AFN to co-chair a working group on Jordan's Principle, which the AFN accepted. The AFN's submissions echo many of the concerns raised by the Caring Society and the Commission in terms of the definition and process surrounding Jordan's Principle.

[21] The Chiefs of Ontario's (the "COO") and the Nishnawbe Aski Nation's (the "NAN") submissions with respect to Jordan's Principle focus mainly on the provision of mental health services under the *Memorandum of Agreement Respecting Welfare Programs for Indians* ("the *1965 Agreement*") in Ontario. While this ruling will deal with Jordan's Principle generally, specific issues with respect to the *1965 Agreement*, along with other requests, will be dealt with in a separate ruling.

[22] In addition, the Panel highlights that NAN's motion had also sought a "Choose Life" order that Jordan's Principle funding be granted to any Indigenous community that files a proposal identifying children and youth at risk of suicide. Health Canada has since committed to establishing a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. As such, and at NAN's request, the Panel adjourned the request for a "Choose Life" order (see 2017 CHRT 7).

A. Legal arguments

(i) Burden of proof and compliance

[23] In general, and in deciding all aspects of the motions now before the Panel, the Caring Society and the AFN submit that Canada bears the burden of demonstrating to the Tribunal that it has complied with the orders for immediate relief made to date. Canada is in possession of the necessary information to show whether the immediate relief ordered by the Tribunal has been provided. Furthermore, it would be unjust, having proved that Canada has discriminated against First Nations children and their families in a systemic way, to bear a "burden of proof" to show that discrimination is continuing in the absence of further orders.

[24] In the absence of evidence clearly demonstrating that Canada has fully addressed the immediate relief items ordered by the Tribunal, the Complainants and the Interested Parties have, among other things, asked the Tribunal to find that Canada continues to discriminate, that it has not complied with the Panel's orders to date, and, in some cases, asked that the Tribunal issue an order declaring Canada non-compliant.

[25] The Commission submits that, where the Tribunal has retained jurisdiction to facilitate implementation of an order, and a dispute subsequently arises, it is open to the Tribunal to reconvene the hearing to: (i) make findings about whether a party has complied with the terms of the original order, and (ii) clarify and supplement the original order, if further direction is needed to address the discriminatory practice identified in the original order. In its view, despite a number of positive and encouraging developments, Canada has not yet brought itself into full compliance with the Tribunal's rulings regarding Jordan's Principle. It is therefore open to the Tribunal to provide additional clarification and/or guidance.

[26] Canada submits that there is no established legal test governing a motion for non-compliance before this Tribunal. The test to be met on this motion must accordingly be derived from the general principles that guide human rights law. According to Canada, the law is clear that the moving parties have the legal burden to prove their allegations on a

balance of probabilities: in this case, allegations of non-compliance. In Canada's view, the moving parties have not met their burden and, therefore, their motions should be dismissed. In any event, Canada states it has complied with the Tribunal's orders.

[27] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *Canadian Human Rights Act* ["the *Act*"]). In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135 at paras. 61 and 67, aff'd 2011 FCA 202 ["*Walden*"]). In determining the present motions, this is the situation in which the Panel finds itself.

[28] In the *Decision*, while the Panel made general orders to cease the discriminatory practice and take measures to redress and prevent it, it also explained that it required further clarification from the parties on the relief sought, including how immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis (see para. 483). Indeed, while the Panel was able to further elaborate upon its orders in its subsequent rulings based upon additional information provided by the parties, the Panel continued to retain jurisdiction over the matter pending further reporting from the parties, mainly from Canada (see 2016 CHRT 10 and 2016 CHRT 16). That is to say that, as opposed to determining the merits of a complaint, the Tribunal's determination of appropriate remedies is less about an onus being on a particular party to prove certain facts, and more about gathering the necessary information to craft meaningful and effective orders that address the discriminatory practices identified.

[29] Consistent with this approach, and as this Panel has previously stated, the aim in making an order under section 53 of the *Act* is to eliminate and prevent discrimination. On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *Act* and meaningful in vindicating any loss suffered by the victim of discrimination. However, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an

intricate task and may require ongoing supervision (see 2016 CHRT 10 at paras. 13-15 and 36).

[30] It is for these reasons that, absent a gap in the evidentiary record, the Panel does not consider the question of burden of proof to be a material issue in determining the present motions. As the Federal Court of Appeal stated in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, at paragraph 42 ("*Chopra*"), "[t]he question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding." While discrete issues regarding the burden of proof may arise in the context of determining motions like the ones presently before the Panel, where the evidentiary record allows the Panel to draw conclusions of fact which are supported by the evidence, the question of who had the onus of proving a given fact is immaterial.

[31] In the same vein, the Panel's role in ruling upon the present motions is not to make declarations of compliance or non-compliance *per se*. Rather, in line with the remedial principles outlined above, the Panel's purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation is to ensure that as many of the adverse impacts and denials of services identified in the *Decision* are temporarily addressed while INAC's First Nations child welfare programing is being reformed. That said, in crafting any further orders to immediately redress or prevent the discrimination identified in the *Decision*, it is necessary for the Panel to examine the actions Canada has taken to date in implementing the Panel's orders and it may make findings as to whether those actions are or are not in compliance with those orders.

[32] As the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 32, "[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal." This statement is in line with the Panel's approach to remedies to date in this matter. In order to facilitate the immediate implementation of the general remedies ordered in the *Decision*, the Panel has requested additional information from the parties, monitored Canada's implementation of its orders and, through its subsequent rulings, provided

additional guidance to the parties and issued a number of additional orders based on the detailed findings and reasoning already included in the *Decision*.

[33] While that approach has yielded some results, it has now been over a year since the *Decision* and these proceedings have yet to advance past the provision of immediate relief. The Complainants, the Commission and the Interested Parties want to see meaningful change for First Nations children and families and want to ensure Canada is implementing that change at the first reasonable occasion. The Panel shares their desire for meaningful and expeditious change. The present motions are a means to test Canada's assertion that it is doing so and, where necessary, to further assist the Panel in crafting effective and meaningful orders.

[34] This is the context in which the present motions have been filed. The Tribunal's remedial discretion must be exercised reasonably, in consideration of this particular context and the evidence presented through these motions. That evidence includes Canada's approach to compliance with respect to the Panel's orders to date, which evidence can be used by the Panel to make findings and to determine the motions of the parties.

(ii) Separation of powers

[35] In crafting further orders, Canada urges the Tribunal to bear in mind general principles regarding the appropriate separation of powers. That is, the Tribunal should leave the precise method of remedying the breach to the body charged with responsibility for implementing the order. According to Canada, the Tribunal would exceed its authority if it were to make orders resulting in it taking over the detailed management and coordination of the reform currently being undertaken.

[36] Canada submits deference must be afforded to allow it to exercise its role in the development and implementation of policy and the spending of public funds. Absent statutory authority or a challenge on constitutional grounds, courts and tribunals do not have the institutional jurisdiction to interfere with the allocation of public funds or the development of public policy. To the extent the Tribunal is being asked to make additional

remedial orders that would require it to dictate policies or authorize the spending of public funds, Canada contends those requests should be denied as they would exceed the Tribunal' s jurisdiction.

[37] Canada's separation of powers argument lacks specificity. Aside from one specific order requested by the Caring Society, which the Panel will address in a separate ruling, Canada has not pointed to any other orders requested by the other parties to which this argument would apply. For the purposes of this ruling, it has not identified any requested orders related to Jordan's Principle that may offend the separation of powers. In any event, as explained in the reasons below, any further orders made by the Panel are based on the findings and orders in the *Decision* and subsequent rulings, which Canada has accepted; the evidence presented on these motions; and, the Panel's powers under section 53(2) of the *Act*. In performing this analysis, Canada's generalized separation of powers argument is not particularly helpful.

B. Further orders requested

(i) Definition of Jordan's Principle

[38] Despite Canada's assurances that its definition of Jordan's Principle now applies to all First Nations children, regardless of their condition or place of residency, the Caring Society submits that government officials have been promulgating a restrictive definition of Jordan's Principle that still focuses on children with disabilities or with a critical short-term condition requiring heath or social services. The Caring Society adds that INAC has yet to undertake a review of past Jordan's Principle cases where services were denied. While Health Canada is engaged in a process of looking at past Jordan's Principle cases where services were denied, the Caring Society and the AFN are unclear about the number of years into the past this process is considering.

[39] Moreover, the Caring Society is concerned that the definition of Jordan's Principle is limited to children as defined by provincial legislation. In some provinces, a child is defined as being under the age of 16. Such an approach is unacceptable to the Caring Society because Jordan's Principle is not restricted to services provided under a

province's child and family services legislation. Similarly, the Caring Society submits that Jordan's Principle requires an outcome-based, and not process-based, approach to access to services. That is, the provincial/territorial normative standard of care is an inadequate measure when designing programs and initiatives to provide substantive equality to First Nations children.

[40] The Commission generally agrees with the Caring Society that the Tribunal should provide additional guidance by clarifying the exact definition of Jordan's Principle that is to be applied, going forward, to redress the discriminatory practices identified in the *Decision*. Considering the rulings already made by the Panel to date, the Commission suggested certain key principles that any definition of Jordan's Principle must include.

[41] While Canada has done some work to implement Jordan's Principle since the *Decision*, it still has not implemented its full meaning and scope. As mentioned above, in 2016 CHRT 16, the Panel indicated that a definition of Jordan's Principle that applies to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" appeared to be more restrictive than formulated by Parliament. Following the Panel's request for further information, and pursuant to the evidence presented in the course of these motions, the Panel can now confirm that Canada has indeed been applying a narrow definition of Jordan's Principle that is not in compliance with the Panel's previous orders.

[42] Canada put forward three witnesses in response to the motions of the Complainants and the Interested Parties:

- Ms. Robin Buckland, Executive Director of the Office of Primary Health Care within Health Canada's First Nations and Inuit Health Branch;
- Ms. Cassandra Lang, Director, Children and Families, in the Children and Families Branch at INAC; and,
- Ms. Lee Cranton, Director, Northern Operations in Ontario Region within Health Canada's First Nations and Inuit Health Branch.

[43] Each of these three witnesses swore an affidavit and was cross-examined thereon by the other parties, all of which was put before the Panel in the context of these motions. Generally, the three witnesses presented similar testimonial evidence in support of Canada's position. However, as the Panel will explain in the pages that follow and with a primary focus on the evidence of Ms. Buckland, their testimony in relation to Jordan's Principle was not corroborated by the bulk of the documentary evidence emanating from Canada and dated over the last year since the *Decision*.

[44] Ms. Buckland is the federal government official responsible for implementing Jordan's Principle. She has been involved in doing so since the *Decision*'s release (see Gillespie Reporting Services, transcript of Cross-Examination of Robin Buckland, Ottawa, Vol. I at p. 15, lines 21-23 [*Transcript of Cross-Examination of Ms. Buckland*]).

[45] In her affidavit, Ms. Buckland states that the previous restrictions found in the definition of Jordan's Principle have now been eliminated, including the requirement that First Nations children must have multiple disabilities that require multiple service providers or that they must reside on reserve. Despite this, she states that families are often not coming forward to request support. In this regard, she indicates proactive efforts in partnership with service delivery organizations on the ground will need to continue and that Canada has commenced various engagement activities to help facilitate the broader application of Jordan's Principle (see *affidavit of Ms. Robin Buckland*, January 25, 2017, at paras. 3, 16-17).

[46] Ms. Buckland further explained that the current definition of Jordan's Principle, which applies to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports", was to focus efforts on the most vulnerable children:

> [I]t's more about looking for the highest area of need and, and trying to focus our efforts.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 17, lines 12-13.

> [A] child living on reserve with an interim, a condition or short-term condition or a disability affecting their activities of daily living was a focus of our efforts, was and is a focus of our efforts in terms of Jordan's Principle.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 39 lines, 17-21.
>
> Whenever you're working on a complex health issue, you always take a multi-modal approach to it. There's always different angles from which you need to be able to address the problem if you are going to make a difference. The focus on First Nations children on reserve with a disability or a short-term condition with -- that affects their activities of daily living is an effort, is our effort to try to get at a segment of the population, a subset of the population where we feel there is an opportunity to make -- where we feel there is the greatest need and where we feel there is an opportunity to make the greatest difference.
> So I think as I said earlier, we were -- it was unfortunate that our communications in the beginning did not -- were not properly prefaced, indicating that Jordan's Principle applies to all First Nations children.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 40, lines 10-25.
>
> We're trying to focus, we're trying to start somewhere and trying to -- where are we likely to find the greatest number of jurisdictional disputes.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 41, lines 4-6.
>
> Children with disability or critical interim need is, is a particular focus. Jordan`s Principle, as I mentioned just moments ago, applies to all first nations kids and who have an unmet need in terms of health and social needs.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 275, lines 19-23.

[47] As the Caring Society points out at paragraph 24 of its December 16, 2016 submissions, the *Decision* found Canada's similarly narrow definition and approach to Jordan's Principle to have contributed to service gaps, delays and denials for First Nations children on reserve. Specifically, the evidence before the Panel in determining the *Decision* indicated Health Canada and INAC's approach to Jordan's Principle focused mainly on "inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers" (see *Decision* at paras. 350-382). Indeed, the Panel specifically highlighted gaps in services to children beyond those with multiples disabilities. For example, an INAC document referenced in the *Decision,* entitled

INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region, indicates that these gaps non-exhaustively include mental health services, medical equipment, travel for medical appointments, food replacement, addictions services, dental services and medications (see *Decision* at paras. 368-373).

[48] As the Panel also highlighted in the *Decision*, the Federal Court likewise found Health Canada and INAC's focused approach to Jordan's Principle to be narrow and the finding that the principle was not engaged with respect to Jeremy Meawasige, a teenager with multiple disabilities and high care needs, to be unreasonable (see *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 ["*Pictou Landing*"]).

[49] The justification advanced by Ms. Buckland for the focused approach to Jordan's Principle is the same one advanced by Canada in the past and underscored by the Panel in the *Decision* (see paras. 359 and 368-369). Specifically, in a Health Canada PowerPoint presentation from 2011, entitled *Update on Jordan's Principle: The Federal Government Response* (Exhibit R-14, Tab 39 at p. 6), Canada indicated:

> This slide presents an overview of the federal response to Jordan's Principle. We acknowledge that there are differing views regarding Jordan's Principle. The federal response endeavors to ensure that the needs of the most vulnerable children at risk of having services disrupted as a result of jurisdictional disputes are met.
>
> […]
>
> The Government of Canada's focus is on children with multiple disabilities requiring services from multiple service providers whose quality of life will be negatively impacted by jurisdictional disputes. These are children who are the most vulnerable – children like Jordan.

[50] Despite the findings in the *Decision*, Canada has repeated its pattern of conduct and narrow focus with respect to Jordan's Principle. In February 2016, a few weeks after the release of the *Decision*, Canada considered various new definitions of Jordan's Principle. Those new definitions and their implications are found in a document entitled *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions*,

dated February 11, 2016 (*Exhibits to the Cross-Examination of Ms. Cassandra Lang on her affidavit dated January 25, 2017*, February 7-8, 2017, at tab 4):

Proposed Definition Options	Key Elements and Considerations
Option One: Jordan's Principle is a child-first approach to address the needs of First Nation children assessed as having disabilities/special needs by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.	**Key Elements** Similar to the criteria and scope as original JP response but broader than original definition (which was limited to "children with multiple disabilities requiring services from multiple service providers), this approach maintains a focus on children with special needs. Broadens the definition of jurisdictional dispute to include intergovernmental disputes (not just federal/provincial) this responds **Considerations:** • May draw criticism due the continued focus on special needs (while broader) as the original JP response. • Maintaining the notion of comparability to provincial resources may not address the criticism of the Tribunal regarding the need to ensure substantive equality in the provision of services. • The focus on a dispute does not account for potential gaps in services where no jurisdiction is providing the required services.
Option Two: Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.	**Key Elements:** Similar to Option One with the exception of broadening the scope to include all First Nation children on reserve rather than limited to special needs. Maintains original focus on: • jurisdictional disputes • normative standards set by province (with a modification to move away from specific reference to geographical comparability **Considerations:** • Responds to the key direction of the Tribunal by broadening the scope beyond children with special needs. However, the broader scope may also dilute the focus on some of the most vulnerable children. • May have significant resources implications

Proposed Definition Options	Key Elements and Considerations
	and may go beyond current policy authorities and/or program mandates.
Option Three: Jordan's Principle is a child-first approach to address the assessed needs of First Nation c children by ensuring cross jurisdictional issues to not disrupt delay or prevent a child from accessing services. In the event that there is a dispute over payment of services between or within governments, First Nation children will receive required social and health supports. The agency of first contact will pay for the services until there is a resolution.	**Key Elements:** • Broader scope – does not limit the response to First Nation children living on reserve. • A dispute between governments or within government is still required in order to trigger JP. **Considerations:** • The inclusion of all First Nation children may have far reaching resource implications and will require additional policy and program mandates. • The continued focus on instances where there is a dispute may limit the ability for JP to respond to gaps in service (where no jurisdiction is providing the required service).
Option Four: Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, First Nation children will receive required social and health supports. The issue of payment will be resolved by the government involved, the agency of first contact will pay for the services until there is a resolution.	**Key Elements:** A very broad application of the principle that includes all First Nation children and does not require an identified jurisdictional dispute in order to trigger JP. **Considerations:** • Considerable resource and policy and program implications • Goes beyond the Tribunal recommendations and has implications for federal mandate given that there are gaps in services that are not currently funded by any level of government. • Provinces may react to federal definition as it may put additional financial pressures on partners involved

[51] The Panel finds *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document relevant and reliable. Not only is it an internal government document filed into evidence but, similar to the August 2012 presentation entitled *First Nations Child and Family Services Program (FNCFS) The Way Forward* discussed in the *Decision* (see at paras. 292-302), it presents options that inform government decision making. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document specifies:

> The definitions and/or principles described above represent a menu of possible options (not mutually exclusive) that the federal government could draw from to meet the Tribunal's order to cease applying a narrow definition of Jordan's Principle and take measures to implement its full meaning and scope.

[52] Ultimately, it was "option one" that was selected for implementation, an option that *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document considers to not be fully responsive to the Tribunal's order. As the Caring Society and the Commission highlight in their submissions and the Panel confirmed in its review of the documents on record, including those referenced at pages 59-60 of the Caring Society's February 28, 2017 submissions, this definition and approach to Jordan's Principle was recently presented internally and externally to a number of organizations and First Nations in the following terms:

- First Nations children living on reserve with a disability or a short-term condition.
- First Nations children living on reserve with a disability or a short-term condition requiring health or social services.
- First Nations children with a disability or a critical short-term health or social service need living on reserve, or who ordinarily reside on reserve.
- First Nation child with a disability or a discrete condition that requires services or supports that cannot be addressed within existing authorities.
- First Nation children living on reserve with an ongoing disability affecting their activities of daily living, as well as those who have a short term issue for which there is a critical need for health or social supports.
- First Nations children living on reserve and in the Yukon who have a disability or an interim critical condition affecting their activities of daily living have access to health and social services comparable to children living off reserve.
- First Nations children with a disability or interim critical condition living on reserve have access to needed health and social services within the normative standard of care in their province/territory of residence.

[53] These iterations of Jordan's Principle do not capture all First Nations children. Instead, as stated by the Caring Society at paragraph 15 of its December 16, 2016

submissions, they capture "…varying subsets of First Nations children with disabilities or short-term conditions." Notwithstanding the above, Ms. Buckland indicates that Canada still meant for Jordan's Principle to apply to all First Nations children and that the fact the definition does not reflect all First Nations children is a communications issue and not a narrow application of the principle.

[54] The Panel does not accept this explanation. Ms. Buckland's assertion is not supported by the preponderance of evidence presented on this motion, which includes various charts, communication documents, and even extracts from INAC's website.

[55] A significant example is *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document referred to above. The consideration of each of the four options indicates that the definition of Jordan's Principle adopted by Canada was a calculated, analyzed and informed policy choice based on financial impacts and potential risks rather than on the needs or the best interests of First Nations children, which Jordan's Principle is meant to protect and should be the goal of Canada's programming (see *Decision* at para. 482).

[56] Another example is a letter dated January 19, 2017, addressed to Ontario First Nation Chiefs and Council Members, entitled *Attention: Ontario First Nation Chiefs and Council Members, Subject: Update-Jordan's Principle- Responding to the needs of First Nations children* (*Answers to requests of Lee Cranton*, March 7, 2017, at tab 13). In the letter, the Ontario Regional Executive for the First Nations and Inuit Health Branch announces the implementation of a new initiative designed to address the health and social needs of First Nations children with "…an ongoing disability affecting their daily living, or for those with a short-term issue where there is a critical need for health or social services." The letter comes almost a year after the *Decision*, nearly 9 months after the April 2016 ruling and, more significantly, after the Panel indicated in its September 2016 ruling that Health Canada and INAC's definition of Jordan's Principle appeared to be overly narrow and not in line with the Panel's previous findings and orders.

[57] A Health Canada presentation entitled *Jordan's Principle – Child First Initiative* presented on September 15, 2016 to the Non-Insured Health Benefits Committee, and on

October 6, 2016 to the Innu Round Table, indicates that the new approach to Jordan's Principle, restricted to children with disabilities or critical interim conditions living on reserve, will continue up to 2019 (see September 15, 2016 presentation at *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at pp. 4-5; and, October 6, 2016 presentation at A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at pp. 4-5). At page 5, the presentation provides a "Then and Now" table comparing Canada's approach to Jordan's Principle from 2008-2016 to that in 2016-2019:

2008-2016	**2016-2019**
Dispute-based, triggered after declaration of a dispute over payment for services within Canada, or between Canada and a province	*Needs-based*, child-first approach to ensure access to services without delay or disruption due to jurisdictional gaps.
First Nations child living on reserve or ordinarily resident on reserve	Still First Nations child on reserve or ordinarily resident on reserve
	Are within the age range of "children" as defined in their province/territory of residence
Child assessed with: • multiple disabilities requiring multiple providers	Children assessed with needing health and/or social supports because of: • a disability affecting activities of daily living; OR • an interim critical condition affecting activities of daily living
Child required services comparable to provincial normative standards of care for children off-reserve in a similar geographic location	Child requires services comparable to provincial normative standards of care, AND requests BEYOND the normative standard will be considered on a case-by-case basis

[58] The *Jordan's Principle – Child First Initiative* presentation specifies that the goal of the new approach to Jordan's Principle is "…to help ensure that children living on reserve with a disability or interim critical condition have equitable access to health and social services comparable to children living off reserve" (at p. 6). At page 8, the October 6, 2016 presentation goes on to provide a "JP Fund – Eligibility Determination Checklist" which asks questions such as: is the request for a child as defined by provincial law? Does the child live on reserve or ordinarily lives on reserve? Does the child have a disability that impacts his/her activities of daily living at home, school or within the community, or has an interim critical condition requiring health or social services or supports? Does the request fall within the normative standard of care of the province or territory of residence?

[59] These presentations are meant to inform and guide individuals on how Canada is implementing Jordan's Principle. In another similar example, in a letter dated August 8, 2016, addressed to all First Nations and Inuit Health Branch and Band employed nurses in Alberta, with the subject line "Government of Canada's New Approach to Implementing Jordan's Principle" (see A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I at p.2), the Director of Nursing for the First Nations and Inuit Health Branch, Alberta Region, writes:

- Please read the information below/attached to orientate yourself to the new approach.
- There will be further details coming to help guide your assistance with these clients.
- As part of your regular work, if you see or are approached about a First Nations child with disabilities (short-term or long term) that may not be receiving the needed health or social services normally provided to a child off-reserve please contact FNIHB-AB.

[60] The letter attaches a guide illustrating the process to be followed in assessing a potential Jordan's Principle case. Despite the case-by-case analysis stated in other presentations for situations falling outside the eligibility criteria, the process indicated in the chart for nurses steers those cases away from the application of Jordan's Principle. The first question in the chart is: "Does the child have needs related to a disability or a short term health issue that are not being met?" If the answer is 'no', the chart indicates that the "Client/Family should access regular programming." If the answer to this first question is 'yes', then the next question is: "Are there programs on reserve, or easily accessed off reserve, that could meet those needs?" If the answer to this second question is 'no', the chart directs the nurses to: "Gather the related information and send to the JP focal point (JPFP) (See Contacts)." If the answer to the second question is 'yes', the nurse can "…make these referrals as they normally would i.e. Home Care, NIHB, PCN services."

[61] At the time of Ms. Buckland's cross-examination, in February 2017, INAC's website continued to espouse the narrow definition of Jordan's Principle:

> The Government of Canada's new approach to Jordan's Principle is a child-first approach that addresses in a timely manner the needs of First Nations children living on reserve with a disability or a short-term condition.
>
> "Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children", Government of Canada (February 4, 2017), *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 7; see also *Transcript of Cross-Examination of Ms. Buckland* at pp.43-45.

[62] Canada submits that it has now removed any restrictions in its definition of Jordan's Principle. However, only one document submitted prior to Ms. Buckland's cross-examination supports this point. A November 2016 presentation to the "ADM Oversight Steering Committee" states: "Jordan's Principle (JP) reflects a commitment to ensure all First Nations children receive access to services available to other Canadian children, in a timely manner" [Health Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at p. 2)]. It goes on to indicate that Health Canada and INAC are implementing a child-first approach, "addressing specific needs of children on a case-by-case basis." When compared to other presentations submitted into evidence, as outlined above, it does not appear that this presentation was widely communicated, within or outside government. It is also unclear that the principles enunciated therein have been implemented.

[63] Two other documents could be said to support Canada's assertion that it has now removed any restrictions in its definition of Jordan's Principle. Both those documents were submitted following Ms. Buckland's cross-examination and in answer to requests from the other parties.

[64] The first document is another presentation, dated December 21, 2016. It indicates, among other things, that Jordan's Principle applies to all First Nations children, that the Government of Canada recognizes that First Nations on reserve face greater difficulty in accessing Federal/Provincial/Territorial supports, and, that Canada is focused on the most

vulnerable children – those with a disability or critical short-term condition (see Health Canada, *Improving Access to Health and Social Services for First Nations Children*, presentation dated December 21, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, tab 3B, at pp. 2 and 5). The presentation does not specify who it was presented to and, again, when compared to other presentations submitted into evidence, it does not appear to have been widely distributed or communicated, if at all.

[65] The other document contains notes from a "February 10th" meeting with regional executives (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A). It states:

> Update on JP
> - applies to all FN children, not just on reserve
> - JP not limited to short term needs and disabilities
> - all FN children, all disputes, all needs
> - each order from CHRT has clarified our responsibilities
> - focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes
> - comms tools and key messages – getting these out
> - will be asked to go back to all stakeholders and clarify our directions
>
> […]
>
> Next Steps
> - will follow up with written lines which will say:
> - all FN children, on and off reserve
> - all jurisdictional disputes e.g. between departments
> - not limited to children with disabilities or short term critical needs

[66] Based on the wording of the notes, it is clear that they came from a meeting in February 2017: "applies to all FN children, not just on reserve" (this requirement was clarified in September 2016 in 2016 CHRT 16); "each order from CHRT has clarified our responsibilities" (only one order in February 2016); and, "focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes" (this more detailed "focus" characterization only arises following Ms. Buckland's cross-examination). Again, when compared to the other evidence, the definition of Jordan's Principle discussed at this meeting does not appear to have been widely distributed or communicated, if at all, and it is also unclear that the principles enunciated therein have now been implemented.

[67] Accordingly, the Panel finds the evidence presented on this motion establishes that Canada's definition of Jordan's Principle does not fully address the findings in the *Decision* and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan's Principle since the *Decision* and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children.

[68] Presumably, while Canada could have implemented the actual definition of Jordan's Principle, as ordered by the Panel, and at the same time implemented a method to focus on the urgent needs of certain children, that was not the course of action taken by Canada. Having a broad definition does not exclude the possibility of having a process to deal with some children on a more urgent basis. However, there is a distinction between, on the one hand, having an inclusive definition and then attributing priorities in terms of urgencies and, on the other hand, limiting the definition with the result of excluding individuals for the sake of focusing on more vulnerable cases.

[69] Furthermore, the emphasis on the "normative standard of care" or "comparable" services in many of the iterations of Jordan's Principle above does not answer the findings in the *Decision* with respect to substantive equality and the need for culturally appropriate services (see *Decision* at para. 465). The normative standard of care should be used to establish the minimal level of service only. To ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services (see *Decision* at paras. 399-427).

[70] In this regard, the normative standard of care in a particular province may help to identify some gaps in services to First Nations children. It is also a good indicator of the services that any child should receive, whether First Nations or not. For example, in the hearing on the merits, the Panel heard that Health Canada will only pay for one medical device out of three and, if it is a wheelchair, it is paid for once every five years. The normative standard of care generally provides for all three devices to be paid for (see *Decision* at para. 366 and *Jordan's Principle Dispute Resolution Preliminary Report*

(Terms of Reference Officials Working Group, May 2009), Exhibit HR-13, tab 302). This example highlights the gap and flawed rationale contributing to Health Canada's policy, which does not take into account a child's growth over five years.

[71] However, the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document identifies above, under the "Considerations" for "Option One": "The focus on a dispute [over payment of services between or within governments] does not account for potential gaps in services where no jurisdiction is providing the required services."

[72] This potential gap in services was highlighted in the *Pictou Landing* case mentioned above and in the *Decision*. Where a provincial policy excluded a severely handicapped First Nations teenager from receiving home care services simply because he lived on reserve, the Federal Court determined that Jordan's Principle existed precisely to address the situation (see *Pictou Landing* at paras. 96-97). Furthermore, First Nations children may need additional services that other Canadians do not, as the Panel explained in the *Decision* at paragraphs 421-422:

> [421] In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also *Transcript* Vol. 40 at pp. 69, 71).
>
> [422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive

> adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[73] Therefore, the fact that it is considered an "exception" to go beyond the normative standard of care is concerning given the findings in the *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the *Decision*. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan's Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination.

[74] Canada's narrow interpretation of Jordan's Principle, coupled with a lack of coordination amongst its programs to First Nations children and families (as will be discussed in the next section), along with an emphasis on existing policies and avoiding the potential high costs of services, is not the approach that is required to remedy discrimination. Rather, decisions must be made in the best interest of the children. While the Ministers of Health and Indigenous Affairs have expressed their support for the best interest of children, the information emanating from Health Canada and INAC, as highlighted in this ruling, does not follow through on what the Ministers have expressed.

[75] Overall, the Panel finds that Canada is not in full compliance with the previous Jordan's Principle orders in this matter. It tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of

Jordan's Principle. Presenting a criterion-based definition, without mentioning that it is solely a focus, does not capture all First Nations children under Jordan's Principle. Furthermore, emphasizing the normative standard of care does not ensure substantive equality for First Nations children and families. This is especially problematic given the fact that Canada has admittedly encountered challenges in identifying children who meet the requirements of Jordan's Principle and in getting parents to come forward to identify children who have unmet needs (see *Transcript of Cross-Examination of Ms. Buckland* at p. 43, lines 1-8).

[76] On this last point, the evidence indicates and the Panel wishes to highlight that any funding set aside to address Jordan's Principle cases that is not spent in a given year cannot be carried over into the next year. It is set and has to be spent on Jordan's Principle cases or it is returned to the consolidated revenue fund of Canada. In this regard, from July 2016 to February 2017, only approximately $12 million or a little over 15% of the $76.6 million budgeted for Jordan's Principle in 2016-2017 had been spent, $8 million of which was for respite care services in Manitoba [see "Jordan's Principle - Child First initiative", presentation to the Non-Insured Health Benefits Committee, September 15, 2016 (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at p. 10); "Jordan's Principle, Health Canada and INAC 2016-17 Dashboard, Service Access Resolution Funding", valid as of January 11, 2017 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit A); "Memorandum to Senior Assistant Deputy Minister, Requests for Funding for Respite Care and Allied Services under Jordan's Principle", October 3, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); "Memorandum to Senior Assistant Deputy Minister, Request for Funding in Manitoba Region for Specialized Therapy Services Under Jordan's Principle", December 9, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); and, "2016-17 JP-CFI Allocation by Region" (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 9)].

[77] Canada's current approach to Jordan's Principle is similar to the strategy it employed from 2009-2012 and as described in paragraph 356 of the *Decision*. During that time, Canada allocated $11 million to fund Jordan's Principle. The funds were provided

annually, in $3 million increments. No Jordan's Principle cases were identified and the funds were never accessed and lapsed. The Panel determined it was Health Canada and INAC's narrow interpretation of Jordan's Principle that resulted in there being no cases meeting the criteria for Jordan's Principle (see *Decision* at paras. 379-382).

[78] Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see *Decision* at para. 356). In this sense, the evidence shows that Canada's funding of $382 million over three years for Jordan's Principle is not an investment that covers the broad definition ordered by the Panel in the *Decision* and subsequent rulings. Similar to Canada's past practice, it is a yearly pool of funding that expires if not accessed. Also, it is tailored to be responsive to the narrow definition Canada selected and, as specifically mentioned in Canada's own documents, this fund only covers First Nations children on reserve. Now, with a broadening of the definition of Jordan's Principle and the expiration of some of the funding, resources to address Jordan's Principle may become scarce [see "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A)].

[79] Again, the Panel recognizes that Canada made some efforts to implement Jordan's Principle and had a short time frame within which to do so following this Panel's ruling in April 2016. However, the same cannot be said for the numerous months following the April ruling, especially following the September 2016 ruling and up to the time of the hearing of these motions in March 2017. That said, the Panel believes Canada wants to comply with the *Decision* and related orders and has communicated as much [for example, see "Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children" (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", May 18, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, at tab 5, p. 1)].

[80] Despite this, nearly one year since the April 2016 ruling and over a year since the *Decision*, Canada continues to restrict the full meaning and intent of Jordan's Principle. The Panel finds Canada is not in full compliance with the previous Jordan's Principle orders in this matter. There is a need for further orders from this Panel, pursuant to section 53(2)(a) and (b) of the *Act*, to ensure the full meaning and scope of Jordan's Principle is implemented by Canada. In this regard, to redress Canada's previous discriminatory practices, the Panel notes that there are no restrictions that it is aware of that would stop individuals who were previously denied funding under Jordan's Principle, or who would now be considered to fall within the application of Jordan's Principle, from now coming forward and submitting or resubmitting their request. In fact, as highlighted by the Caring Society, considering Canada's previously narrow application of Jordan's Principle from at least 2009 to present, it would be appropriate and reasonable for Canada to review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, to ensure compliance with the correct application of Jordan's Principle ordered in this ruling.

[81] All the Panel's orders with respect to the implementation of the full meaning and scope of Jordan's Principle are detailed in the "Order" section below, under "Definition of Jordan's Principle.

(ii) Changes to the processing and tracking of Jordan's Principle cases

[82] Canada believes its new processes ensure any Jordan's Principle case is not delayed due to case conferencing or policy review. As mentioned above, it alleges urgent cases are addressed within 12 hours, while other cases are addressed within 5 business days, and complex cases which require follow-up or consultation with others are addressed within 7 business days.

[83] The Caring Society submits that Canada's revised processes for dealing with Jordan's Principle cases still impose delays. The AFN shares the Caring Society's view that the arm of government first contacted still does not address the matter directly by funding the service and seeking reimbursement afterwards as is required by Jordan's

Principle. In this regard, Canada's service standards relate to the lapse of time for a decision to be made and not the time it takes for the services to be actually provided to a child. Therefore, Canada should be required to confirm to the Tribunal that its process has been modified so that the government organization that is first contacted pays for the service without the need for policy review or case conferencing before funding is provided.

[84] Also, the Caring Society points out that Canada lacks a transparent and independent mechanism for a family or service provider to appeal a Jordan's Principle case. While a family of a child can request an appeal, there are no appeal procedures described or provided, no timelines for the appeal process and no assurance that written reasons will be provided.

[85] Furthermore, the Caring Society submits that Canada is not formally tracking the number of Jordan's Principle cases that are denied or in progress. It is also not measuring its performance against its stated timelines for resolving Jordan's Principle cases. In this regard, the AFN highlights that Jordan's Principle is meant to cover gaps in federal funding to First Nations children; however, Canada has not yet developed an internal understanding of what those gaps are.

[86] The Commission agrees with the Caring Society's request that Canada immediately: (i) cease imposing service delays due to policy review or case conferencing, and (ii) implement reliable systems to ensure the identification of Jordan's Principle cases. However, there are arguably multiple different methods of compliance. Therefore, the Tribunal should simply set a specific deadline by which the required procedures should be put in place, and require that Canada report to the parties at that time on the means chosen.

[87] Aside from some answers from its witnesses, Canada did not specifically address the submissions with respect to the first contact principle, appeal mechanisms or tracking.

[88] As highlighted in the Panel's last ruling in this matter (2017 CHRT 7), in January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact

amongst a group of young children and youth. This information was contained in a detailed July 2016 proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

[89] The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle'' (see *affidavit of Dr. Michael Kirlew*, January 27, 2017, at para. 16).

[90] While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle.

[91] Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see *Transcript of Cross-Examination of Ms. Buckland* at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16).

[92] If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay

was part of the process, as there was no clarity surrounding what the process actually was [see "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F, at p. 3); see also *Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 1-12].

[93] More significantly, Ms. Buckland's comments suggest the focus of Canada's Jordan's Principle processing remains on Canada's administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan's Principle. The Panel finds Canada's new Jordan's Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process.

[94] The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the *Decision*. According to Ms. Buckland, a Jordan's Principle case comes to Canada's attention through the local Jordan's Principle focal point, which receives the intake form and then sends it to headquarters. The case is then evaluated by staff at headquarters, who first evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service requested. It is unclear how long this intake and initial evaluation can take.

[95] For example, the Panel was provided with an exchange of emails between Health Canada and a First Nations mother looking for assistance in busing her son with severe cerebral palsy to an off-reserve service centre with a program for special needs children (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 12). Following the initial request and an exchange of further information on January 19 and 20, 2017, Health Canada provided an update to the mother on January 27, 2017 indicating that it is working with INAC to determine if their education program could address the request. The mother wrote to Health Canada on

February 3, 2017 requesting a further update from Health Canada because she had yet to hear back for them. Two weeks after receiving the initial request, Canada was still trying to navigate between its own services and programs. When presented with this case under cross-examination, Ms. Buckland indicated “So I guess there's additional work to be done and, and I'm not sure that I have a better answer for it than that” (*Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 10-12).

[96] Where an existing program cannot resolve the service need, headquarters staff will then determine whether the case can be determined at the staff level, the Executive Director level, or the Assistant Deputy Minister level. It is only at this point that Canada’s timelines come into play (urgent cases addressed within 12 hours, other cases within 5 business days, and complex cases within 7 business days). Even then, the evidence indicates these timelines were not fully implemented at the time of Ms. Buckland’s cross-examination. A draft flow chart entitled “Jordan’s Principle Approval Process”, dated February 20, 2017, and provided following Ms. Buckland’s cross-examination, is marked as being in draft format (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 11). As Ms. Buckland indicated in her cross-examination, the process is still being refined (see *Transcript of Cross-Examination of Ms. Buckland* at p. 119, lines 13-19).

[97] The evidence indicates, and Ms. Buckland testified as much, that access to Jordan’s Principle funding is a last resort (see *Transcript of Cross-Examination of Ms. Buckland* at p. 51, lines 3-9; pp. 65-67; p. 72, lines 6-21; and, pp. 76-78). The new Jordan’s Principle process outlined above is very similar to the one used in the past, which the Panel found to be contributing to delays, gaps and denials of essential health and social services to First Nations children and families. Ultimately, this process factored into the Panel’s findings of discrimination (see *Decision* at paras. 356-358, 365, 379-382, and 391).

[98] The new process still imposes delays due to exchanges among federal government departments, whether it is called case conferencing, policy review or service navigation. As the Panel found in the *Decision*, this added layer of administration is counterintuitive to a principle designed to address exactly those issues, which result in delays, disruptions and/or denials of goods or services for First Nations children. Pursuant to Jordan’s

Principle, once a service need is determined to exist, the government should pay for the service and determine reimbursement afterwards. In practical terms, this means that the delay in the process to evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service should be eliminated. This administrative hurdle or delay, and the clear lack of coordination amongst federal programing to First Nations children and families, should be borne by Canada and not put on the shoulders of First Nations children and families in need of service.

[99] Jordan's Principle requires that there be a direct evaluation of need at the focal point or headquarters stage and that a decision be made expeditiously. Access to Jordan's Principle funding should be a priority, not a last resort. In this regard, no specific explanation was provided for why most cases will take an average of 5 business days to process. Given urgent cases can be processed within 12 hours, it is reasonable to assume that Canada can process most Jordan's Principle cases within a similar timeframe and shall be ordered to do so.

[100] For appeals, there is no formal process. In her affidavit, Ms. Buckland indicated that "Canada is implementing an approval and appeal process to review all requests in a timely manner" (*Affidavit of Robin Buckland*, January 25, 2017, at para. 11). Under cross-examination, she indicated that the appeals process is still being refined but currently consists of a family notifying the local Jordan's Principle focal point of the desire to appeal and that, thereafter, the case is referred to her for review at the Assistant Deputy Minister level (see *Transcript of Cross-Examination* of Ms. Buckland at p. 117, line 3, to p. 119, lines 3-19).

[101] In another draft flow chart entitled "Jordan's Principle Appeal Process", again in draft format and subject to further refinement, dated February 20, 2017 and provided following Ms. Buckland's cross-examination, a few additional details regarding the appeals process are elaborated upon (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 11; and, *Transcript of Cross-Examination of Ms. Buckland* at p. 117, line 3, to p. 119, line 19). Under "Guiding Principles" it mentions, among other things, that "[d]ecisions are consistently applied, and based on impartial judgement", that the "[p]rocess is open, available to the public, and easily understandable", and that "[d]ecisions are made within a

reasonable time period, without delay, and in keeping with established service standards of Jordan's Principle."

[102] However, it is unclear how these principles are incorporated into the actual appeals process. All that is described in the flow chart is that the regional Jordan's Principle focal point receives the request to appeal; the focal point then sends the request with any new or additional information for review to Health Canada's Senior Assistant Deputy Minister, First Nations and Inuit Health Branch and/or INAC's Assistant Deputy Minister, Education and Social Development Programs and Partnership. If the appeal is denied, the client is provided a rationale. No timelines are mentioned in the chart and no other information on the appeals process is found in the documentary record.

[103] In terms of the Jordan's Principle process overall, the Panel finds there is a clear need for improvement to ensure the principle is meeting the needs of First Nations children and addressing the discrimination found in the *Decision*. Pursuant to section 53(2)(a) of the *Act*, the Panel orders Canada to ensure its processes surrounding Jordan's Principle implement the standards detailed in the "Orders" section below, under "Processing and tracking of Jordan's Principle cases." In addition, Canada should turn its mind to the establishment of an independent appeals process with decision-makers who are Indigenous health professionals and social workers.

[104] In terms of tracking Jordan's Principle cases, there was little evidence to suggest Canada is formally doing so beyond a very basic level. As Ms. Buckland put it, tracking "…definitely needs to be augmented to further track with better detail" (*Transcript of Cross-Examination of Ms. Buckland* at p. 96, line 25, to p. 97, line; see also p. 72, line 22, to p. 73, line 22; p. 92, lines 12-15; and, p. 97, line 10, to p. 98, line 2). A November 2016 presentation to the Assistant Deputy Minister Oversight Steering Committee, entitled "Jordan's Principle: Engaging with partners to design long-term approach" (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H), indicates under "Activities & Timelines" at page 6 that from Fall 2016 to Winter 2017 a data collection tool will be rolled out for use by INAC and Health Canada Service Coordinators and Jordan's Principle focal points. However, in light of the narrow definition of Jordan's Principle that was being used by

Canada, as discussed above, it is likely that any current tracking of cases may not capture all potential Jordan's Principle case, gaps in services and all First Nations children.

[105] With regard to the AFN's submission that Canada has not yet developed an internal understanding of what the gaps in federal funding to First Nations children are, the Panel notes that the *Jordan's Principle – Child First Initiative* presentation, presented to the Innu Round Table on October 6, 2016 (A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I), under "Implementation Points" at page 12, states: "Conducting a province by province gap analysis of health and social services for on-reserve children with disabilities" (see also Health Canada, *Jordan's Principle – Child First Initiative*, presentation dated October 12, 2016 (A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at p. 12).

[106] There are no timelines indicated for when this analysis will be completed and, based on the Panel's reasoning above regarding Canada's definition of Jordan's Principle, the analysis will need to be broadened beyond "on-reserve children with disabilities." The information that is collected must reflect the actual number of children in need of services and the actual gaps in those services in order to be reliable in informing future actions.

[107] Therefore, the Panel orders Canada to track and collect data on Jordan's Principle cases pursuant to the definition of Jordan's Principle ordered in this ruling. In order to ensure Jordan's Principle is being implemented correctly by Canada, the Panel agrees with the Caring Society that Canada should be formally tracking the number of Jordan's Principle cases that are approved, denied or in progress. Additionally, performance measures should be tracked in terms of stated timelines for resolving Jordan's Principle cases and in providing approved services. Consequently, pursuant to section 53(2)(a) of the *Act*, the Panel makes the remaining orders detailed in the "Order" section below, under "Processing and tracking of Jordan's Principle cases."

(iii) Publicizing the compliant definition and approach to Jordan's Principle

[108] Given Canada has disseminated a narrow definition of Jordan's Principle, the Caring Society requests that Canada be required to proactively, and in writing, correct the record with any person, organization or government who received, or could be in receipt of flawed material on Jordan's Principle. Relatedly, the Caring Society asks that Canada revisit any funding agreements or other arrangements already concluded to ensure that they reflect the full and proper scope and implementation of Jordan's Principle.

[109] The Caring Society is also concerned that Canada has failed to take any formal measures to ensure that all staff are aware, understand and have the tools and resources necessary to implement the findings in the *Decision* related to Jordan's Principle, along with the subsequent rulings and orders issued by the Panel in this regard.

[110] The Commission agrees that it would be appropriate for the Tribunal to supplement its initial order by directing Canada to take specific steps, within fixed timeframes, to adequately inform government officials, FNCFS Agencies and the general public about its compliant approach to Jordan's Principle. It adds that the Caring Society and the other parties to this complaint have invaluable expertise to contribute to any discussion about how best to educate the public about Jordan's Principle. Together, they can help to ensure that any public relations material contains up-to-date, reliable and first-hand information from those who work daily in delivering child welfare and other services to First Nations children. Therefore, the Commission asks that it, the Caring Society, the AFN and the Interested Parties be consulted by Canada on the distribution of any public education materials.

[111] Canada submits it is focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available to support First Nations children, and given an opportunity to get involved and share their views. It adds that, with Canada's initial work to reform its approach to Jordan's Principle complete, there is now greater room for engagement with the parties to this matter and other stakeholders regarding the impact of Canada's changes. According to

Canada, reform is an evolving process, and one that it acknowledges will benefit from engagement moving forward.

[112] In light of the evidence and findings with respect to the definition and processing of Jordan's Principle cases, the Panel finds there is a clear need for Canada to go back to its employees, the organizations it works with and its First Nation partners to inform them of the correct definition and processes surrounding Jordan's Principle. As stated previously, the multiple presentations made by Canada to date included a restricted definition of Jordan's Principle and its processes surrounding the principle have recently been changed and will continue to be changed following this ruling. Canada's previous definition of Jordan's Principle led to families not coming forward with potential cases and urgent cases not being considered as Jordan's Principle cases. Canada admittedly had difficulties identifying applicable children. A corrected definition and process surrounding Jordan's Principle warrants new publicity and education to public, employees, applicable organizations and all First Nation partners. INAC and Health Canada's websites would be a prominent and reasonable place to begin this publicity. Also, given the hearing of this complaint and the present motions was broadcasted on APTN, the Panel's believes this would also be an important and reasonable place to publicize the corrected definition and process surrounding Jordan's Principle.

[113] In doing so, there is no doubt that the Commission should be consulted. It has been actively involved in pursuing this case for over a decade and played a central role in leading the majority of the evidence at the hearing of the merits of the complaint. Furthermore, section 53(2)(a) of the *Act* specifically provides that the Panel can order that "…the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures…" (emphasis added).

[114] However, aside from the Commission, the *Act* and applicable case law suggest the Tribunal does not have the power to order consultation with other parties (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 164-169 [*Johnstone*]). Nevertheless, in the circumstances of this case, the Panel agrees that the Caring Society and other parties to this complaint have invaluable expertise to contribute to any

discussion about how best to educate the public, especially First Nations peoples, about Jordan's Principle.

[115] A number of important considerations lead to this conclusion. Primarily, the *Act* must be interpreted in light of its purpose, which is to give effect to the principle that:

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

[116] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have, are First Nations children. This was not the situation in *Johnstone*. As canvassed in the *Decision*, the relationship between Canada and Aboriginal peoples is trust–like, rather than adversarial, and the contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship (see *Decision* at para. 93, citing *R. v. Sparrow*, [1990] 1 SCR 1075, at page 1108). It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Decision* at para. 89, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16). This requires Canada to treat Aboriginal peoples fairly and honourably, and there is a special fiduciary relationship between the Crown and Aboriginal peoples (see *Decision* at paras. 91-95). The Crown also has a constitutional duty to consult Indigenous peoples on decisions that affect them and those consultations must be meaningful (see 2016 CHRT 16 at para. 10). The unique position that Aboriginal peoples occupy in Canada is recognized in section 35 of the *Constitution Act, 1982* and section 25 of the *Canadian Charter of Rights and Freedoms*. With respect to the *Act*, when section 67 was repealed in 2008, Parliament confirmed in section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, that:

> For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

[117] This case is about the provision of child welfare services to First Nations children and families. This is an area that directly affects the fundamental rights of First Nations children, families and communities and is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 75 [*Baker*]). As stated in the *Decision* at paragraph 346, in reference to Professor Nicholas Bala:

> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved in making decisions about children, not only for judges and lawyers, but for also assessors and mediators.

[118] To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials.

[119] This consultation is also reasonable based on Canada's submissions and actions in this matter. Canada has stressed consultation with First Nations peoples and organizations since the *Decision* (see for example *Respondent's Factum*, March 14, 2017, at paras. 36 and 39). It has also recognized the AFN and the Caring Society as key partners in the reform of its policies and programs. The AFN has been participating in the Executive Oversight Committee since July 2016. Dr. Cindy Blackstock, the Executive Director of the Caring Society, was also invited by the Minister of Health to participate in the Executive Oversight Committee [see *Affidavit of Robin Buckland*, January 25, 2017, at paras. 17-18; "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F,

p. 2); Letter from The Honourable Jane Philpott, Minster of Health, to Dr. Cindy Blackstock, Executive Director, First Nations Child and Family Caring Society of Canada (December 22, 2016) (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit G); Health Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at pp. 3-7); "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", September 14, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, tab 5, p. 2)].

[120] Canada is committed to working with child and family services agencies, front-line service providers, First Nations organizations, leadership and communities, the Complainants, and the provinces and territories, on steps towards program reform and meaningful change for children and families (see 2016 CHRT 10 at para. 6). The Panel supports this commitment and an order to consult with the Complainants and the Interested Parties on how best to educate the public, especially First Nations peoples, about Jordan's Principle essentially reinforces what is already partially occurring in this matter. The Panel wants to ensure this commitment to partnership continues and is improved in a meaningful way by formalizing it in an order. Therefore, pursuant to section 53(2)(a) of the *Act*, the Panel makes the orders detailed in the "Order" section below, under "Publicizing the compliant definition and approach to Jordan's Principle."

(iv) Future reporting

[121] The Caring Society requests that, moving forward, Canada produce its compliance reports in the form of an affidavit and that a timeline be established very early on in the process to allow for cross-examination of the affiants, followed by the filing of written arguments and oral submissions. Exchanging evidence and having the opportunity to cross-examine makes the remedial process more transparent. The AFN is supportive of the Caring Society's request for future reporting, while the COO has made a similar request with respect to the orders it is requesting.

[122] The Commission takes no position on this request, other than to suggest that if such an order is to be granted, the Tribunal should include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[123] The Caring Society's proposed process for future reporting is similar to the process employed to hear and determine the present motions. The Panel found this process efficient and found the use of affidavit evidence, and having that evidence tested under cross-examination, was of great assistance to the Panel in determining the issues put before it.

[124] However, moving forward, the Panel would prefer that the cross-examination of affiants occur in a hearing before the Panel and be governed by the Tribunal process. In the present motions, the cross-examination occurred outside the Tribunal process, without the Panel present, and with a transcript of the evidence presented to the Panel afterwards for its consideration. This resulted in two issues. First, a dispute arose as to whether a party has an obligation, in the context of a cross-examination on an affidavit, to give undertakings to make inquiries and provide answers to which the affiant does not know the answers. Second, the Panel did not have the ability to ask its own questions to the witnesses.

[125] On the first issue, the NAN made requests for undertakings regarding Canada's refusal to fund the Wapekeka proposal for a mental health service team based within the community. Canada refused to provide undertakings because, in its view, the affiant answered the NAN's questions to the best of her ability, while other questions sought information that fell outside the scope of her employment. Furthermore, Canada states there is no legal obligation to provide undertakings during a cross-examination on an affidavit. The NAN submitted arguments and case law to the contrary and requested that the witness appear before the Panel to complete her evidence.

[126] The Panel refused this request because it was more akin to a discovery request in a civil action than to a cross-examination of a witness during a Tribunal hearing. While section 48.9(2) of the *Act* empowers the Chairperson to make rules governing discovery

proceedings before the Tribunal, no such rules have been made thus far. Rather, parties before the Tribunal have an obligation to disclose and produce arguably relevant documents throughout the Tribunal's proceedings [see Rules 6(1)(d) and (e); and, Rule 6(5) of the Tribunal's *Rules of Procedure (03-05-04)*]. The purpose of disclosure is to divulge the case a party intends to make, which in turn allows each party to effectively prepare and present its respective case. The question is whether the information sought is arguably relevant and necessary for the party to prepare its case before the Tribunal.

[127] While the information sought by the NAN is arguably relevant to the issues raised in its amended motion, and is highly important for the families and communities who lost their children, it did not prevent the NAN from making its case on its motion.

[128] The information was also not determinative for the Panel in order to make findings on the NAN's motion. The Tribunal was able to draw inferences from the affiant's inability to answer the NAN's questions. That is, with respect to the issues raised in the NAN's motion, the NAN's questioning was sufficient to shed light on the need for more rigorous processes surrounding access to Jordan's Principle funding to ensure the Wapekeka proposal situation is not repeated.

[129] In all fairness, while the Panel agreed to have the parties cross-examine affiants outside of the Tribunal's hearing process, no process with respect to undertakings was specifically agreed to by the parties or the Panel. Moving forward, if the Panel is present during cross-examinations, it can deal with these types of issues right away, without the need for further submissions or rulings.

[130] On the second issue, the Panel would like the opportunity to ask questions to the witnesses, should it have any. The advantage of having a cross-examination occur before the Panel is that it allows the Panel to efficiently ask its questions, without the need to recall a witness, while also allowing the parties the opportunity to ask additional questions arising out of those asked by the Panel.

[131] Therefore, future reporting by Canada in this matter will be supported by an affidavit or affidavits attesting to the information found in the report. Timelines will be established to allow for cross-examination of the affiants before the Panel, followed by the filing of written

arguments and, if necessary, oral submissions. In any future reporting in this matter, the Panel will keep in mind the Commission's suggestion that it include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[132] Pursuant to the above and to section 53(2)(a) of the *Act*, the Panel retains jurisdiction over the above orders until it is assured that they are fully implemented. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of those orders, pursuant to the process outlined in the "Order" section below, under "Retention of jurisdiction and reporting."

V. Orders

[133] The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the *Decision* and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

[134] Specific timelines for the implementation of each of the Panel's orders are indicated below to ensure a clear understanding of the Panel's expectations and to avoid misinterpretation issues that have occurred previously in this matter (such as with the term "immediately").

[135] Pursuant to the above, the Panel's orders are:

1. Definition of Jordan's Principle

A. **As of the date of this ruling**, Canada shall cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's orders in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16 and in this ruling.

B. **As of the date of this ruling**, Canada's definition and application of Jordan's Principle shall be based on the following key principles:

i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.

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

iii. When a government service is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government;

iv. When a government service is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government.

v. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.

C. Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).

D. Canada shall review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, dating from **April 1st, 2009**, to ensure compliance with the above principles. Canada shall complete this review by **November 1st, 2017**.

2. Processing and tracking of Jordan's Principle cases

A. Canada shall develop or modify its processes surrounding Jordan's Principle to ensure the following standards are implemented by **June 28, 2017**:

i. The government department of first contact will evaluate the individual needs of a child requesting services under Jordan's Principle or that could be considered a case under Jordan's Principle.

ii. The initial evaluation and a determination of the request shall be made within 12-48 hours of its receipt.

iii. Canada shall cease imposing service delays due case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided.

iv. If the request is granted, the government department that is first contacted shall pay for the service without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided; and

v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of his or her right to appeal the decision, the process for doing so, the information to be provided by the applicant, the timeline within which Canada will determine the appeal, and that a rationale will be provided in writing if the appeal is denied.

B. By **June 28, 2017** Canada shall implement reliable internal systems and processes to ensure that all possible Jordan's Principle cases are identified and addressed, including those where the reporter does not know if the case is a Jordan's Principle case.

C. By **July 27, 2017** Canada shall develop reliable internal systems to track: the number of Jordan's Principle applications it receives or that could be considered as a case under Jordan's Principle, the reason for the application and the service requested, the progression of each case, the result of the application (granted or denied) with applicable reasons, and the timelines for resolving each case, including when the service was actually provided.

D. Canada shall provide a report and affidavit materials to this Panel on **November 15, 2017** and every 6 months following the implementation of the internal systems outlined above, which details its tracking of Jordan's Principle cases. The need for any further reporting pursuant to this order shall be revisited on **May 25, 2018**.

3. Publicizing the compliant definition and approach to Jordan's Principle

A. By **June 09, 2017** Canada shall post a clear link to information on Jordan`s Principle, including the compliant definition, on the home pages of both INAC and Health Canada.

B. **By June 28, 2017**, Canada shall post a bilingual (French and English) televised announcement on the Aboriginal Peoples Television Network, providing details of the compliant definition and process for Jordan's Principle.

C. By **June 09, 2017**, Canada shall contact all stakeholders who received communications regarding Jordan's Principle since January 26, 2016 and advise them in writing of the findings and orders in this ruling.

D. By **July 27, 2017**, Canada shall revisit any agreements concluded with third-party organizations to provide services under the Child First Initiative's Service Coordination Function, and make any changes necessary to reflect the proper definition and scope of Jordan's Principle ordered in this ruling.

E. By **July 27, 2017**, Canada shall fund and consult with the Complainants, Commission and the Interested Parties to develop training and public education materials relating to Jordan's Principle (including on the *Decision* and subsequent rulings), and ensure their proper distribution to the public, Jordan's Principle focal points, members of the Executive Oversight Committee, managers involved in the application of Jordan's Principle/Child First Initiative, First Nations communities and child welfare agencies and any other applicable stakeholders.

4. Retention of jurisdiction and reporting

A. The Panel retains jurisdiction over the above orders to ensure that they are effectively and meaningfully implemented and to further refine or clarify its orders if necessary. The Panel will continue to retain jurisdiction over these orders until **May 25, 2018** when it will revisit the need to retain jurisdiction beyond that date.

B. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of the above orders by **November 15, 2017**.

C. The Complainants and the Interested Parties shall provide a written response to Canada's report by **November 29, 2017**, and shall indicate: (1) whether they wish to cross-examine Canada's affiant(s), and (2) whether further orders are requested from the Panel.

D. Canada may provide a reply, if any, by **December 6, 2017**.

E. Any schedule for cross-examining Canada's affiant(s) and/or any future reporting shall be considered by the Panel following the parties' submissions with respect to Orders 4(C) and 4(D).

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 26, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: May 26, 2017

Date and Place of Hearing: March 22-24, 2017 at Ottawa, Ontario

Appearances:

David Taylor, Anne Levesque, Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Samar Musallam and Brian Smith, counsel for the Canadian Human Rights Commission

Jonathan Tarlton and Melissa Chan, counsel for the Respondent

Maggie Wente and Krista Nerland, counsel for the Chiefs of Ontario, Interested Party

Julian N. Falconer and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 15
Date: May 28, 2020
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

Table of Contents

Compensation Process Ruling on Outstanding Issues in Order to Finalize the *Draft Compensation Framework*

I. Introduction

[1] This ruling follows this Tribunal's compensation decision and orders rendered on September 6, 2019 (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 [*Compensation Decision*]) and subsequent ruling on additional compensation requests emanating from some parties arising out of the compensation orders (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 7).

[2] In the *Compensation Decision*, Canada was ordered to pay compensation in the amount of $40,000 to victims of Canada's discriminatory practices under the First Nations Child and Family Services Program (FNCFS program) and Jordan's Principle. This Panel ordered Canada to enter into discussions with the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) and to consult with the Canadian Human Rights Commission (Commission) and the interested parties, the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN), to co-develop a culturally safe compensation process framework including a process to locate the victims/survivors identified in the Tribunal's decision, namely First Nations children and their parents or grandparents. The parties were given a mandate to explore possible options for the compensation process framework and return to the Tribunal. The AFN, the Caring Society and Canada have jointly indicated that many of the COO, the NAN and the Commission's suggestions were incorporated into the *Draft Compensation Framework* and *Draft Notice Plan*. The Panel believes that this is a positive outcome.

[3] However, some elements of the *Draft Compensation Framework* are not agreed upon by all parties and interested parties. In particular the two interested parties, the COO and the NAN, made additional requests to broaden the scope of the *Compensation Decision* orders with which the other parties did not agree, as it will be explained below. Further, the

COO and the NAN made a number of specific requests for amendments to the *Draft Compensation Framework.* The NAN's requests mainly focus on remote First Nations communities, some of which will be discussed below. This reflects the complexity of this case in many regards. The Panel is especially mindful that each First Nation is unique and has specific needs and expertise. The Panel's work is attentive to the inherent rights of self-determination and of self-governance of First Nations which are also important human rights. When First Nations parties and interested parties in this case present competing perspectives and ask this Tribunal to prefer their strategic views over those of their First Nations friends, it does add complexity in determining the matter. Nevertheless, the Panel believes that all the parties and interested parties' views are important, valuable and enrich the process. This being said, it is one thing for this Panel to make innovative decisions yet, it is another to choose between different First Nations' perspectives. However, a choice needs to be made and the Panel agrees with the joint Caring Society, AFN, and Canada submissions and the AFN's additional submissions on caregivers which will be explained below. At this point, the Panel's questions have now been answered and the Panel is satisfied with the proposed *Draft Compensation Framework* and *Draft Notice Plan* and will not address all of the interested parties' suggestions that were not accepted by the other parties (i.e. the Caring Society, the AFN and Canada) ordered to work on the *Draft Compensation Framework*. The Panel will address the contentious issue involving specific definitions including some suggestions from the NAN concerning remote First Nations communities and two substantial requests from the COO and the NAN to broaden the scope of compensation below. For the reasons set out below, the Panel agrees with the Caring Society, the AFN and Canada's position on the COO and the NAN's requests.

[4] Discussions between Canada, the AFN and the Caring Society on a compensation scheme commenced on January 7, 2020. The discussions resulting in the *Draft Compensation Framework* and *Draft Notice Plan* have been productive, and the parties have been able to agree on how to resolve most issues. At this point, there remains disagreement on three important definitions on which the parties cannot find common ground. These definitions are "essential service", "service gap" and "unreasonable delay". While the Panel is not imposing the specific wording for the definitions, the Panel provides

reasons and guidance to assist the parties in finalizing those definitions as it will be explained below.

[5] The Caring Society, the AFN and Canada wish to clarify the proposed process for the completion of the Tribunal's orders on compensation. As the AGC outlined in its April 30, 2020 letter, the Complainants and the Respondent are submitting the *Draft Compensation Framework* and *Draft Notice Plan* for the Tribunal's approval in principle. Once the Tribunal releases its decision on the outstanding Compensation Process matters, the *Draft Compensation Framework* will be adjusted to reflect said orders and will undergo a final copy edit to ensure consistency in terms. The Complainants and the Respondent will then consider the document final and will provide a copy to the Tribunal to be incorporated into its final order. The Panel agrees with this proposed process.

[6] The Panel wishes to thank the Caring Society, the AFN, Canada, the COO, the NAN and the Commission for their important contributions to the realization of the *Draft Compensation Framework*.

II. Reconciliation and Jordan River Anderson and his Family

[7] In its recent ruling dealing with three questions related to the compensation process (2020 CHRT 7), the Panel asked the parties to consider whether compensation to the estate of Jordan River Anderson and the estate of his deceased mother and also to his father and First Nations peoples in similar situations should be paid as part of this Tribunal's compensation process. While the Panel did not make a final determination on this issue, the Panel requested further submissions from the parties and interested parties on this point.

[8] While the AFN and the Caring Society agreed with the spirit of this possible amendment to the Tribunal's compensation orders, they feared this could jeopardize the compensation process as a whole given that Canada opposes it. Canada previously submitted that with respect to compensation under Jordan's Principle, the Panel was clear. At paragraph 251 of the *Compensation Decision*, compensation was granted for a defined period, Dec. 12, 2007- to November 2, 2017. These dates were also placed in bold in the judgment.

[9] Canada argues that their comments on the temporal scope above do not suggest a reopening of these compensation orders under Jordan's Principle. Additionally, Canada submits that the complaint mentioned Jordan's Principle and did not mention services prior to the adoption of Jordan's Principle in December 2007.

[10] The NAN also made submissions in favour of such broadened compensation orders as described above. However, upon consideration, the Panel does not want to jeopardize the compensation process as a whole.

[11] In light of the above, the Panel strongly encourages Canada to provide compensation to Jordan River Anderson's estate, his mother's estate, his father and siblings as a powerful symbol of reconciliation.

III. Framework for the Payment of Compensation under the *Compensation Decision* (*Draft Compensation Framework* and *Draft Notice Plan*)

[12] The Panel has studied the *Draft Compensation Framework* and *Draft Notice Plan* alongside all the parties', including interested parties', submissions and requests. The Panel approves the *Draft Compensation Framework* and *Draft Notice Plan* "in principle", with the exception of the issues addressed below. The "in principle" approval should be understood in the context that this framework is not yet finalized and that the parties will modify this *Draft Compensation Framework* and *Draft Notice Plan* to reflect the Panel's reasons and orders on the outstanding issues regarding compensation. The *Draft Compensation Framework, Draft Notice Plan* and the accompanying explanations in the joint Caring Society, AFN and Canada submissions provide the foundation for a Nation-wide compensation process. The opt-out provision in the *Draft Compensation Framework* addresses the right of any beneficiary to renounce compensation under this process and pursue other recourses should they opt to do so. The opt-out provision protects the rights of people who disagree with this process and who prefer to follow other paths. The Panel expects that the parties will file a final *Draft Compensation Framework* and final *Draft Notice Plan* seeking a consent order from this Tribunal.

[13] The reasons on the outstanding compensation issues are included below.

IV. The COO and the NAN Request for the *Compensation Decision* Order to Apply Equally to First Nations Persons On or Off Reserve in Ontario

[14] The Panel has considered all the parties and interested parties' submissions to determine this request. In the interest of brevity, the Panel has not reproduced all of those submissions. Rather it focuses on the COO's submissions on this point, summarized below, given that the Panel provides reasons to the COO explaining why it does not accept its request.

Key Positions of the Parties

[15] The COO submits that in Ontario, the *Compensation Decision* Order should apply equally to First Nations persons on or off reserve. From an Ontario-specific perspective, the COO urges the Panel to consider the scope of the definition of "beneficiary" for the purposes of First Nations people in Ontario who would benefit from the *Compensation Decision* Order. The NAN adopts the COO's submissions on this point.

[16] The COO advances that the Panel's findings with respect to the delivery of child and family services in Ontario pursuant to the *Memorandum of Agreement Respecting Welfare Programs for Indians* (*1965 Agreement*) at *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 [*Merit Decision*] (found at paras. 217-246) rightly centre the locus of racial discrimination in the *1965 Agreement*[1]. The Panel held, at paragraph 392, that there was discrimination under the *1965 Agreement* because First Nations children did not receive all the services set out in the Ontario child welfare legislation, the *Child and Family Services Act,* RSO 1990, c C.11 [*CFSA*], and its predecessors (now replaced by the *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1 [*CYFSA*]). Rather, Canada underfunded services to First Nations children under the *1965 Agreement* by funding only some of the

[1] In 1965, Canada entered into the agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations children and families on reserve (see *Merit Decision* at para. 49).

services set out in provincial legislation, and failed to keep up to date with Ontario legislation (*Merit Decision* at paras. 222-226).

[17] The COO submits the resulting discrimination runs through Ontario's programs and funding formulas, which apply equally to First Nations children receiving services from First Nations child welfare agencies and those receiving services from provincial "mainstream" child welfare agencies, as noted by the Panel in the *Merit Decision* at para. 222. The programs and funding formulas apply equally whether on or off reserve.

[18] The COO contends that it is helpful to remember that the *1965 Agreement* does two main things. One, it requires Canada to pay a cost-share to Ontario, and that cost-share is indeed based on a calculation that uses the population of registered Indians mainly (though not exclusively) on reserve. Two, it requires Ontario to make the listed services available to "Indians" throughout the province, and not merely to those on reserve. The very nature of the *1965 Agreement* is that service provision extends, via the Government of Ontario, both on and off reserve.

[19] The COO submits that from the perspective of a First Nations child, parent, or grandparent as a service recipient, the service they received was discriminatory both on and off reserve. The system of service provision under the *1965 Agreement* does not draw a reserve-based distinction at the service delivery level.

[20] The NAN's Chiefs Committee on Children, Youth, and Families has highlighted that NAN First Nations have members who live off-reserve in Ontario who have also experienced discrimination in child and family services. The NAN submits these individuals should not be excluded from eligibility for compensation solely for reasons of off-reserve residency.

[21] The NAN adopts and relies upon the submissions of the COO on the topic of eligibility for off-reserve First Nations children and their caregivers in relation to the *1965 Agreement*.

Reasons on Compensation Off-Reserve in Ontario

[22] The Panel understands the COO's comment on First Nations children, parents or grandparents' perspective as service recipients and it is true to say that the Panel found the

1965 Agreement discriminatory. Given this important perspective, the Panel reviewed the record, its own findings, the complaint, the parties' and the interested parties' Statements of Particulars and amended Statements of Particulars, the parties' and interested parties' final arguments, the remedies requested in 2014, 2019 and 2020 and the Tribunal's own findings in the *Merits Decision*. After a thorough review of the documents referred to above, the Panel finds it does not support the COO's position of a broadened compensation under the *Compensation Decision* to include those children who were removed off-reserves. The COO's own Statement of Particulars mentions on-reserve First Nations and adopts the Commission's theory of the case and requested remedies contained in its amended Statement of Particulars which refer to on-reserve First Nations. The Commission and the COO's final arguments, while addressing the *1965 Agreement's* discriminatory impacts, did not adduce sufficient evidence and arguments on off-reserve children and families. Rather, they focused towards on-reserve First Nations in Ontario and, in so doing, were able to meet their onus. The Tribunal's findings were made after having carefully considered the COO and the Commission's positions, the evidence, the submissions and the final arguments. Moreover, the Panel crafted its *Compensation Decision* orders based on the above. The Panel posed compensation questions to the parties prior to the compensation hearing held in 2019. The COO did not make written submissions on the issue of compensation. In their oral submissions, the COO advised it is content with the other parties' requests for compensation.

[23] The Panel did invite parties to propose categories of children that could be added so the COO and the NAN's request is completely understandable, however, the requests need to be connected to the claim and supported by the evidence and the findings. The Panel to arrive at its *Merit Decision* and rulings, did not consider if First Nations children in Ontario were unnecessarily removed from their homes off-reserves under the *1965 Agreement* because it was not argued, proven or requested until now. The Panel believes that doing so now would require additional evidence and submissions and that it would be unfair to authorize this to take place at this late stage. In fact, in its ruling granting the NAN interested party status, the Tribunal wrote:

> However, given we are at the remedial stage of these proceedings, the NAN's written submissions should only address the outstanding remedies and not

> re-open matters already determined. The hearing of the merits of the complaint is completed and any further evidence on those issues is now closed. The Panel's role at this stage of the proceedings is to craft an order that addresses the circumstances of the case and the findings already made in the [*Merit*] *Decision* (see 2016 CHRT 11, at para.14).

[24] Additionally, reopening matters to adduce new evidence and arguments could jeopardize the compensation process entirely as it may be viewed as unfair by some parties and this could significantly delay compensation to the victims identified in this case. The new evidence that the Panel accepts is geared towards the effectiveness and implementation of the Panel's orders for immediate, mid-term and long-term reform including the order to cease and desist from the discriminatory practices identified in the *Merit Decision* and in its subsequent rulings. The off-reserve discriminatory impacts of the *1965 Agreement* towards First Nations children off-reserve can be addressed by reform of the *1965 Agreement* and Jordan's Principle but unfortunately not under the Tribunal's *Compensation Decision* orders outside of Jordan's Principle orders.

[25] Nonetheless, in the *Merit Decision*, the Panel found the *1965 Agreement* discriminatory and found:

> AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:
>
> […]
>
> - The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act* (see *Merit Decision* at para. 458, emphasis added).
>
> Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the

> FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve (see *Merit Decision* at para. 461, emphasis added).
>
> Pursuant to these sections of the *CHRA*, the Complainants and Commission request immediate relief for First Nations children. In their view, this can be accomplished by ordering AANDC to remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program and child and family services in Ontario under the *1965 Agreement*; and, requiring AANDC to properly implement Jordan's Principle. Moving forward in the long term, the Complainants and Commission request other orders that AANDC reform the FNCFS Program and the *1965 Agreement* to ensure equitable levels of service, including funding thereof, for First Nations child and family services on-reserve (see *Merit Decision* at, para. 475, emphasis added).
>
> The AFN requests similar reform, including commissioning a study to determine the most effective means of providing care for First Nations children and families and greater performance measurements and evaluations of AANDC employees related to the provision of First Nations child and family services. Similarly, in Ontario, the COO requests that an independent study of funding and service levels for First Nations child welfare in Ontario based on the *1965 Agreement* be conducted (see *Merit Decision* at para. 478, emphasis added).
>
> The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's principle and to take measures to immediately implement the full meaning and scope of Jordan's principle (see *Merit Decision* at para. 481).

[26] The *1965 Agreement* is discriminatory and needs to be entirely reformed and the Ontario Special study of the *1965 Agreement* may be a helpful tool to achieve this goal for the benefit of First Nations children in Ontario.

[27] For those reasons, the Panel denies the COO and the NAN's request to broaden the scope of compensation to include First Nations children who were not resident on reserves

or ordinarily resident on reserves and who were unnecessarily removed from their off-reserve homes.

V. The COO and the NAN Request that the Category of Eligible Caregivers Be Expanded from Parents or Grandparents to Other Caregivers

Key Positions of the Parties

[28] In sum, the COO believes that the reality of families in First Nations communities means that aunts, uncles and other family members may well have been caring for children at the time of removal, and submits that such people should not be precluded from entitlement to compensation.

[29] In sum, the NAN submits it is not unusual in NAN First Nations for individuals other than parents or grandparents to act in a primary caregiving capacity. This reality is not reflected in the *Compensation Decision* Order. The NAN requests the category of eligible caregivers be expanded from parents or grandparents to include aunts, uncles, cousins, older siblings, or other family members and kin who were acting in a primary caregiving role.

[30] While the Panel issued the *Compensation Decision* after thoughtful deliberations, the Panel still reconsidered its decision based on the NAN and the COO's suggestions. However, for the reasons explained below, the Panel denies their request.

Reasons on Compensation Eligibility for Additional Caregivers

[31] The COO and the NAN made extensive suggestions on how this compensation process could potentially work to include an expanded category of caregivers. Many suggestions have merit, however, the approach proposed by the NAN and the COO significantly departs from the approach the Tribunal adopted in the Compensation Decision where it agreed with the Caring Society and the AFN that children should not be retraumatized by being forced to testify about their circumstances and the trauma of being removed from their homes. This approach is paramount and is reflected in the Compensation Decision.

[32] The Panel entirely agrees with the AFN's compelling submissions, summarized below, and believes those submissions are a full answer to the COO and the NAN's request on this issue. Moreover, the AFN's submissions convey the Panel's findings, goal and approach to compensation and reasons why it chose to adopt such an approach. The Panel's decision was carefully crafted to shield children from additional trauma and to account for the need to adopt a culturally safe and appropriate process.

[33] Moreover, unless the parties in this case agree in a settlement to create an adjudicative function outside the Tribunal, the Tribunal has no jurisdiction to order the creation of another tribunal to delegate its functions under the *Canadian Human Rights Act,* RSC 1985, c H-6 in order to adjudicate compensation arising out of its compensation orders. The AFN, the Caring Society and Canada reject this approach and the Panel agrees with them. This is consistent with the Panel's *Compensation Decision*.

[34] Furthermore, the AFN submits it is deeply concerned about the COO and the NAN's request to expand the definition of "caregiver" to other individuals. Both the COO and the NAN's proposals would greatly complicate the compensation process and give rise to competing claims of who was the rightful caregiver. The Panel believes this to be true.

[35] The AFN notes that this Panel's *Compensation Decision* Order was modeled after the Indian Residential Schools Settlement Agreement's Common Experience Payment. The trigger that would entitle an individual to compensation is the apprehension of a child or the denial or delay of a service under Jordan's Principle. There would be no reason for a person to justify any individual harm, nor would it require an individual to provide evidence to justify why they are entitled to compensation. This Panel opted to adopt a similar approach to the Common Experience Payment in determining eligibility for compensation to victims to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped. A simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. Both the COO's and the NAN's recommendations would mark a significant departure from the Common Experience Payment model. Currently, one must demonstrate that they or their child/grandchild was apprehended/removed or impacted by the misapplication of Jordan's Principle. Upon verification they would be paid compensation.

However, both the COO and the NAN suggest that the compensation process now include an adjudicative function whereby a parent or grandparent must participate in contested proceedings along with the child's uncles, aunts, cousins or other relatives. Under this proposed process, the parent/grandparent may have to prove: (1) they were the relevant caregiver; (2) they were financially responsible or paid more to support the child; (3) they loved the child more than others; and (4) they maintained a parental role or bond. They may also be expected to obtain the child's written testimony that they believed their parents/grandparents were the primary caregivers. Again, the Panel believes this to be exact.

[36] The AFN submits that this proposed process is not in the best interests of the beneficiaries. This process will be traumatic for all involved, especially the child who might face pressure, coercion, bullying and stress in stating who stood in their life as the parental figure.

[37] Much like the COO and the NAN, the AFN agrees that every child is very important to the extended family. It is often recognized in First Nations that "it takes a community to raise a child". As such, every member of the child's family, the Chief and Council, educators, health professionals and others all owe a sacred duty to the child. Children are the most precious resource of a First Nations community.

[38] Building on the importance of family that both the COO and the NAN identify, the AFN acknowledges that other factors also play a significant role in how First Nations children are raised. For instance, this Panel has accepted evidence that housing shortages in First Nations communities exist. Typically, this results in more than two families living in a single housing unit. Often members of the same family would occupy such a residence. It therefore would not be unusual for a child to live with their parents, grandparents, uncles, aunts or older cousins. Strong family bonds are created in such a setting and a child may rely on more than one adult figure for things such as getting food to eat, seeking assistance in homework, etc.

[39] According to the AFN, despite the close kinship, the biological parents or grandparents of the child remain the most important figures in the child's life, followed by the child's siblings.

[40] Additionally, the AFN submits this Panel took notice of the widespread poverty many First Nations individuals suffer. Poverty related issues, systemic discrimination in the criminal justice system, and pursuit of economic opportunities can result in one or both parents leaving the community for a short period of time. During the brief period of a parent's absence, a grandparent or other family member may care for the child.

[41] Under the COO and the NAN's proposal, any of these adults living in the same dwelling as the child, and those who temporarily are looking after a child while their parents are away working or temporarily incarcerated would be able to contest an application for compensation filed by a parent. The AFN submits that the compensation plan has to be practical and very clear on who is eligible for compensation.

[42] Both the COO and the NAN assert that guidelines can be developed by the parties to address these types of competing claims. However, determining what types of caregiving was provided and the length of time associated therewith would require intrusive and in-depth investigation into potential beneficiary's history. It is clear that this form of compensation process would be ripe for abuse. There is the potential that people could be compensated whom the apprehended child may not even know or remember. In the circumstance of a child who was apprehended, this system raises the specter that individuals who cared for the child on and off for a few months could become entitled to compensation. In addition, situations may arise where a family member filed and obtained compensation prior to and without the knowledge of the parents or grandparents applying for compensation. The Panel agrees with the AFN's position.

[43] The AFN submits that both the COO and the NAN appear to focus on those individuals who were willing to assist in caregiving and/or contributing financially towards the care of a child as a determining element of compensation. The AFN submits that this may not be the best approach. The purpose of compensation is not meant to repay expenses or address the inconveniencing of family members. Rather, compensation is meant to

compensate for the trauma of losing a family member who was apprehended as a result of Canada's discrimination.

[44] The AFN adds that when compensation is expanded to other caregivers, the compensation is no longer for the loss of a biological child or grandchild by apprehension or misapplication of Jordan's Principle. The nature and purpose of the compensation changes to that of compensating people for their time, expense and love for the child. The AFN submits that the purpose of the compensation awarded by the Panel is to compensate a biological parent or grandparent for the loss of their child to a system that targeted them because they were First Nations.

[45] The AFN submits the compensation scheme is meant to be objective, not subjective. To investigate the relationship between an adult and child removes the objective element and replaces it with an interrogatory process, which goes against AFN's strong position that children in care not be subjected to the same traumatic process as Residential School survivors in the Independent Assessment Process. The Panel finds this to be the correct interpretation of the approach taken by the Panel in the *Compensation Decision.*

[46] Additionally, the COO asserts that caregivers beyond parents and grandparents aligns more closely with the family structures and practices experienced in many First Nations communities.

[47] However, the AFN contends that the COO references Canadian case law and legislation to suggest principles such as physical care, presentation of a parent-like relationship, financial contributions and intention to treat a child like their own should be determinative in this assessment. Likewise, while the NAN asserts First Nations laws, practices and traditions should be the guiding factors in determining who may be a potential caregiver, the NAN also seeks to avail to Canadian jurisprudence and legislation to compel the Central Administrator to make a subjective consideration on who is the most appropriate caregiver. This would import an adjudicative function into the compensation process that would likely require the creation of an industry that employs third party adjudicators and lawyers.

[48] The AFN strongly disagrees with the suggestion that a child's perspective on who the appropriate caregiver is should be taken into account. The NAN does not propose a method on how the child's perspective will be recorded. The only viable mechanism to adduce this information would be to question current or former children in care or Jordan's Principle candidates about which caregiver, parent or grandparent they loved more, or who is more deserving of compensation. This approach would be traumatic as it effectively puts the relationship between a child and their family members on trial, which would certainly stress and potentially harm the emotional bonds between a child and their family members.

[49] Finally, the AFN does not support the COO's proposal on how to address Ontario's *CYFSA* and under-identification. The Ontario *CYFSA* was enacted in 2017. It replaced the former Ontario *CFSA* which was in place in Ontario from 1990-2017. The 1990 *CFSA* does not include an interpretation section which outlines the definition of "child in need of protection". Therefore, the COO's concerns would only capture children and youth beneficiaries from 2017 to 2020 and will not apply to the majority of beneficiaries in Ontario, much less the rest of Canada. The original taxonomy suggested by the Complainants and the Respondent would apply in almost all circumstances and cover those children impacted by the *CYSFA*. The Panel accepts this position.

[50] For those reasons, the Panel denies the COO and the NAN's request for additional orders to expand the category of caregivers in this compensation process.

VI. The NAN Request Relating to Remote First Nations Communities

Key Positions of the Parties

[51] The NAN provided a reply to the responding joint submissions filed on behalf of the Caring Society, the AFN, and Canada and to the additional submissions filed on behalf of the AFN and on behalf of Canada. The NAN's reply submissions address two novel issues raised in the joint submissions and additional submissions: (1) conflicting messages regarding the Framework's responsiveness to remote First Nations; and (2) Canada's suggestion that it would be procedurally unfair for this Tribunal to consider the NAN and the

COO's submissions of May 1, 2020 regarding caregivers given that the round of submissions was closed on March 16, 2020.

[52] In sum, the NAN submits that the parties oppose the NAN's proposed modification to section 6.3 of the *Draft Compensation Framework*, a modification which would list considerations specific to remote First Nations, when determining resourcing requirements on the basis that such inclusion "risks excluding the unique needs of other First Nations communities." At the same time, the Caring Society, the AFN and Canada oppose affirmation of the unique needs of other First Nations through incorporation of a proposed guiding principle that would affirm that "the compensation process is intended to be responsive to the diversity (linguistic, historical, cultural, geographic) of beneficiaries and of First Nations." For the NAN, these are contradictory messages. In the context of proceedings in which substantive equality has been central, the NAN is surprised and confused by the opposition to the proposed guiding principle.

[53] The NAN argues that the concern regarding section 6.3 can be addressed by a simple drafting change indicating that the specific considerations listed by the NAN are not an exclusive or exhaustive list. The NAN provided the following copy of section 6.3, with the NAN's initial proposed modifications underlined, and the NAN's new proposed modification underlined and in bold:

> 6.3 First Nations will require adequate resources to provide support to beneficiaries. Canada will assist First Nations where requested by providing reasonable financial or other supports. In providing these support and determining what constitutes "reasonable financial or other supports" and what constitutes "sufficient resources" in section 6.2(b), consideration will be given to **all relevant factors, including** the particular needs and realities of remote First Nations with limited resources or infrastructure for providing support to beneficiaries, and who face increased costs in provision of services due to remoteness.

[54] The NAN contends that in its submission of May 6, 2020, the AFN opposes the NAN's position that the Compensation Framework needs to be implemented in a way that takes into account regional specificities. However, in the same submissions, the AFN states that "regional considerations are adequately incorporated into the *Draft Compensation Framework*."

[55] With respect to the NAN's submission, the Caring Society, the AFN and Canada submit the intention is not for "discussions to continue" on any substantive issues outlined in the *Draft Compensation Framework*, *Draft Notice Plan* and accompanying products prior to or after the final rulings. For greater clarity, the Complainants and the Respondent have not filed the *Draft Compensation Framework*, *Draft Notice Plan* and accompanying products subject to any right by the NAN to return before the Tribunal "should an issue of concern arise". It is the view of the Caring Society, the AFN and Canada that this was not the process envisioned by the Tribunal.

Reasons on the Proposed Modifications to Section 6.3

[56] The Panel is not privy to the Parties discussions on this *Draft Compensation Framework* and does not wish to rewrite the framework achieved by the Caring Society, the AFN and Canada in consultation with the Commission and the interested parties, the COO and the NAN. However, the Panel finds there is merit to the NAN's argument and finds the proposed amendments to section 6.3 above to be appropriate. This provision addresses resources to support beneficiaries financially or otherwise and while the *Compensation Decision* orders and process are Nation-wide support to beneficiaries should account for their specific needs including the particular needs and realities of remote First Nations. The Panel does not see why adding a precision such as this one poses a difficulty or risks excluding the unique needs of other First Nations communities. The Panel's substantive equality approach focuses on unique needs of First Nations including remote First Nations. Moreover, this reality has formed part of the Tribunal's findings since 2016.

[57] The Panel directs the Caring Society, the AFN and Canada to discuss this possible amendment further when they finalize the *Draft Compensation Framework*. If this poses a significant roadblock preventing the finalization of the *Draft Compensation Framework*, the parties should inform the Tribunal and provide sufficient information to assist the Panel in understanding the underlying issues. This is not an invitation for the interested parties to return to the Tribunal with other issues surrounding the *Draft Compensation Framework* given that the objective is to finalize it shortly. The Panel is satisfied that the interested parties were consulted, some of their suggestions were included, another one identified

above was found acceptable by this Panel and the other suggestions put before the Tribunal have been answered in the negative by the other parties and the Panel accepts this outcome.

Reasons on Procedural Fairness in Considering the NAN and the COO's May 1, 2020 Submissions regarding Caregivers

[58] This being said, on the issue of procedural unfairness raised by Canada, the Panel's response mirrors what it has mentioned in previous rulings to reject Canada's unfairness argument:

> Moreover, the Federal Court of Canada in regards to remedies stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands **innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility." (emphasis added)** [emphasis in original]. (see 2018 CHRT 4 at para. 39).

Additionally, this intricate task necessarily requires some back and forth between the Tribunal and the parties.

> In this case, it is very different as the Tribunal has heard the merits of the case extensively and made findings and orders. It retained jurisdiction given the complexity of the remedies and the immediate, mid-term and long-term relief remedies and the necessity to assess if remedies are effective and implemented. This necessarily requires some back and forth between the parties and the Tribunal unless all parties agree and propose consent orders to the Tribunal [emphasis added]. (see 2019 CHRT 7 at para. 47).

[59] In another ruling the Tribunal's referred to *Grover* and to the notion that it is an intricate task to fashion effective remedies to a complex dispute:

> Consistent with this approach, and as this Panel has previously stated, the aim in making an order under section 53 of the *Act* is to eliminate and prevent discrimination. On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *Act* and meaningful in vindicating any loss suffered by the victim of discrimination. However, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task and may require ongoing supervision (see 2016 CHRT 10 at paras. 13-15 and 36) [emphasis added]. (see 2017 CHRT 14 at para. 29).

[60] Furthermore, after the Panel's questions to the COO and the NAN, the Panel allowed the parties to respond to the COO and the NAN's submissions. Finally, the Panel rejected the COO and the NAN's requests. Additionally, the other parties' replies to the COO and the NAN's supplemental submissions were instrumental in assisting the Panel in determining the issues. In light of the above, the Panel rejects the AGC's procedural unfairness argument.

VII. Definitions for Essential Service, Service Gap, Unreasonable Delay

[61] The remaining points on which the Caring Society, the AFN and Canada require the Tribunal's direction are the definitions of the terms "service gap", "unreasonable delay", and "essential service" for the purposes of eligibility for Jordan's Principle compensation. The parties submit these are important threshold terms in deciding the types of situations that qualify as a "worst-case scenario" for the purposes of receiving compensation as set out in the Tribunal's *Compensation Decision* order from September 6, 2019.

[62] In sum Canada submits the Tribunal has ordered compensation for Canada's failure to provide "essential services" to First Nations children. The word "essential" is thus a significant qualifier, and should be interpreted in a common-sense way. Canada proposes that it include those services considered necessary for the child's safety and security, while considering substantive equality, cultural appropriateness and best interests of the child. "Service gap" is a concept that the Tribunal has used to describe a failure to provide a necessary service for reasons such as incompatibility between government programs, or Canada's use of an unduly narrow definition of Jordan's Principle. The definition Canada proposes helps ensure that the "gap" was a circumstance that resulted in a serious need going unmet for discriminatory reasons. An "unreasonable delay" is one that could reasonably have had an adverse impact, there was no reasonable justification for the delay, and the delay was outside a normative standard.

[63] Canada argues that providing clear definitions to these terms will greatly facilitate the compensation process. The definitions will help identify First Nations children intended to be beneficiaries. The definitions should be succinct and clear, so as not to encourage

unreasonable expectations of receiving compensation, and not to discourage those who may be eligible from applying.

[64] Each of these three definitions is discussed in turn below. The Panel carefully reviewed all of the parties and interested parties' submissions, however, in the interest of brevity not all views will be discussed here. Rather, the Panel will focus its summaries and reasons on the contentious areas surrounding the definitions.

A. Service Gap

Key Positions of the Parties

[65] Canada's proposed definition is as follows:

> "Service gap" is a situation where a child requested a service that was not provided because of a dispute between jurisdictions or departments as to who should pay; would normally have been publicly funded for any child in Canada; was recommended by a professional with expertise directly related to the service; but the child did not receive the service due to the federal government's narrow definition of Jordan's Principle.

[66] Canada submits that the Tribunal's *Merit Decision* identified two types of service gap. One type of gap arises from the narrow definition of Jordan's Principle applied by Canada at certain points in the past. The second involves the lack of coordination among the various programs intended to address First Nations children's health. The Tribunal expressed the concept in the following paragraph:

> In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need (see *Merit Decision* at para. 381).

[67] According to Canada, the *Compensation Decision* itself also suggests that the reason for giving compensation for children experiencing service gaps in relation to Jordan's

Principle was that the service gaps led to some children being placed “outside of their homes, families, and communities in order to receive those services.” (see *Compensation Decision* at para. 250). Placing these children outside their families, homes and communities could itself be seen as a harm.

[68] There is substantial agreement between the parties as to how service gaps arose under the application of Jordan’s Principle when Canada was applying an unduly narrow definition. Canada also agrees that where a child did not receive a service simply because the lack of co-ordination of programs meant no payment was permitted, compensation is appropriate.

[69] The essence of the dispute between the parties in relation to this definition concerns whether some necessary limitations should apply to ensure that there was indeed a gap. Canada proposes that the service in question must be one that was ordinarily provided to other children in Canada under certain conditions: such conditions could include the need to travel to certain locations, eligibility criteria including specific age brackets, limited frequency, and within certain income thresholds. This is less a limitation than inherent in the understanding of the word “gap”: the need to compensate arises because there was a gap between the services a First Nations child was receiving and the services other Non-First Nations children received.

[70] The second part of Canada’s definition is aimed at ensuring that the service in question was recommended by a professional with the relevant expertise to determine that the service is essential to meet the child’s needs. As Valerie Gideon described, it is sometimes the case in considering Jordan’s principle cases that a service request is supported by a recommendation from someone who does not have the required professional expertise. In these cases, the Department will offer support for the child to access the needed professional referral. Such situations should not be compensable, since they do not provide evidence either of a service gap or of unreasonable delay. They are just a necessary step to ensure that the approved service will meet the assessed need of the child.

[71] Finally, Canada submits it is important to note that many programs are not universally available across communities. This may cause differences in the availability of supports, products or services, but this a common practice among governments to respond to specific needs where they arise; it is not based on discriminatory treatment of specific children.

[72] Governments must prioritize resources and will do so based on varying criteria: unmet needs, conditions for success of the initiative, demonstration of results for future implementation in other communities. A proper understanding of the existence of a service "gap" must recognize that the availability of programs to First Nations children must be assessed against programs that are generally available to most other children.

[73] Canada adds that there are a number of ameliorative programs that consider the specific needs of children, such as the Non-Insured Health Benefits program, the Home and Community Care and Assisted Living programs on-reserve.

[74] Canada proposes a definition of "service gap" where (a) a child "requested" a service; (b) the service was not provided due to a dispute between jurisdictions or departments as to who should pay; (c) the service would normally be publicly funded for any child in Canada; and (d) was recommended by a professional with expertise directly related to the service.

[75] The AFN requests that this Panel reject the requirement that claimants must have made a request to Canada to receive a product or service. Canada's historical approach to Jordan's Principle and requests for products or services not normally funded under the First Nations Inuit Health Benefits Program would have dissuaded individuals from making a formal request. Put simply, if one knew their request would be declined or not even considered, why would one apply for the service at all? This Panel noted that Canada's narrow definition of Jordan's Principle resulted in not a single application being approved (see *Merit Decision* at para. 381).

[76] Secondly, the AFN submits that Canada's proposed definition could be viewed as regressive, particularly in situations where one level of government was required to provide a specific service or product for all other children. The present definition of Jordan's Principle now enables Canada to fund goods and services not normally provided to other Canadians, based on the principle of substantive equality. Finally, the requirement that the service be

recommended by a professional with expertise directly related to the services is too narrow. A medical or other certified professional should be able to direct a treatment and their assessment should not be subject to the verification or agreement of a specialist in a particular field.

[77] The AFN adds that one must be cognizant to the fact that parents were desperately seeking services for their sick, disabled, or special needs child after the House of Commons adopted *Motion 296* (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279). In some cases, the First Nations government assisted, in other situations family members contributed or pooled funds.

[78] Unfortunately, there are examples where these vulnerable children did not receive the service they required. With respect to "service gaps", this Panel addressed "gaps" in its 2017 CHRT 14 ruling: The Decision found Canada's similarly narrow definition and approach to Jordan's Principle to have contributed to service gaps, delays and denials for First Nations children on reserve. Specifically, the evidence before the Panel in determining the *Merit Decision* indicated Health Canada and INAC's approach to Jordan's Principle focused mainly on "inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers" (see *Merit Decision* at para. 380 and more generally paras. 350-382).

> Indeed, the Panel specifically highlighted gaps in services to children beyond those with multiples disabilities. For example, an INAC document referenced in the *Decision*, entitled INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region, indicates that these gaps non-exhaustively include mental health services, medical equipment, travel for medical appointments, food replacement, addictions services, dental services and medications (see 2017 CHRT 14 at para. 47).

[79] The AFN submits the definition for "service gaps" should focus on an unmet medical or other need(s) of a First Nations child. This would cover a product or service a medical or other professional who is licensed or who has the necessary expertise has recommended, based on the best interests of the child. It should also give consideration to overcoming historic disadvantages and address substantive equality.

[80] The Caring Society proposes the following definition of a “service gap”:

> “Service gap” is a situation where a child needed a service that
>
> • was necessary to ensure substantive equality in the provision of services, products and/or supports to the child;
>
> • was recommended by a professional with expertise directly related to the service need;
>
> but the child’s needs were not met due to the federal government’s discriminatory definition of and approach to Jordan’s Principle.
>
> For greater certainty, the discriminatory definitions and approach employed by the federal government demanded satisfaction of all the following criteria during the following time periods:
>
> a) Between December 12, 2007 and July 4, 2016
>
> • A child registered as an Indian per the Indian Act or eligible to be registered and resident on reserve;
>
> • Child with multiple disabilities requiring multiple service providers;
>
> • Limited to health and social services;
>
> • A jurisdictional dispute existed involving different levels of government (disputes between federal government departments and agencies were excluded);
>
> • The case must be confirmed to be a Jordan’s Principle case by both the federal and provincial Deputy Ministers; and
>
> • The service had to be consistent with normative standards
>
> b) Between July 5, 2016 and November 2, 2017
>
> • A child registered as an Indian per the Indian Act or eligible to be registered and resident on reserve (July 5, 2016 to September 14, 2016);
>
> • The child had a disability or critical short- term illness (July 5, 2016 to May 26, 2017);
>
> • The service was limited to health and social services (July 5, 2016 to May 26, 2017).

[81] The Caring Society strongly disagrees with three of the requirements that Canada would impose on the definition of a "service gap". Canada says that: (a) there must have been a "request" for a service; (b) there must have been a dispute between jurisdictions or departments as to who should pay; and (c) the service must have been normally publicly funded for any child in Canada.

[82] The Caring Society argues that these three requirements impose restrictions arising from aspects of Canada's approach to Jordan's Principle that the Tribunal has already ruled to be discriminatory. The Caring Society's position is that a "service gap" should be defined with reference to a child's confirmed needs at the time and in keeping with the principles of a child's best interests, substantive equality, and consideration of distinct circumstances. The Caring Society's proposition is that needs that were not met due to the discriminatory definition and implementation of Jordan's Principle ought not to be equated to a frivolous request that was never made.

[83] The Caring Society submits that as demonstrated by Canada's witnesses and the documents it filed before the Tribunal, Canada's discrimination shaped both its definition of Jordan's Principle and the approach to implementing it. In particular, Canada did not publicize Jordan's Principle, did not have an application process for Jordan's Principle, did not have a systematic process for documenting requests, and the few cases that managed to surface as "requests" never met Canada's requirements to be termed a Jordan's Principle case.

[84] Canada is relying on its "old mindset" to support its contention that compensation should only be awarded where an individual applied for a service or a product. As the record indicates, Canada's approach to Jordan's Principle until July 2016 ensured that First Nations children did not have a path to come forward with a service or product request when they had a need. Indeed, during the hearing on the merits, Canada's witness, Ms. Corinne Baggley (Senior Policy Manager at Aboriginal Affairs and Northern Development responsible for Jordan's Principle between 2007-2014) provided important insight into how Canada's "old mindset" contributed to so few requests coming forward. Canada's approach was constructed in such a manner that the public knew little to nothing about Jordan's

Principle. During her testimony, Ms. Baggley spoke directly to Canada's decision to not "publicize" Jordan's Principle:

> […] that wasn't within our mandate when we implemented Jordan's Principle to publicize the approach. We had a communications strategy in place that was more reactive, so we weren't really permitted to publicize, you know, the – where to bring Jordan's Principle cases to. (Examination-in-Chief of Ms. Corinne Baggley, May 1, 2014 (Steno Tran Transcript Vol 58) at p 32 line 8 to line 14.)

[85] The Caring Society submits that Ms. Baggley also confirmed that federally appointed focal points, on whom Canada relied to manage Jordan's Principle cases, were not identified to the public. In fact, when the AFN requested a list of focal points in 2009, it was only furnished three years later. This highlights a deep flaw in Canada's reliance on "requests" to identify compensable Jordan's Principle cases. It is entirely unclear why Canada would require a "request" to identify a compensable Jordan's Principle case when it specifically failed to establish any public mechanism for such requests to come forward.

[86] There was also no mechanism for requestors to apply for products or services under Jordan's Principle. Indeed, Ms. Baggley's evidence directly confirmed this point:

> Ms. Arsenault: Is it or was it possible to apply for Jordan's Principle funding?
>
> Ms. Baggley: No. It is -- as I explained earlier, it's not a program, so like the other programs we have across the federal family, there are no Terms and Conditions, there are no eligible beneficiaries, eligible recipients, eligible expenditures identified, it is very much a policy initiative and it is very much a process that is used to resolve cases. (See Examination-in-Chief of Ms. Corinne Baggley, April 30, 2014 (Transcript Vol 57) at p 128 line 13 to line 23).

[87] Furthermore, even if a request did come forward, focal points had no special training on how to handle Jordan's Principle cases, other than general periodic procedural discussions.

[88] However, Ms. Baggley's testimony also illuminated significant shortcomings in Canada's process for receiving and documenting those Jordan's Principle requests that did come forward despite the obstacles imposed by Canada.

[89] According to Ms. Baggley, First Nations were not involved in the formulation of Canada's definition of Jordan's Principle:

> Mr. Poulin: But there is no First Nation -- my understanding is there is no First Nation agreement on the definition that is used by the federal government.
>
> Ms. Baggley: Well, it's a federal definition, as I have explained, and we didn't go out seeking agreement with our definition, and we certainly do acknowledge in any documents that we develop through the agreements for example, if there are other definitions that the parties are working with, we do acknowledge and reference those. (See Cross-Examination of Ms. Corinne Baggley, May 1, 2014, (Steno Tran Transcript Vol 58) at p 11 line 13 to line 24).

[90] The Caring Society contends that it is important to acknowledge that Canada's definition shaped its approach to Jordan's Principle, including its system for receiving and documenting requests. The documentation that Canada did produce is sparse, is often region-specific, and restricted to children with disabilities. Taken together, the record before the Tribunal shows that Canada crafted a system that blocked service and product requests from coming forward, and now seeks to benefit from that system to reduce the scope of victims entitled to compensation for their pain and suffering resulting from this wilful and reckless discrimination.

[91] The result of Canada's proposed approach would limit compensation to those who received direct denials prior to 2016 as, even when cases came to Canada's attention, they employed an approach that failed to yield a single Jordan's Principle case prior to the Tribunal's 2016 decision. As the Tribunal noted in its May 2017 Ruling, "it was Health Canada's and INAC's narrow interpretation of Jordan's Principle that resulted in there being no cases meeting the criteria for Jordan's Principle" (see 2017 CHRT 14 at para 77, citing *Merit Decision* at paras. 379-382).

[92] In the same way that the Caring Society argued in its February 21, 2020 submissions that Canada ought not profit by denying beneficiaries compensation because they died waiting for Canada to end its discrimination, the Caring Society contends that Canada ought not profit by restricting compensation to persons who "requested" compensation when it was Canada's discrimination that directly suppressed such requests from coming forward in the first place.

[93] As such, the Caring Society's position is that a "request" is not required for a "service gap" to exist. Rather, the analysis should focus on the child's need(s) that arose during the period of Canada's discrimination. Such needs should be assessed based on the child's best interests, substantive equality and consideration of distinct circumstances – all guiding principles that the Tribunal has already made clear must apply in this case.

[94] Furthermore, the Caring Society argues the approach to Jordan's Principle ordered by the Tribunal focuses on the ability of First Nations children to access services and products that were required, and not those that were requested. This is logical as, until 2017, processes did not exist for requests to come forward. As noted above, the Tribunal found in May 2017 that "Canada's previous definition of Jordan's Principle led to families not coming forward with potential cases and urgent cases not being considered as Jordan's Principle cases. Canada admittedly had difficulties identifying applicable children" (2017 CHRT 14 at para. 112). In such circumstances, where the Tribunal has already reached an unchallenged conclusion that Canada's approach was so discriminatory that families did not know they could come forward, it defies logic to require a request to have been made in order to identify a service gap.

[95] The Caring Society's position is supported by contrasting "service gaps" to "denials" and "unreasonable delays". Unlike service gaps, denials and delays presume that requests have been made. Denials and delays have as their point of reference the request that was made for a service or product. In the case of a denial, a specific "ask" was refused. For delays, the "clock" on unreasonable delay begins running when the request was made. Requiring a "request" in order to identify a service gap would be entirely redundant, as all "requests" result in approvals, denials, or delays and would be covered by those terms, such that there would be no "definitional work" left for a service gap.

[96] Indeed, a gap is entirely different than a denial or a delay, as it references unmet needs that are not addressed by existing services. The Panel addressed "service gaps" most directly at paragraphs 381-382 of its *Merit Decision*:

> *In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which*

> *jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.*
>
> *More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made* (see *Merit Decision* at paras. 381-382, italics added).

[97] Even where a service request had been made, Canada would also require that the service "was not provided because of a dispute between jurisdictions or departments as to who should pay". Adding such a requirement flies in the face of the Tribunal's 2017 CHRT 14 decision, which held that "[w]hile Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle." (see 2017 CHRT 14 at para. 135(1)(B)(v), see also 2017 CHRT 35 at para. 10).

[98] The Caring Society contends that it is evident even in Canada's own briefing materials produced following the Tribunal's *Merit Decision* that a dispute between governments should not be required in order for a service gap facing a First Nations child to constitute a "worst-case scenario" of discrimination.

[99] On February 11, 2016, sixteen days after the *Merit Decision*, Canada produced a document titled *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions*. In this document, which the Tribunal found "relevant and reliable", (2017 CHRT 14 at para. 51). Canada acknowledged that "[t]he focus on a dispute does not account for potential gaps in services where no jurisdiction is providing the required services" (see 2017 CHRT 14 at para. 50). The Tribunal agreed (see 2017 CHRT 14 at para. 71).

[100] The Caring Society submits it is entirely unclear why Canada is attempting to reintroduce this definitional requirement more than four years after recognizing that disputes between or within governments do not account for service gaps. In essence, Canada is trying to get a “new decision” on previously adjudicated points that Canada lost and chose not to judicially review. This cannot be permitted.

[101] The NAN submits that in any process developed to process claims for Jordan’s Principle-related compensation, the NAN believes the following principles should apply in order to be responsive to the unique reality experienced by children and families in remote and isolated First Nations:

> a) Canada should not benefit from its discriminatory conduct;
>
> b) A claimant should not automatically be denied eligibility for being unable to demonstrate that a request for a service/support was made; and
>
> c) A claimant should not automatically be denied eligibility for being unable to establish that the service/support was, historically, recommended by a professional.

[102] Individuals involved in processing claims should be familiar with systemic gaps specific to the region in which the claimant lived.

[103] In many instances, however, the reality will be far-removed from the ideal because Canada’s discriminatory conduct, as found by this Tribunal, prevented or discouraged a referral and/or a request from being made in the first place. As a result, the process for determining eligibility must not require proof of a request for a service from Canada, nor proof of a recommendation or referral from a professional.

[104] The NAN’s concern about a requirement that an individual must establish historical proof of an assessment, referral and recommendation for a service or product to be eligible for compensation is this: the requirement will unfairly bar from compensation citizens of NAN First Nations who were never able to access assessment and identification services due to systemic barriers and gaps.

[105] While the proof of assessment, referral or recommendation for a service or product can help establish a successful claim, their absence should not automatically disentitle a claimant.

Reasons on the Definition of "Service Gap"

[106] The Panel agrees with the AFN and the Caring Society's positions, summarized above, and their characterisation of the Tribunal's past findings and approach to remedying discrimination by ensuring substantive equality. It is accurate to say that the Tribunal focuses on the ability of First Nations children to access services and products that were required, and not those that were requested. Moreover, a "service gap" should be defined with reference to a child's confirmed needs during the period of Canada's discrimination and such needs should be assessed based on the principles of a child's best interests, substantive equality, overcoming historic disadvantages and consideration of distinct circumstances. The AFN and the Caring Society are correct in affirming that those are all guiding principles that the Tribunal has already made clear apply in this case.

[107] Therefore, the Panel rejects the following parameters proposed by Canada that there must have been a "request" for a service; there must have been a dispute between jurisdictions or departments as to who should pay; and the service must have been normally publicly funded for any child in Canada.

[108] Also, the Panel relies on its unchallenged *Merit Decision* and subsequent rulings especially the Panel's orders on Jordan's Principle definition (see 2017 CHRT 14 and 35) and believes they provide an answer to the dispute over this definition.

[109] This definitional exercise should focus on what the Tribunal meant in its rulings when it referred to essential services, service gaps and unreasonable delay. This is done in reference to the Tribunal's findings and evidence in the record.

[110] In terms of parties bringing suggestions and new perspectives, this is more appropriately directed to the efficiency of the compensation process than to the definitional exercise.

[111] The Panel finds that Canada is bringing forward some arguments that were raised and addressed in the *Merit Decision* and previous rulings. For example, the arguments in the two paragraphs below were advanced at the hearing on the merits, considered and rejected after weighing the evidence as a whole.

[112] Canada already argued at the merits hearing and again advances in this matter that governments must prioritize resources and will do so based on varying criteria including unmet needs, conditions for success of the initiative, and demonstration of results for future implementation in other communities. A proper understanding of the existence of a "service gap" must recognize that the availability of programs for First Nations children must be assessed against programs that are generally available to most other children.

[113] Similarly, Canada adds that there are a number of ameliorative programs that consider the specific needs of children, such as the Non-Insured Health Benefits program, the Home and Community Care and Assisted Living programs on-reserve.

[114] The above arguments were advanced by Canada in the hearing on the merits where an exhaustive list of programs on reserves was filed in evidence and tested. Canada's arguments on programs addressing needs of First Nations children were rejected and discussed at length. The Panel already found that Canada was unable to measure comparability with provincial services offered to children.

[115] Without repeating all the previous reasons found in multiple rulings, a few examples are reproduced below:

> *In another document dealing with AANDC's expenditures on Social Development Programs on reserves it states that, despite the federal government acting as a province in the provision of social development programs on reserve, federal policy for social programs has not kept pace with provincial proactive measures and thus perpetuates the cycle of dependency (see Annex, ex. 33 at pp. 1-2 [Explanations on Expenditures of Social Development Programs document]). The document describes AANDC's social programs as "…limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances" (Explanations on Expenditures of Social Development Programs document at p. 2). It goes on to say that if its current social programs were administered by the provinces this would result in a*

significant increase in costs for AANDC (see *Merit Decision* at para. 267, italics added).

Correspondingly, a 2006 presentation regarding AANDC social programs on reserves, including the FNCFS Program, describes those programs as being remedial in focus, not always meeting provincial/territorial rates and standards, and not well-integrated across jurisdictions (see Annex, ex. 34 at p. 5 [Social Programs presentation] (see *Merit Decision* at para. 268, italics added).

The difficulties in performing this comparative analysis were also identified in a document entitled *Comparability of Provincial and INAC Social Programs Funding*, authored by AANDC employees and to be included in a Ministerial Briefing Binder (see Annex, ex. 44). The document explains that for a number of reasons, such as differences in the way social programs are delivered in the provinces in terms of types of services, the number of services and the allocation of funding, it is difficult to arrive at conclusive and comparable numbers (see Comparability of Provincial and INAC Social Programs Funding at p. 1). In addition, provincial data may not be directly comparable as it could include costs such as overhead or program costs not funded through the FNCFS Program (see *Comparability of Provincial and INAC Social Programs Funding* at p. 4). Where total expenditures per child in care are compared, there is some indication that AANDC funds child and family services at higher levels compared to some provinces. However, the *Comparability of Provincial and INAC Social Programs Funding* document, at page 4, notes that funding levels do not relate to the real needs of children and their families:

> this analysis is not able to recognize that disadvantaged groups may have higher levels of need for services (due to poverty, poor housing conditions, high levels of substance abuse, and exposure to family violence) or that the services or placement options they require may be at a substantially higher cost for services." (See *Merit Decision* at para. 336, underlining added).

MS CHAN: […] Can you tell, or is there a way for the Program to know if they are comparable in terms of the services that are being provided on-Reserve?

MS D'AMICO: I don't believe that we can.

[…]

Because we are talking about different types of communities, different types of systems and different types of services that are being administered by different service delivery agents. So what I mean by this is, one First Nation community off-Reserve who looks exactly the same as an off-Reserve community isn't actually going to get the same services as that other community, they are going to get culturally specific services that that Agency deems appropriate for the children and families that they are serving.

> (Transcript Vol. 51 at p. 183) (see *Merit Decision* at, para. 337, italics added. See also paras. 463-464).

[116] The Panel is concerned by those submissions contesting systemic discrimination already found in the *Merit Decision*. The Compensation process is focused on harms to individuals caused by the systemic discrimination found in the *Merit Decision*.

[117] This being said, the Panel agrees there is merit in Canada's argument that a service should have been recommended by a professional with the relevant expertise to determine that the service is essential to meet the child's needs. This criterion is consistent with the amendments agreed to by the parties in this case and the Tribunal in 2017 CHRT 35 at. paragraph 135: "[…] Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs […]". This could bring objectivity and efficiency to the compensation process as beneficiaries can indicate the service that was recommended but not obtained. However, the Panel agrees in part with the AFN that a medical or other certified professional should be able to direct a treatment and their assessment should not be subject to the verification or agreement of a specialist in a particular field. This being said, the Panel believes exceptions should be made when the treatment also contains risks to the child that require a specialist to determine if the treatment's benefits outweigh the risks. Ultimately, the decision concerning the child will belong to the parent or guardian. Those situations are not the norm and should not be used as a criterion to exclude children. Rather, it accounts for some situations that may arise in the treatment of children. This flexibility should be reflected in the compensation process. Moreover, the Panel recognizes the systemic barriers encountered by many First Nations peoples in accessing services and agrees with the NAN that the absence of proof of assessment, referral or recommendation should not automatically disentitle a claimant. This flexibility should also be reflected in the parameters of the compensation process.

[118] The next step to require that a request was made is to be entirely rejected given the accurate interpretation of the Tribunal's findings made by the AFN and the Caring Society,

mentioned above. As already mentioned, the Panel's past *Merit Decision*, rulings and findings are a full answer to this aspect of Canada's request.

[119] Moreover, the criteria that a jurisdictional dispute occurred is to be rejected as it would be less inclusive than what the Panel found in past unchallenged rulings and in the definition agreed to by the parties and the Tribunal in 2017 CHRT 35 at. paragraph 135: "[…] Canada's definition and application of Jordan's Principle shall be based on the following key principles […] While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.". The Panel has no intention to reopen this matter. The parties who successfully proved their case in this matter disagree and understandably view this as regressive, trying to reopen matters that were previously decided and not challenged. Consequently, this request is denied.

[120] Similarly, the Panel rejects Canada's requirement that the service must normally have been publicly funded for any child in Canada given the Panel's substantive equality findings and its orders accepted by Canada in 2017 CHRT 14 and in 2017 CHRT 35 at paragraph 135: "[…] When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child […]".

B. Essential Service

Key Positions of the Parties

[121] Canada's proposed definition is as follows:

> "Essential service" is a support, product or service that was:
>
> > requested from the federal government;
> >
> > necessary for the safety and security of the child, the interruption of which would adversely impact the child's ability to thrive, the child's health, or the child's personal safety.
>
> In considering what is essential for each child the principles of substantive equality and the best interests of the child will be considered to ensure that the focus is on the individual child.

[122] Canada submits the term "essential service" appears nine times in the *Compensation Decision*, but is not specifically defined. However, in paragraph 226 of the *Compensation Decision*, the Tribunal gave considerable guidance as to its meaning:

> First Nations Children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them. The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.

[123] In considering Canada's proposed definition, the concepts of safety and security should be interpreted to capture situations in which the child's ability to thrive, health or personal safety would be compromised by failure to provide the support, product or service concerned. This approach encompasses the requirement that there be a prospect of real harm flowing from a failure to respond appropriately to a request for such support, service or product.

[124] The Tribunal's reference to "real harm" is a significant qualifier, one that accords with a common-sense understanding of what is truly "essential". Not all supports, products and services are equally necessary, and the failure to provide them, or the failure to provide them in a timely way, should not be compensable. Canada is not suggesting that the harm actually had to occur, since the child may have obtained a product or service by other means and avoided the harm. However, the potential harm for non-provision should have had to have been at least objectively foreseeable for compensation to be given.

[125] Canada submits the affidavit of Valerie Gideon includes as an exhibit a chart of the broad range of supports, products and services that have been provided under Jordan's Principle since the Tribunal set out its definition in 2017 CHRT 14 and 2017 CHRT 35. The chart demonstrates that Canada has not interpreted Jordan's Principle narrowly and has implemented child-centric decision-making. In particular, it has applied the principles of substantive equality and best interests of the child in a way that has resulted in the provision of hundreds of thousands of supports, products and services, as the Tribunal has approvingly noted (see *Compensation Decision*, at para. 222).

[126] But not every service on that chart is equally necessary. Ms. Gideon's affidavit also includes examples of services that the Caring Society definition of "essential services" would encompass, and demonstrates why an overly-expansive definition is unjustified.

[127] To be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential". Canada's definition does that.

[128] Another difference between the parties is that Canada's definition requires that the child, or someone on the child's behalf, must have made a request. It need not be the case that the person applying used the term "Jordan's Principle," but they must have brought the service request to Canada's attention. While the Caring Society is correct that Canada did not make a significant effort to establish a simple mechanism for families or service providers to come forward with Jordan's Principle requests, Canada did provide a number of other mechanisms for families or service providers to reach out, including through the Non-Insured Health Benefits Program and other community-based programs, including navigators. Unless the definition includes the making of a request as a condition, the process risks becoming a search back in time for a service that might have been requested had the person chosen to do so. Canada cannot be accused of discrimination for failing to respond to requests that were never made. Compensation should not be provided in such cases.

[129] The AFN submits that First Nations children face unique challenges in accessing services, and Jordan's Principle is an essential mechanism for ensuring their human, constitutional, and treaty rights.

[130] The AFN argues that Canada is proposing a definition of “essential service” as a product or service that was (i) requested from the federal government; and (ii) is necessary for the safety and security of the child, the interruption of which would adversely impact the child’s ability to thrive, the child’s health, or the child’s personal safety.

[131] The AFN submits that Canada’s proposal is limited in scope. First, it would only cover those services requested from the federal government. This Panel has ruled that Jordan’s Principle is to apply to all jurisdictional disputes (see 2017 CHRT 14 at para. 135).

[132] Secondly, the AFN argues that Canada’s definition means that services would have to be necessary and any interruption would adversely impact a child. This definition assumes that a child was able to secure a service and was already receiving treatment, and as a result, the operative element would focus on the interruption of existing services. Evidence was provided to this Panel illustrating that not all individuals were able to access services. The AFN would support a definition of “essential services” that is consistent with the finding of this Panel. In this Panel’s 2017 CHRT 14 decision, this Panel noted that Jordan’s Principle is designed to ensure substantive equality for First Nations children (see 2017 CHRT 14 at paras. 69-75).

[133] Building on international standards, the AFN recommends that the definition for “essential services” incorporate some recognized international principles. Under international human rights law, defining what an essential medical service or treatment is for a child must follow components of the right to health for children. These components have been drafted and agreed upon by the international community and provide that children are entitled “to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.” (United Nations’ *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Article 24 [*CRC*]). This right is articulated in Article 24 of the *CRC*, which is a widely ratified international human rights instrument and consolidates all previous treaties on the rights of children. Further, international human rights law provides that the right to health for children has long been understood to be an “inclusive” right, which extends beyond protection from immediately identifiable infringements, such as limitations on access to health care or services, and includes the wide range of rights and freedoms

that are determinate to children's health, such as the rights to non-discrimination and access to health-related education and information.

[134] Moreover, it is defined in international human rights law that the right to health, outlined in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 in General Comment 14 of the Committee on Economic, Social and Cultural Rights, includes the following core components:

> a) Availability: Refers to the need for a sufficient quantity of functioning public health and health care facilities, goods and services, as well as programmes for all.
>
> b) Accessibility: Requires that health facilities, goods, and services must be accessible to everyone. Accessibility has four overlapping dimensions:
>
> - non-discrimination
> - physical accessibility
> - economical accessibility (affordability)
> - information accessibility.
>
> c) Acceptability: Relates to respect for medical ethics, culturally appropriate, and sensitivity to gender. Acceptability requires that health facilities, goods, services and programmes are people-centred and cater to the specific needs of diverse population groups and in accordance with international standards of medical ethics for confidentiality and informed consent.
>
> d) Quality: Facilities, goods, and services must be scientifically and medically approved. Quality is a key component of Universal Health Coverage, and includes the experience as well as the perception of health care. Quality health services should be:
>
> - Safe – avoiding injuries to people for whom the care is intended;
> - Effective – providing evidence-based healthcare services to those who need them;
> - People-centred – providing care that responds to individual preferences, needs and values;
> - Timely – reducing waiting times and sometimes harmful delays.

> • Equitable – providing care that does not vary in quality on account of gender, ethnicity, geographic location, and socio-economic status;
>
> • Integrated – providing care that makes available the full range of health services throughout the life course;
>
> • Efficient – maximizing the benefit of available resources and avoiding waste.

[135] Lastly, the World Health Organization has provided its definition of quality of care as "the extent to which health care services provided to individuals and patient populations improve desired health outcomes. In order to achieve this, health care must be safe, effective, timely efficient, equitable and people-centred."[2] This is critical in how essential services within states are to operate and the degree of care needed for not only children, but all individuals in the state.

[136] The Caring Society suggests the following definition of "essential service" is appropriate:

> "Essential service" is a support, product or service that was:
>
> > • necessary to ensure substantive equality in the provision of services, products and/or supports to the child.
>
> In considering what is essential for each child, the focus will remain on the principles of substantive equality (taking into account historical disadvantage, geographic circumstances, and the need for culturally appropriate services, products and/or supports) and the best interests of the child.

[137] The Caring Society argues that Canada also proposes to narrow "essential services" to consider only the safety and security of children, or their "ability to thrive". The Caring Society views safety and security as part of a child's best interests, but not limited thereto.

[138] The Caring Society understands that Canada takes the position that the existence of a "request" having been made of the federal government is an important limitation that it would like to impose on compensation under the Tribunal's order. However, for the reasons outlined above in the Caring Society's submissions regarding "service gaps", this would not

[2] https://www.who.int/maternal_child_adolescent/topics/quality-of-care/definition/en/

be appropriate due to Canada's discriminatory approach to Jordan's Principle having foreclosed those with need from coming forward.

[139] The Caring Society submits the notion of a "request" is inherent in situations where an essential service was "denied" (as denials can only follow requests) or "unreasonably delayed" (as, once again, delays can only be calculated with respect to the time of the request). Accordingly, any requirement for a "request" should be dealt within relation to the definition of a "service gap", such that the matter of a request need not be dealt with when defining the words "essential service". Services are essential, whether requested or not. Canada's definition of "essential service" also limits the eligible range of services, supports or products to those "necessary for the safety and security of the child, the interruption of which would adversely impact the child's ability to thrive, the child's health, or the child's personal safety."

[140] However, the Caring Society argues this definition appears to roll back Jordan's Principle to Canada's definition in place from July 5, 2016 to May 26, 2017, which focused on disabilities and critical needs for health and social supports. The Tribunal ruled that that definition was discriminatory in the 2017 CHRT 14 decision, confirmed with amendments approved by the Tribunal following the consent of the parties in 2017 CHRT 35. Canada discontinued its judicial review of the 2017 CHRT 14 decision on November 30, 2017.

[141] Moreover, Jordan's Principle is designed to ensure substantive equality to First Nations children. In keeping with the purpose of the *CHRA*, Jordan's Principle is a particular tool to provide First Nations children "an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices" (*CHRA*, s. 2, explained in 2017 CHRT 14 at paras. 69-75).

[142] The Caring Society contends the Tribunal provided a very clear metric of the importance of substantive equality to this analysis in its *Merit Decision*. Speaking in the context of the FNCFS Program, the Tribunal said that Canada "is obliged to ensure that its involvement […] does not perpetuate the historical disadvantages endured by Aboriginal

peoples. If AANDC's conduct widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory" (see *Merit Decision* at paras. 399-404).

[143] The Caring Society submits the metric of an "essential service" should be whether the service in question was necessary to ensure substantive equality in the provision of services, products and/or supports to the First Nations child. Effectively, wilful and reckless conduct that widened the gap between First Nations children and the rest of Canadian society and caused pain and suffering should be compensable whenever it occurred, and not only when it had an adverse impact on the health or safety of a First Nations child.

[144] Canada ought not be permitted to shield itself from compensation for its discriminatory conduct by recirculating arguments that the Tribunal has already rejected.

[145] The Commission submits it would be inappropriate to effectively penalize the claimant for not having approached Canada in this context. First Nations children and families in vulnerable circumstances should not be expected to have made hopeless service requests in order to take the benefit of human rights protections.

Reasons on the Definition of an "Essential Service"

[146] The Panel already provided reasons above rejecting Canada's proposal that the definition include the requirement that a request was made. This same reasoning applies here in denying this aspect of Canada's proposed requirement. The Panel agrees with the AFN, the Caring Society and the Commission's positions above. Given the discrimination findings in this case, it is not appropriate to require that a request was made for beneficiaries to be eligible for compensation under this Tribunal process.

[147] The Panel also agrees with the AFN and the Caring Society's positions on the definition of what is an "essential service" mentioned above. The Panel agrees that an "essential service" should be whether the service in question was necessary to ensure substantive equality in the provision of services, products and/or supports to the First Nations child. The Panel also agrees that a conduct that widened the gap between First Nations children and the rest of Canadian society and caused pain and suffering should be

compensable whenever it occurred, and not only when it had an adverse impact on the health or safety of a First Nations child.

[148] Nevertheless, the Panel agrees with Canada that not all supports, products and services as currently approved by Canada since the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35 are equally necessary and lack thereof or delay cause harm to First Nations children. Therefore, some measure of reasonableness is acceptable. The examples provided in the *Merit Decision* and subsequent rulings and *Compensation Decision* refer to the clear examples of harm to children caused by Canada's discriminatory practices. However, as already explained in the *Merit Decision* and subsequent rulings, the adverse impacts experienced by First Nations children and their caregiving parents or grandparents as a result of Canada's discrimination amount to harm and the Panel opted for a compensation process that would avoid measuring the level of harm borne by each victim. However, some measure of reasonableness should be applied given that some examples recently brought forward by Canada may not be considered real harm by this Panel. The Panel is not privy to the parties' discussions and the full context surrounding those examples of services and is not in a position to make findings on an untested affidavit however, one example stands out. If a request for a laptop at school is made in July for the September start of the school year, Canada must make this determination within the prescribed timeframe despite the laptop not being required for two months (see Affidavit of Dr. Gideon of April 30, 2020, at para. 9). This is an example where it is difficult to see any harm to a child. A reasonableness analysis is particularly helpful in this case.

[149] The Panel also understands that Canada is bringing forward examples of supports, products and services that were approved by Canada after the Tribunal's rulings 2017 CHRT 14 and 2017 CHRT 35 showing the wide range of services to support this valid aspect of their argument.

[150] Moreover, the Panel agrees that Canada has not interpreted Jordan's Principle narrowly and has implemented child-centric decision-making and that it has applied the principles of substantive equality and best interests of the child in a way that has resulted in the provision of hundreds of thousands of supports, products and services after the Tribunal's 2017 CHRT 14 and 2017 CHRT 35 rulings. The Compensation period for

Jordan's Principle ends on the day the Tribunal released its ruling in 2017 CHRT 35. All the evidence showing compliance is helpful to inform the reasonableness interpretation.

[151] The Panel agrees with Canada that to be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential" and that the definition should foresee this and should be finalised by the Caring Society, the AFN and Canada. However, the Panel disagrees that Canada's definition does that in an effective way given it is too narrow for the reasons mentioned above. This reasonable interpretation of what is essential must be done through an adequate substantive equality lens. The Panel agrees with the AFN and the Caring Society's arguments on this point.

[152] Furthermore, Canada already made the argument as part of the hearing on the merits of this case that it provided a number of other mechanisms for families or service providers to reach out, including through the Non-Insured Health Benefits Program and other community-based programs, including navigators. This was part of their defense and cannot be reopened here. This was rejected by the Panel as it reviewed the arguments and evidence. The Panel found that this was insufficient to meet the real needs of First Nations children and their families. The Panel need not reiterate all its reasons detailed in its *Merit Decision* and many rulings to reject this argument. The *Merit Decision* and those earlier rulings provide a full answer on this point.

C. Unreasonable Delay

Key Positions of the Parties

[153] Canada's proposed definition is as follows:

> "Unreasonable delay" is informed by:
>
> > the nature of the product, support or service sought;
> >
> > the reason for the delay;
> >
> > the potential of delay to adversely impact the child's needs;
> >
> > the normative ranges for providing the category or mode of support or services across Canada by provinces and territories.

> For greater certainty, where a child was in palliative care with a terminal illness, and a professional with relevant expertise recommended a service that was not provided through Jordan's Principle or another federal program, delay resulting from administrative procedures or jurisdictional dispute will be considered unreasonable.

[154] Canada argues that all Canadians understand that some amount of delay is endemic in our health care system. Few, however, would expect to receive compensation where they experienced some delay in getting the service. To be worthy of compensation, the delay must, in some objective sense, be unreasonable based on the harm (actualized or potential) experienced by the individual.

[155] Canada's definition would accept that if the reason for delay was jurisdictional wrangling over who should pay, the delay was unreasonable. That is a reality that First Nations children experienced that other Canadian children did not, or were much less likely to experience. Jordan's Principle is now in place to prevent these situations from occurring.

[156] As pointed out above, Canada submits the Tribunal was concerned in its *Compensation Decision* about the possibility of harm to children because of delay. Conversely, where there was no reasonable possibility of harm, that factor should weigh against the provision of compensation.

[157] The essence of the dispute between the parties under this definition is whether the Tribunal's judgment imposing 12- and 48-hour standards for the provision of services should be the touchstone for compensation. However, as the affidavit of Valerie Gideon sets out, those standards exceed the standards set by the federal government with respect to services to children and families, and those of provinces and territories.

[158] The fact that Canada is bound by the Tribunal's order to observe much higher standards is a mechanism to ensure the longstanding injustices experienced by First Nations children will cease. However, minor deviations from those high standards should not lead to compensation: it is simply not evidence of discrimination to fail to achieve standards that exceed those of other jurisdictions and experienced by other children.

[159] Instead, what Canada proposes is that the failure to achieve normative standards, that is, standards which other Canadian jurisdictions strive to achieve with respect to

services to children, should be the benchmark against which the reasonableness of delay is assessed. On that standard, the evidence is that Canada is achieving such standards.

[160] The AFN recognizes the fears and helplessness parents and children encounter when waiting for a service or product to be provided, especially in cases of medical treatments or services that can improve the quality of life of an individual. It is all too tragic where a delay in accessing services results in permanent disability, long-term adverse health impacts, or even death.

[161] The AFN agrees with the Commission's suggestion that the definition of "unreasonable delay" should incorporate the Jordan's Principle service standards that were agreed to by all Parties. Urgent individual cases should generally be determined within 12 hours, and non-urgent individual cases within 48 hours. These timeframes should set the basis on which a common understanding should be built.

[162] Nevertheless, the AFN recognizes that not all delays past 12 hours in urgent cases or 48 hours in non-urgent cases will be unreasonable in every circumstance. However, claimants should not have to bear the onus of proving that a delay was unreasonable. That burden should rest solely on Canada. In these circumstances, Canada should be required to rebut the presumption of unreasonable delay by providing the Central Administrator with the particulars related to an individual's compensation application. The process for this rebuttal can be further explored in the ongoing discussions between Canada, the AFN and the Caring Society.

[163] The Caring Society proposes the following definition of "unreasonable delay":

> "Unreasonable delay" will be presumed where a request was not determined within 12 hours for an urgent case, or 48 hours for other cases. Canada may rebut the presumption of unreasonable delay in any given case with reference to the following list of contextual factors, none of which is exclusively determinative:
>
> • the nature of the product, support and/or service sought;
>
> • the reason for the delay;
>
> • the potential for the delay to adversely impact the child's needs;

> • whether the child's need was addressed by a different service, product and/or support of equal or greater quality, duration and quantity, otherwise provided in a reasonable time;
>
> • the normative standards for providing the support, product and/or services across Canada by provinces and territories, that were in force at the time of the child's need; and
>
> • the timelines established on November 2, 2017 by the CHRT[3] for Canada to determine requests under Jordan's Principle: 12 hours for urgent cases, 48 hours for other cases.
>
> As part of the Guide, the parties will agree on a process for Canada to provide the Central Administrator with information on the factors noted above in order to rebut the presumption.

[164] The Caring Society submits that in its *Compensation Decision*, the Tribunal recalled a case that embodies the tragic human consequences of Canada's unreasonable delay in providing services and products to children in need:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline 30 degrees in order to alleviate the respiratory distress that resulted from her condition (see *Compensation Decision* at para. 224).

[165] The Caring Society argues that the Tribunal found as a fact in its *Merit Decision* that delays were built into Canada's response to Jordan's Principle:

> The 2009 and 2013 Memorandums of Understanding have delays inherently built into them by including a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding is even provided. It should be noted that the case conferencing approach was what was used in Jordan's case, sadly, without success (see *Merit Decision* at para. 379).

[166] This conclusion was restated in the Tribunal's summary of its findings and orders made with respect to Jordan's Principle in its 2017 CHRT 14 decision:

> In the [*Merit*] *Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases (see 2017 CHRT 14 at para. 5).

[3] See the decision of the CHRT in 2017 CHRT 35.

[167] The Tribunal found that these problems were not cured by the *Merit Decision*, as Canada's implementation of Jordan's Principle operated without timelines until sometime in February 2017:

> While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay was part of the process, as there was no clarity around what the process actually way (see 2017 CHRT 14 at para. 92).

[168] The Caring Society submits that Canada's system for considering Jordan's Principle cases was rife with built-in delays, claimants should not bear the onus of proving that their delay was unreasonable if it exceeded the 12- or 48-hour standards for evaluating and determining requests.

[169] However, the Caring Society recognizes that not all delays in excess of 12-hours in urgent cases or 48-hours in non-urgent cases will be unreasonable. As such, the Caring Society suggests that the factors outlined in its proposed definition afford Canada with a fair opportunity to rebut the presumption of unreasonable delay by providing the Central Administrator with particular details related to the child's case. Much like the other processes laid out in the Compensation Process Framework, this mechanism's operation will be spelled out in further discussions between Canada, the AFN and the Caring Society.

Reasons on the Definition of "Unreasonable Delay"

[170] Again, the Panel believes that the analysis of the term "unreasonable delay" should start by considering what the Tribunal meant by unreasonable delay.

[171] The Panel agrees that some delay in receiving services is acceptable in some circumstances. This is why the Panel used the words "unreasonable delay". The Panel believes that some reasonableness should form part of the analysis. The Panel agrees that minor deviations in some cases from those high standards ordered by the Tribunal and agreed to by all parties including Canada (see Consent order in 2017 CHRT 35) such as in the example outlined by Canada of providing a laptop to a child, mentioned above, should not lead to compensation. The opportunity for Canada to rebut the presumption of

unreasonable delay by providing the Central Administrator with the particulars related to an individual's compensation application is an acceptable suggestion in this compensation process framework to avoid having claimants bear the onus of proving that a delay was unreasonable. That burden should rest solely on Canada.

[172] The question here is fully answered when looking at the reference period for compensation which is from December 12, 2007 to November 2, 2017. This period coincides with Canada's systemic discriminatory practices adversely impacting children. The Panel discussed examples in the *Compensation Decision* and previous rulings and the *Merit Decision* of harm caused by delays. Again, this was discussed at length in the unchallenged *Merit Decision* and subsequent rulings. While Canada argues it complies with normative provincial standards for service provision this is not what the Tribunal found occurred in this case up to November 2, 2017. The Caring Society and the AFN's examples referred to in the Tribunal's previous unchallenged *Merit Decision* and rulings, summarized above, indicate that those delays were unreasonable and caused harm to children. There is abundant evidence in this case of unreasonable delays causing harm to children. The recognition that Canada was abiding by the Panel's specific orders is reflected in the compensation period ending in November 2017.

[173] Advancing arguments and evidence now to challenge the Tribunal's previous systemic discrimination findings for the same reasons already mentioned in the service gaps section cannot be permitted. Current compliance to the Tribunal's orders is not the appropriate lens to assess compensation for past discrimination. The Panel rejects this approach.

[174] This being said, the Panel believes that making the argument for exceptions to the "high standards" must be possible to avoid situations such as the "laptop situation" referred to above. As mentioned above, the rebuttal of the presumption of unreasonable delay is an adequate option to account for those exceptional situations.

[175] For the above reasons, the Panel agrees with many aspects of the Caring Society and the AFN's proposed definitions and with some aspects proposed by Canada. The Panel generally agrees with the Caring Society's first three proposed general principles (see

Annex 1). The Panel directs the parties to consider the Panel's reasons above mentioned and to adapt the three definitions to reflect the Panel's reasons in the finalization of the *Draft Compensation Framework*.

VIII. Retention of Jurisdiction

[176] The Panel retains jurisdiction until the process for compensation issue has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Annex 1: General Principles

1. For greater certainty, where a child was in palliative care with a terminal illness, and a professional with relevant expertise recommended a service, support and/or product to safeguard the child's best interests that was not provided through Jordan's Principle or another program, delay will be considered unreasonable.

2. Seeing as the principle of substantive equality involves consideration of a First Nations child's needs and circumstances in relation to cultural, linguistic, historical and geographic factors, Canada will provide the Central Administrator with access to the information in its possession regarding the historical and socio-economic circumstances of First Nations communities. The Central Administrator will make use of the information to inform the determination of what was an "essential service", a "service gap" or "unreasonable delay".

3. Individual claims are required in all cases, even where more than one child in a community faced similar unmet needs due to the lack of access to the same or similar essential services.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 28, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: May 28, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton and Max Binnie, counsel for the Respondent

Maggie Wente and Sinéad Dearman counsel for the Chiefs of Ontario, Interested Party

Julian Falconer and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 7
Date: April 16, 2020
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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Reasons on Three Questions Regarding Eligibility for Compensation

I. Context

[1] On September 6, 2019, the Tribunal rendered its decision on the issue of compensation remedies (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 [*Compensation Decision*]) and found Canada liable to pay compensation under the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*) to victims/survivors of its discriminatory practices, namely First Nations children and their parents or grandparents (caregivers).

[2] The Panel finds it important to reiterate the significant context and findings in which the compensation order was decided and has reproduced a summary of its decision in the *Compensation Decision* below:

> [13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being $40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which […] and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its Decision that the Federal First Nations child welfare program is negatively impacting

> First Nations children and families it undertook to serve and protect. The gaps and adverse effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws
>
> [14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination
>
> [15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada.
>
> (*Compensation Decision* at paras. 13-15)

[3] Furthermore, in its decision, the Panel also directed the First Nations Child and Family Caring Society of Canada (Caring Society), the Assembly of First Nations (AFN) and Canada to discuss possible options, to consult with the Commission, Chiefs of Ontario (COO) and Nishnawbe Aski Nation (NAN) on a process for identifying specific victims or distributing the compensation and to return to the Tribunal on February 21, 2020 with their proposals.

[4] After discussions, the Caring Society, the AFN and Canada have created a draft "Framework for the Payment of Compensation under 2019 CHRT 39" (the "Draft Framework") that sets out proposals on implementation that they have agreed to as of February 21, 2020. This Draft Framework has not yet been finalized and the parties have now requested the Tribunal to rule on three questions where they did not reach a consensus and required further guidance from this Panel.

[5] On February 28, 2020, the Attorney General of Canada (AGC) wrote a letter to the Tribunal indicating that no party wished to file a reply on those three questions and confirmed that the three questions could now be taken under reserve by the Panel.

[6] On March 3, 2020, the Panel sought the parties' views on a specific case related to one of the three questions and the parties' submissions were received on March 11, 2020.

[7] Finally, on March 16, 2020, the Panel reached a decision on the three questions, and in the interests of expediency and to facilitate resolution, its determinations were provided in a short form with full reasons to follow shortly. That format is consistent with an oral ruling issued from the bench. The full reasons are outlined in this ruling.

II. Question 1) At what age should beneficiaries gain unrestricted access to the compensation?

[8] **Decision:** The provincial/territorial age of majority

A. The First Nations Child and Family Caring Society of Canada's Position

[9] The Caring Society argues that compensation should only be paid to victims/survivors who are 25 years of age and older, rather than by relying on the provincial/territorial ages of majority, with an exception for those aged 18-25 who wish to access funds for education or for "compelling compassionate reasons". The Caring Society argues that children are a highly vulnerable group, and society recognizes this, building structures to protect them from making decisions they are not adequately prepared to make is appropriate.

[10] The Caring Society contends that current age of majority presumptions, are premised on a societal belief that the once they transition to adulthood, people are less impulsive and susceptible to peer pressure, better able to understand complex concepts and appreciate risks and consequences. However, the Caring Society's position is that such growth should not be presumed to occur at an age which was somewhat arbitrarily chosen by legislatures.

[11] The Caring Society cites Lord Scarman from his concurring 1985 reasons in *Gillick v. West Norfolk and Wisbech Area Health Authority*, which were quoted by the Supreme Court of Canada in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para. 51:

> … The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose on the process of "growing up" fixed limits where nature knows only a continuous

> process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change ….

[12] The Caring Society argues that research in the areas of child development and neuroscience provide the same conclusion as Lord Scarman: effectively, the process of maturation is a continuous one, and that the "age of transition" is closer to 25 years. The Caring Society provided the Tribunal with an expert report prepared by Dr. Sidney Segalowitz, a professor of psychology and neuroscience, to support its position. Dr. Segalowitz's evidence advances that brain development continues past age 18 and levels off at approximately 25 years old for healthy individuals.

[13] Dr. Segalowitz's research is summarized at page 4 of his report as follows:

> There is growing consensus that, for many important functions, the average age at which brain development in healthy individuals' asymptotes is about 25 years. However, there will be a sizable group whose trajectory is behind this schedule as well as some ahead of it. This can be for a number of reasons. […] The research […] has led us to this average figure of 25 years for some developmental process and the various factors that can interfere with this normative trajectory.

[14] In arriving at this finding, Dr. Segalowitz reviews the current research on brain development and suggests that the mental functions most associated with adult maturity involve emotional self-regulation and complex cognitive functions involving attention, memory and inhibitory control. Risk-taking is a key concern among young people, especially when in the presence of peers. Impulsivity and sensation-seeking behaviours decrease gradually through adolescence, according to Dr. Segalowitz, and there is a major reduction in such behaviour in the 26-30 years range.

[15] Importantly, Dr. Segalowitz notes that negative early life experiences (such as chronic stress, poverty, poor nutrition, exposure to air and water pollution, pre- and post-natal drug exposure, traumatic brain injury and PTSD) can put an individual's mental health trajectory at risk by compromising brain growth in regions related to emotional self-regulation and cognitive processing.

[16] Dr. Segalowitz's evidence, the Caring Society argues, is illustrative of the fact that scientific knowledge on brain development has made significant advances since the time

when provincial ages of majority were set in the 1970's. The scientific evidence provided by Dr. Segalowitz, coupled with the 'egregious nature of the harm and adverse impacts experienced by the child victims in this case' points to payment at age 25 as the only appropriate result, according to the Caring Society.

B. The Assembly of First Nations' Position

[17] The AFN disagrees with the Caring Society's proposal on this issue, pointing instead to provincial legislation on age of majority as well as laws which lay out duties of property guardians upon a minor attaining the age of majority. Section 53 of Ontario's *Children's Law Reform Act*, RSO 1990, c C.12, for example, provides that guardians of property must transfer to the child all property in the care of the guardian when the child attains the age of eighteen years. Similarly, the *Indian Act*, RSC 1985, c I-5 provides at s. 52 that the Minister can appoint guardians of property for infant children under the Act's jurisdiction, but at s. 52.3(1) specifies that any property held for them must be conveyed to the child in lump sum upon attaining the age of majority.

[18] The AFN points to trust law in support of its argument that distribution at an age higher than the provincial/territorial age of majority would be problematic. They cite the rule in *Saunders v. Vautier*, summarized by the Supreme Court of Canada in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28 as follows at para 21:

> The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton: Law of Trusts and Trustees* (14th ed. 1987), at p. 628:
>
> > If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or trustees.

[19] The AFN also cites two cases where structured settlements (arrangements through which claimants can receive all or part of a settlement by way of periodic payments rather

than via lump sum) established by court order were modified or extinguished where trust beneficiaries were capable of managing their own affairs. (See *Hubbard v Hubbard*, 140 ACWS (3d) 216, 2005 CanLII 20811 (ONSC) and *Grieg v National Trust Co*, 47 BCLR (3d) 42, 1998 CanLII 4239 (BCSC)).

C. The Canadian Human Rights Commission's Position

[20] The Commission ultimately takes no position on the question of the appropriate age for receiving compensation. That said, in light of the evidence provided by the Caring Society in support of its position, the Commission does share a concern that young persons in the period of 'emerging adulthood', may face unique challenges or pressures if substantial sums of money are suddenly made available to them. The Commission points out that potential beneficiaries will have faced discrimination and may have been impacted by other forms of marginalization and disadvantage which could add to their vulnerability. For these reasons, regardless of what minimum age may eventually be selected for paying out compensation awards, it will be critically important for Canada to follow through on the laudable commitments made in the Draft Framework to adequately fund the delivery of culturally-appropriate financial and other supports to beneficiaries.

D. The Chiefs of Ontario's Position

[21] The COO did not take any position on this question.

E. The Nishnawbe Aski Nation's Position

[22] The NAN did not take any position on this question.

F. Canada's Position

[23] The AGC advances that a child's unrestricted access to the compensation should coincide with attaining the age of majority set by their home province or territory. Even Indigenous Services Canada's own Social Programs National Manual 2017-2018 refers

back to the provincial or territorial legislation to determine age of majority. Such an approach, according to the AGC, would ensure that First Nations children who may receive a benefit are treated equally to their same-age peers in the place where they reside. No other approach, the AGC argues (including the one proposed by the Caring Society) is justifiable. The AGC suggests that approaches encouraging deviation from well-established norms around age of majority would be best directed at the legislatures who set the approach to age of majority.

G. Analysis

[24] Throughout all of its decisions and rulings, the Panel has consistently stressed the importance of responding to the specific needs of First Nations children and families and avoiding a one-size-fits-all approach. This reasoning was applied in crafting its orders and remains the backdrop for all its considerations. While the Panel also discussed the need to respond to the specific needs of First Nations Child and Family Services Agencies, it emphasized that the decision was about children and their families and meeting their specific needs. The Panel believes that this reasoning respects substantive equality and upholds each child's fundamental human rights in recognizing that each child is unique and may have different needs, culture, teachings, values, aspirations and circumstances.

[25] This being said, the Panel does share the Caring Society and the Commission's concerns, outlined above, that young adults in the period of 'emerging adulthood', may face unique challenges or pressures if substantial sums of money are suddenly made available to them. Some of them will have faced discrimination and may have been impacted by other forms of marginalization and disadvantage which could add to their vulnerability. The Panel also shares the same concerns for other vulnerable adults above the age of 25.

[26] While the expert evidence is compelling it remains untested in these proceedings and also is insufficient to outweigh the legislators' intent expressed in legislation in each Province/Territory that has already determined the age of majority. The Panel is not convinced by the case law cited by the Caring Society in support of its position and finds it does not trump Provincial/Territorial legislation in that regard.

[27] Of note, some of those same young adults may be parents of young children themselves which is arguably a more significant responsibility than that of administrating large sums of money. The Panel has difficulty reconciling the Caring Society's position with the place that young adults aged 18-24 legally and practically occupy in society, which includes many legislated rights and the parenting role that some may hold.

[28] In addition, none of the other parties share the Caring Society's position on this question.

[29] Moreover, siding with the Caring Society on this point may result in engendering liabilities for the trust fund where young adults could potentially allege discrimination on the basis of age. While the Panel concedes that some young adults may experience difficulty handling large sums of money awarded as compensation, the Panel believes that barring **all** 18-24-year-old victims/survivors across Canada from receiving compensation is unreasonable. The Panel would prefer that vulnerable young adults who need and desire counsel and assistance be able to access it as part of the compensation process.

[30] That said, as part of the Caring Society's significant work on the compensation process, it entered into an agreement with Youth in Care Canada (YICC), a national charitable organization for youth in care and formerly in care, to organize a national consultation with First Nations youth in care and formerly in care regarding the compensation process. Following the consultations, YICC worked independently to produce a report with two main objectives:

1. Provide recommendations to the Caring Society on the process for distributing the funds, with consideration to children in vulnerable circumstances; and
2. Provide recommendations to alleviate risks that providing additional funds to certain primary caregivers may increase the family risk level.

[31] YICC issued a report including a series of recommendations for the compensation process and, while they desire to continue their reflection and work on the compensation process, they did not yet recommend to raise the age of unrestricted access to the compensation funds to 25 years old (See exhibit 11 to Dr. Blackstock's affidavit dated December 2019).

[32] While the YICC did not recommend raising the age of unrestricted access to the compensation funds to 25 years old, it proposed a number of relevant recommendations such as healing circles; support for counselling or therapy; navigational support; mental health supports to help with youth's experiences and challenges; continued support after compensation; mental health supports and navigational assistance to help youth apply for compensation; restitution for children and youth who have died while in care or due to their experiences in the child welfare system; youth's compensation paid to parents, grandparents or to a trust fund; offering non mandatory financial training for youth receiving compensation; and awareness training offered to recipients about predatory banks and financial institutions like those that swindled compensation from residential school survivors.

[33] The Panel generally agrees with those recommendations.

[34] Furthermore, the Panel believes the Draft Framework should include the currently proposed supports for compensation beneficiaries and should consider including additional supports. In sum, adequate support for young adults and all persons receiving compensation, culturally appropriate services, access to financial advisers, mental health supports, guidance from Elders, etc., could alleviate some of the concerns raised by the Caring Society and the Commission. The Panel strongly encourages the parties to maintain or include such provisions in the Draft Framework to ensure the Draft Framework best supports reconciliation between First Nations and Canada.

[35] For the reasons above, the Panel prefers the AFN and the AGC's positions on this question.

H. Order

[36] The provincial/territorial age of majority is determined to be the age for victims/survivors/beneficiaries to gain unrestricted access to the compensation.

III. Question 2) Should compensation be available to children who entered care prior to January 1, 2006 but remained in care as of that date?

[37] **Decision**: Yes

[38] As part of the parties' three questions, another sub-question was also included as part of question 2. It is a request from the Caring Society for compensation for the parents and caregiving grandparents of children who entered care prior to January 1, 2006 but remained in care as of that date. While the above question 2 wording does not reflect this request, it was considered by this Panel given that all parties had an ample opportunity to make full submissions on this question. The Panel believes that it is appropriate to also include its reasons and determination on this point as part of this present ruling.

A. The First Nations Child and Family Caring Society of Canada's Position

[39] The Caring Society argues that an interpretation of the *Compensation Decision* which includes children in care as of January 1, 2006 (but who were removed earlier) and their caregivers is supported by the Tribunal's reasons in both *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 [*Merit Decision*] and the *Compensation Decision*.

[40] In doing so, the Caring Society points to the Tribunal's repeated emphasis on the harms associated with apprehension, removals and family/community separation. Put plainly, the Caring Society suggests that the question to be answered is: As of January 1, 2006, "which children were being harmed by Canada's discriminatory practices?" The answer put forward by the Caring Society is that it was children **in care** as of that date, as well as those taken into care thereafter. The Caring Society advances that discrimination experienced by those children, and their caregivers, is virtually identical and rooted in the very same set of facts which led the Tribunal to find discrimination.

B. The Assembly of First Nations' Position

[41] The AFN shares the Caring Society's view that if a child was in care as of January 1, 2006, the date of removal should be immaterial. The AFN asserts that those children experienced the same harms and discrimination as children who came into care on or after January 1, 2006.

C. The Canadian Human Rights Commission's Position

[42] The Commission advances that while, as pointed out by Canada, the temporal scope of the order is relatively clear on its face, the underlying goals of the compensation order should be considered for cases of children who were removed from home before January 1, 2006 but remained in care as of that date.

[43] The Commission also points to para. 270 of the *Compensation Decision*, where the Panel explicitly retained jurisdiction over a number of issues, welcoming "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." This, the Commission argues, is indicative of a clear retention of jurisdiction and thereby the Panel is not *functus officio* on those matters.

D. The Chiefs of Ontario's Position

[44] The COO did not take any position on this question.

E. The Nishnawbe Aski Nation's Position

[45] The NAN adopts and relies on the Caring Society's position on this question. The NAN submits that children in care prior to January 1, 2006 and as of January 1, 2006, who were removed from their homes for compensable reasons per the Tribunal's compensation entitlement order should be entitled to compensation. According to the NAN, these children and their primary caregivers, were deprived of the opportunity to be reunited with their families in a timely manner during the eligibility period set out by the Tribunal.

F. Canada's Position

[46] The AGC argues that compensation should be payable only to those who entered care **after** the complaint was instituted. The AGC claims that the complaint itself, the

Compensation Decision, and an analysis of the Tribunal's statutory jurisdiction are supportive of this position.

[47] The AGC points out in particular the following excerpt, from para. 245 of the *Compensation Decision*, where the Panel ordered Canada to pay… "$20,000 to each First Nation child removed from its home, family and community between **January 1, 2006** [and a date to be determined]" [Emphasis in original]. It points out two other instances in the decision where exact dates were listed and bolded as being further indicative of a clear intent by the Panel to provide exact dates in exercising its remedial powers under s. 53 of the *CHRA* (see paras 249 and 251). The Panel could not have been clearer, the AGC argues, that based on its assessment of the evidence, January 1, 2006 was that date on which the discrimination was found to have begun, and to extend the scope for compensation to any time period predating that date would be to re-write the judgment.

[48] With respect to compensation under Jordan's Principle, the AGC submits that the Panel was also clear. At para. 251, compensation was also for a defined period, Dec. 12, 2007-November 2, 2017. These dates were also placed in bold in the judgment.

[49] The AGC further argues that it is apparent that the Panel carefully considered the matter of when discrimination occurred for the purposes of exercising its jurisdiction under s. 53 of the *CHRA*.

[50] The AGC further suggests that such potential beneficiaries would be able to access compensation via one of the two as-yet-uncertified class actions which have been filed in Federal Court seeking compensation for those who fall outside of the timelines established by the Tribunal's *Compensation Decision*. The AGC says that it has announced that it would compensate children affected by the discrimination found in the *Merit Decision* even where they fall outside of the terms of the complaint. According to the AGC, a class action, would be an appropriate vehicle to do so.

G. Analysis

[51] The Panel in its *Compensation Decision*, has clearly left the orders open to possible amendments in case any party, including Canada, wanted to add or clarify categories of

victims/survivors or wording amendments to the ruling similar to the process related to the Tribunal's ruling in 2018 CHRT 4 and also informed by the process surrounding the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35. While this practice is rare, in this specific ground-breaking and complex case it is beneficial and also acknowledges the importance of the parties' input and expertise in regards to the effectiveness of the Panel's orders.

[52] The Panel explicitly retained jurisdiction over compensation (see *Compensation Decision* at para. 277), including on a number of issues as part of the compensation process consultation, welcoming any comments, suggestions and requests for clarification from any party in regards to moving forward with the compensation process and the wording or content of the orders. For example, whether the categories of victims/survivors should be further specified or new categories added (see *Compensation Decision* at para. 270).

[53] This is a clear indication that the Panel was open to suggestions for possible modifications of the *Compensation Decision* Order, welcoming comments and suggestions from any party. The Panel originally chose the January 1, 2006 and December 2007 cut-off dates following the Caring Society's requests in its last compensation submissions with the understanding that the evidence before the Tribunal supported those dates and also supported earlier dates as well. Considering this, instead of making orders above what was requested, the Panel opted for an order including the possibility of making amendments or further compensation orders. The Panel was mindful that parties upon discussion of the compensation orders and process may wish to add or further specify categories of compensation beneficiaries. This process is complex and requires flexibility.

[54] Furthermore, the Federal Court in *Grover v. Canada (National Research Council)* (1994), 80 FTR 256, 28 Admin LR (2d) 231 (F.C.) [*Grover*], a case that this Panel relied on in previous decisions in this case (see for example, 2017 CHRT 14, at para. 32, see also 2018 CHRT 4 at para. 39), an application for judicial review of a Tribunal decision had to decide whether the Tribunal had the power to reserve jurisdiction with regards to a remedial order. *Grover* is summarized as follows in *Berberi v. Attorney General of Canada*, 2011 CHRT 23 [*Berberi*]:

[13] …The Tribunal had ordered that the complainant be appointed to a specific job, but retained jurisdiction to hear further evidence with regards to the implementation of the order. The Federal Court held that although the *Act* does not contain an express provision that allows the Tribunal to reopen an inquiry, the wide remedial powers set out therein, coupled with the principle that human rights legislation should be interpreted liberally, in a manner that accords full recognition and effect to the rights protected under such legislation, enables the Tribunal to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants (see *Grover* at paras. 29-36). The Federal Court added:

[14] It is clear that the Act compels the award of effective remedies and therefore, in certain circumstances the Tribunal must be given the ability to ensure that their remedial orders are effectively implemented. Therefore, the remedial powers in subsection 53(2) should be interpreted as including the power to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants. The denial of such a power would be overly formalistic and would defeat the remedial purpose of the legislation. In the context of a rather complex remedial order, it makes sense for the Tribunal to remain seized of jurisdiction with respect to remedial issues in order to facilitate the implementation of the remedy. This is consistent with the overall purpose of the legislation and with the flexible approach advocated by Sopinka J. in *Chandler, supra*. It would frustrate the mandate of the legislation to require the complainant to seek the enforcement of an unambiguous order in the Federal Court or to file a new complaint in order to obtain the full remedy awarded by the Tribunal. (*Grover* at para. 33)

[15] Similarly, in *Canada (Attorney General) v. Moore*, [1998] 4 F.C. 585 [*Moore*], the Federal Court had to determine whether the Tribunal exceeded its jurisdiction by reconsidering and changing a cease and desist order. Having found the complaint to be substantiated, the Tribunal made a general direction in its order and gave the parties the opportunity to work out the details of the order while the Tribunal retained jurisdiction. After examining the reasoning in *Grover* and *Chandler*, the Federal Court stated:

[16] The reasoning in these cases supports the conclusion that the Tribunal has broad discretion to return to a matter and I find that it had discretion in the circumstances here. Whether that discretion is appropriately exercised by the Tribunal will depend on the circumstances of each case. That is consistent with the principle set out in *Chandler v. Alberta Association of Architects*, relied upon by the applicant, which dealt with the decision of a board other than the Canadian Human Rights Tribunal. (*Moore* at para. 49)

[17] The Federal Court determined that the Tribunal had reserved jurisdiction and there was no indication that the Tribunal viewed its decision as final and conclusive in a manner that would preclude it from returning to a matter included in the order. Therefore, on the authority of *Grover*, the Federal

Court concluded that subsection 53(2) of the *Act* empowered the Tribunal to reopen the proceedings (see *Moore* at para. 50).

[18] The Tribunal jurisprudence that has considered the *functus officio* principle and interpreted *Grover* and *Moore*, has generally found that absent a reservation of jurisdiction from the Tribunal on an issue, the Tribunal's decision is final unless an exception to the *functus officio* principle can be established (see *Douglas v. SLH Transport Inc.*, 2010 CHRT 25; *Walden v. Canada (Social Development)*, 2010 CHRT 19; *Warman v. Beaumont*, 2009 CHRT 32; and, *Goyette v. Voyageur Colonial Ltée*, (November 16, 2001), TD 14/01 (CHRT)). However, recent Federal Court jurisprudence, decided several years after *Grover* and *Moore* and which examined the authority of the Commission to reconsider its decisions, provides further guidance on the application of the *functus officio* principle to administrative tribunals and commissions.

(*Berberi* at paras. 13-18, emphasis ours)

[21] The application of the *functus officio* principle to administrative tribunals must be flexible and not overly formalistic (see *Chandler* at para. 21). In *Grover*, in determining whether the Tribunal could supervise the implementation of its remedial orders, the Federal Court recognized that the Tribunal has the power to retain jurisdiction over its remedial orders to ensure that they are effectively implemented. In *Moore*, in deciding whether the Tribunal could reconsider and change a remedial order, the Federal Court expanded on the reasoning in *Grover* and stated that "the Tribunal has broad discretion to return to a matter..." (*Moore* at para. 49). In *Grover* and *Moore*, while the retention of jurisdiction by the Tribunal was a factor considered by the Federal Court in determining whether the Tribunal appropriately exercised its discretion to return to a matter, ultimately, it was not the only factor considered by the Court. In addition to examining the context of each case, the Tribunal must also consider whether "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation" (*Chandler* at para. 22). This method of analyzing the Tribunal's discretion to return to a matter is consistent with the Federal Court's reasoning in *Kleysen* and *Merham*. The question then becomes: considering the *Act* and the circumstances of the case, should the Tribunal return to the matter in order to discharge the function committed to it by the *Canadian Human Rights Act*?

[22] The primary focus of the *Act* is to "...identify and eliminate discrimination" (*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 13). In this regard, subsection 53(2) of the Act grants the Tribunal broad remedial discretion to eliminate discrimination when a complaint of discrimination is substantiated (see *Grover* at para. 31). Therefore, as the Federal Court has stated, "subsection 53(2) should be interpreted in a manner which best facilitates the compensation of those subject to discrimination"

> (*Grover* at para. 32). The *Act* does not provide a right of appeal of Tribunal decisions, and judicial review is not the appropriate forum to seek out the implementation of a Tribunal decision. As the Federal Court indicated to the Complainant: "The Applicant is at liberty to seek an order from the Tribunal with respect to implementation of the remedy" (*Berberi v. Canadian Human Rights Tribunal and Attorney General of Canada (RCMP)*, 2011 FC 485 at para. 65). When the Tribunal makes a remedial order under subsection 53(2), that order can be made an order of the Federal Court for the purposes of enforcement under section 57 of the *Act*. Section 57 allows decisions of the Tribunal to "...be enforced on their own account through contempt proceedings because they, like decisions of the superior Courts, are considered by the legislator to be deserving of the respect which the contempt powers are intended to impose" (*Canada (Human Rights Commission) v. Warman*, 2011 FCA 297 at para. 44).
>
> (*Berberi,* at paras. 21-22)

[55] The Panel agrees with the above reasoning outlined in *Berberi* on the retention of jurisdiction over remedial orders to ensure that they are effectively implemented and has adopted and followed this approach from the *Merit Decision* and onward.

[56] Additionally, the Tribunal used a similar approach to remedies in *Grant v. Manitoba Telecom Services Inc.*, 2013 CHRT 35 [*Grant*] once the decision on the merits was rendered:

> [3] The Tribunal retained jurisdiction on many of the remedies requested by the Complainant, including the missed pension contributions, in order to get further submissions and clarification from the parties.
>
> [4] Both parties were given the opportunity to provide additional submissions on the Complainant's outstanding remedial requests from *Grant (decision)* on a conference call on July 10, 2012.
>
> (*Grant* at paras. 3-4, emphasis ours).
>
> [7] In *Grant (remedies)*, the Tribunal again retained jurisdiction in the event the parties were unable to reach an agreement on the pension remedy, among others.
>
> [8] The parties have been unable to work out the details of the Complainant's lost pension and disagree on what remedy the Tribunal ordered with respect thereof.
>
> (*Grant*, 2013 CHRT 35 at paras 7-8, emphasis ours).

[57] The Tribunal in *Grant* provided further direction on the remedy in that subsequent ruling. Of interest, this case was challenged at the Federal Court after the decision on the merits while the Tribunal was deciding further remedies. The application for judicial review was ultimately discontinued.

[58] Furthermore, the Panel does not agree with the AGC's position, mentioned above, that the complaint itself, the Panel's *Compensation Decision*, and an analysis of the Tribunal's statutory jurisdiction all support that compensation should be payable only to those who entered care after the complaint was instituted.

[59] Additionally, the Supreme Court of Canada in *Moore v. British Columbia (Education), 2012 SCC 61* at, para.64 *[Moore])* stated that the remedy must flow from the claim. Moreover, the Tribunal in the *Compensation Decision* analyzed the claim and found that the claim consists of the complaint, the Statement of Particulars, and the specific facts of the case (see *Compensation Decision* at para. 103).

[60] It is useful here to do a review of the complaint, the Caring Society's Statement of Particulars and the Panel's rulings to understand the claim on this point. Relevant extracts are reproduced below:

> […] This review, known as the *Joint National Policy Review on First Nations Child and Family Services* (NPR MacDonald & Ladd) provides some insight into the reasons why there has been such an increase in the numbers of Registered Indian children entering into care. The review found that INAC provides funding for child welfare services only to Registered Indian children who are deemed to be ''eligible children" pursuant to the Directive. An eligible child is normally characterized as a child of parents who are normally resident on reserve. Importantly, the preamble to the Directive indicates that the formula is intended to ensure that First Nations children receive a ''comparable level'' of service to the other children in similar circumstances […] Overall, the Directive was found to provide 22% less funding per child to FNCFCSA's than the average province. A key area of inadequate funding is a statutory range of services, known as least disruptive measures, that are provided to children and youth at significant risk of child maltreatment […] The NPR also indicates that although child welfare costs are increasing at over 6% per year there has not been a cost of living increase in the funding formula for FNCFCSA's since 1995. Economic analysis conducted last year indicates that the compounded inflation losses to FNCFCSA's from 1999-2005 amount to $112 million nationally.

> […] It has been over 6 years since the completion of NPR and the Federal government has failed to implement any of the recommendations which would have directly benefited First Nation children on reserve. As INAC documents obtained […] in 2002 demonstrate, the lack of action by the Federal government was not due to lack of awareness of the problem or the solution. Documents sent between senior INAC officials confirm the level of funding in the Directive is insufficient for FNCFCSA's to meet their statutory obligations under Provincial child welfare laws- particularly with regard to least disruptive measures resulting in higher numbers of First Nations children entering child welfare care (INAC, 2002).
>
> […] Despite having apparently been convinced of the merits of the problem and the need for the least disruptive measures INAC maintained that additional evidence was needed to rectify the inequitable levels of funding documented in the NPR. […]
>
> […] Additionally, as Canada redresses the impacts of residential schools it must take steps to ensure that old funding policies which only supported children being removed from their homes are addressed.
>
> […] INAC has been aware of this problem for a number of years and was presented with an evidence base of this discrimination in June 2000 with the two *Wen:de* reports being delivered in August and October of 2005 respectively. These reports were followed by the Canadian Incidence Study Report […] in June of 2006.

[61] In light of the complaint reproduced above, the Panel finds that the complaint clearly mentions that INAC was aware of the alleged discrimination, which has now been proven, as early as the 2000 Joint National Policy Review (2000 NPR).

[62] The Caring Society's Statement of Particulars also specifically mentions the 2000 NPR at paras.14-15 and 20-21, reproduced below:

> 14. Furthermore, this Tribunal will have the opportunity of hearing from the Complainants' witnesses in support of each of the following facts:
>
> > (i) The Complainants, together with Canada, participated in a series of expert studies[7] designed to examine the nature of the differential treatment in the provision of statutory child welfare and child protection services on and off reserve and to provide recommendations on the improvement to Canada's current funding structures, policies and formulas;
> >
> > (ii) The findings contained in the expert studies substantiate the differential treatment arising from the current funding structures,

> policies and practices to the severe detriment of registered First Nation children and families normally resident on reserve;
>
> (iii) Canada's response, without supporting expert analysis and opinion, included strategies that did not redress the inequities.[8] Separate and independent reports from the Auditor Generals of Canada and British Columbia in May of 2008, and the recent March 2009 Report of the Standing Committee on Public Accounts[9] found that Canada's response did not redress the inequities;
>
> (iv) Canada independently commissioned studies that came to the same conclusion[10] as that of the Complainants in respect of the inequities;
>
> (v) Canada did not provide the Canadian Human Rights Commission with any factual material to contradict the assertions of discriminatory practices in the Complaint; and
>
> (vi) Canada has acknowledged that the current funding practices and structure contribute to disproportionately growing numbers of registered First Nation children in child welfare and protection care and results in First Nations Child and Family Services Agencies being unable to meet their statutorily mandated responsibilities[11].

15. The Canadian Human Rights Commission requested an inquiry. An inquiry is necessary because findings of fact are required for a determination of the legal issues.

> [7] The studies include the "Joint National Policy Review-Final Report" of June 2000 and a series of three reports: "Bridging Econometrics and First Nations Child and Family Service Agency Funding" (2004); "Wen:de We Are Coming to the Light of Day" (2005) and "Wen de The Journey Continues" (2005)

[…]

20. The evidence will demonstrate that the needs of First Nations Child and Family Services Agencies and the needs of the children and families that they serve are certainly not less[18] than those of children and families off reserve and the agencies that serve them, and thus the remedy sought.

> [18] The Complainants rely upon the Royal Commission on Aboriginal Peoples.

Relief Requested

21. The purpose of the tribunal hearing is to achieve a substantiation of the complaint to the Commission and for an order against the federal authorities:

> (1) Pursuant to section 53 (2)(a) of the CHRA requiring the immediate cessation of disparate funding, as described above;
>
> (2) Pursuant to section 53(2)(a), and in order to redress the discriminatory practices:
>
> (a) The application of Jordan's Principle to federal government programs affecting children and which implementation shall be approved by the Canadian Human Rights Commission in accordance with section 17;
>
> (b) The adoption of all of the funding formula (updated to 2009 values) and policy recommendations contained in "Wen:de The Journey Continues [:] The National Policy Review on First Nations Child and Family Services Research Project Phase 3" and which implementation shall also be approved by the Canadian Human Rights Commission in accordance with section 17; and
>
> […]
>
> (a) As compensation, subject to the limits provided for in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989[19] and thereby experienced pain and suffering;
>
> [19] As the evidence at the hearing will reveal, in 1989, Canada introduced the funding formula known as "Directive 20-1, Chapter 5,"

[63] The NPR is part of the evidence before the Tribunal (see Joint National Policy review, Exhibit HR-1, Tab 3: Dr. Rose-Alma J. MacDonald & Dr. Peter Ladd et al., *First Nations Child and Family Services Joint National Policy Review Final Report* (Ottawa: Assembly of First Nations and Department of Indian Affairs and Northern Development, 2000)). Likewise, the findings before the Tribunal discuss the 2000 NPR numerous times, (see for example *Merit Decision* at paras 150-154, 216, 224, 257, 260, 262 and 264). More specifically, the Panel found the NPR and Wen:de reports to be highly relevant and reliable evidence in this case:

> They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program.
> (*Merit Decision* at para. 257)

[64] Additionally, in the *Compensation Decision* the Panel found that:

> Canada was aware of the discrimination and some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the WEN DE report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunals orders. As the Panel already found in previous rulings, Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.
> (*Compensation Decision* at para. 231, emphasis added see also, paras. 156, 162 and 170)

[65] The above excerpts support that the claim, the evidence and the findings clearly establish that the discrimination was ongoing as early as the year 2000.

[66] What is more, the evidence before the Tribunal established that Canada was already cognizant of the discrimination in 1996 in light of the findings of the 1996 report of the Royal Commission on Aboriginal Peoples (RCAP), part of the Tribunal's evidentiary record that forms part of the claim and also forms part of the Tribunal's evidence and findings (see complaint extracts above and *Compensation Decision* at paras. 1 and 168-169).

[67] Additionally, the AGC's argument that the two class actions filed at the Federal Court could potentially provide compensation to children who were in care prior to January 1, 2006 is speculative and not convincing. The class actions have not yet been certified and it is unclear if Canada will support the certification. Given the early stages of the filed class actions, this argument is concerning as it involves further delays for victims of Canada's racial discrimination.

[68] In addition, a compensation process under the *CHRA* is different than that of a Court where a class action may be filed.

[69] Additionally, this Panel indicated in the *Compensation Decision* at para. 188 the following:

> The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not see section 50 (3) (c) of the *CHRA*

[70] Moreover, the Panel already voiced the crucial context of this case namely, the mass removal of children from their respective First Nations along with "the impracticalities and the risk of revictimizing children which outweigh the difficulty of establishing a process to compensate all the victims/survivors and the need for the evidence presented of having a child testify on how it felt to be separated from its family and community." (*Compensation Decision* at para. 189).

[71] Finally, on this point, all the above support an order providing compensation to First Nations children living on reserve and in the Yukon Territory, who were taken into care prior to or on January 1, 2006 and remained in care on January 1, 2006 and to their parents or caregiving grandparents. The Panel agrees with the Caring Society and the AFN that the discrimination experienced by those children and their caregivers, as they experienced the same harms rooted in the very same set of facts which led the Tribunal to find discrimination, was the same as that experienced by the children who came into care after January 1, 2006.

[72] Finally, the AGC advances that it has announced it would compensate the children affected by the discriminatory underfunding found in the *Merit Decision*, even where the children affected fall outside the terms of the complaint and that a class action, would be an appropriate vehicle to do so. The Panel believes this important acknowledgment that First Nations children will be compensated supports the Caring Society and the AFN's request. Also, the Panel notes that the Caring Society's submissions at page 3, para.11 refer to the December 11, 2019 House of Commons motion, passed unanimously and reproduced below:

> That the House call on the government to comply with the historic ruling of the Canadian Human Rights Tribunal ordering the end of discrimination against First Nations children, including by:

> (a) fully complying with all orders made by the Canadian Human Rights Tribunal as well as in ensuring the children and their families don't have to testify their trauma in court; and
>
> (b) establishing a legislated funding plan for future years that will end the systemic shortfalls in First Nations child welfare.
>
> (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279 [*Motion 296*])

[73] Given the above, it is surprising that the AGC now opposes this.

H. Orders

[74] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further orders:

[75] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal's *Compensation Decision* Order.

[76] Canada is also ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to First Nations parents or caregiving grandparents living on reserve and in the Yukon Territory of First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and were taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal's *Compensation Decision* Order.

IV. Question 3) Should compensation be paid to the estates of deceased individuals who otherwise would have been eligible?

[77] **Decision**: Yes

A. The First Nations Child and Family Caring Society of Canada's Position

[78] The Caring Society submits that the AGC's litigation strategy has caused significant procedural delays in this case. Moreover, to deny payment to the estates of any since-deceased victims of discrimination would be, to allow Canada to benefit improperly from these delays. More importantly, the Caring Society submits that hundreds of child victims have died in care since the Complaint was commenced.

[79] Significantly, Canada ought not benefit from a financial windfall simply because children, youth and family members have died waiting for Canada's discrimination to end. This is particularly so given the Tribunal's findings that Canada's discrimination is wilful and reckless and ongoing in the case of the First Nations Child and Family Service Program. Additionally, the Caring Society contends that one of the purposes of compensation pursuant to the *CHRA* is to remove the economic incentive for discrimination by ensuring that some measure of the cost savings respondents achieve by discriminating are returned to victims. Indeed, allowing Canada to financially benefit due to its own delays in having this case resolved could set a dangerous precedent and entice other respondents to delay cases in the future where a particularly vulnerable group or individual brings a case forward.

[80] In addition to caselaw cited by the Commission and some other provincial decisions, the Caring Society raises the 2003 Ontario case of *Clark v. Toshack Brothers (Prescott) Ltd.*, 2003 HRTO 27. In that decision, the Ontario Human Rights Tribunal adopted a similar principled analysis to that of this Tribunal in *Stevenson v. Canadian National Railway Company*, 2001 CanLII 38288 (CHRT) [*Stevenson*], ruling that the dual purposes of serving public and private interests militated in favour of ultimately allowing the proceedings to continue after the death of a complainant.

[81] Furthermore, on March 3, 2020, the Panel provided the parties with a case on this matter (*Commission des droits de la personne c. Bradette Gauthier*, 2010 QCTDP 10 (*Gauthier*)) and requested feedback. In *Gauthier*, the Quebec Human Rights Tribunal awarded discrimination remedies to the children of a complainant who died prior to the issuance of a decision in his case.

[82] The Caring Society adopts the submissions of the Commission on *Gauthier*.

[83] Regarding *Canada (Attorney General) v. Hislop*, 2007 SCC 10 [*Hislop*], the Caring Society acknowledges that s. 15 *Charter* damages generally do not survive the death of a claimant. However, they argue that it does not follow that this approach should be carried over to *CHRA* cases, pointing to the different language in s. 24(1) of the *Charter* as compared to ss. 53(2)(e) and 53 (3) of the *CHRA*, as well as the differing overarching legislative objectives. To support its position, the Caring Society points to academic commentary which argues that cross-fertilization between constitutional equality rights and statutory human rights regimes should only happen to enrich equality jurisprudence and not when doing so would undermine either's statutory objectives.

[84] The Caring Society raises several cases of individuals who otherwise would have qualified for compensation pursuant to the *Compensation Decision* but have since died. According to the Caring Society, these cases demonstrate the unfairness that would result from allowing Canada to effectively benefit (via cost savings) from their deaths.

[85] Finally, the Caring Society also makes an "in the alternative" argument that the Tribunal possesses the statutory authority as master of its own house to retroactively backdate its orders, and provides a variety of possible dates to do so. The prospective dates to which the order could be backdated include the date the Commission referred the complaint to the Tribunal, the originally-scheduled final hearing date on the merits, the actual final hearing date on the merits, the release date of the decision on the merits, the final date of the hearing on compensation or the release date of the compensation decision.

[86] The Caring Society submits that, in a scenario where the Tribunal opts to craft a *Hislop*-type rule, the earliest possible date would be the most just.

B. The Assembly of First Nations' Position

[87] The AFN's position on this matter is also that an otherwise-eligible individual who died prior to receiving compensation should see the compensation awarded to their estate. They rely on the same cases cited by the Commission and the Caring Society, pointing out that while *Hislop*, *British Columbia v. Gregoire*, 2005 BCCA 585 [*Gregoire*] and *Giacomelli Estate v. Canada (Attorney General)*, 2008 ONCA 346 [*Giacomelli*] have been applied in

several contexts, they are not determinative of the issue at hand. The AFN raises several contemporary cases including the recent case of *Pankoff v. St. Thomas (City)*, 2019 HRTO 993, an interim decision on a matter with a deceased complainant who was alleging discrimination in the context of government services, to support the argument that this issue is not settled law.

[88] The AFN provided extensive submissions on the Ontario case of *Morrison v. Ontario Speed Skating Association*, 2010 HRTO 1058 [*Morrison*], also raised by the Commission. In that case, a complainant filed an employment discrimination complaint but died shortly thereafter. The respondent brought a motion to dismiss, citing *Gregoire*, *Hislop* and *Giacomelli*. The Ontario Human Rights Tribunal (HRTO) found that common-law principles about abatement on death did not apply to statutory claims under the Ontario *Human Rights Code,* RSO 1990, c H.19. The AFN argues that the HRTO distinguished the *Gregoire* and *Charter* cases from the case before it, being a private employment relationship, but expressly left the question of its precedential value to similar cases of government services in the human rights context open, at para 31:

> The *Gregoire* decision itself is also distinguishable. Although both *Gregoire* and the present Application involve claims of breaches of provincial human rights statues, *Gregoire* involved an allegation that the provincial government had breached the applicant's right to be free from discrimination on the basis of disability under the *British Columbia Human Rights Code* by failing to provide appropriate supervision, treatment and counselling services. It was a claim against the government with respect to the provision of government services or benefits. In contrast, the Application before me involves an allegation of discrimination by a private employer. It is unnecessary for me to decide in this case whether *Gregoire* is a compelling precedent in the situation of a claim for government benefits and services, as this Application does not involve such a claim.

[89] The AFN also adopts the submissions of the Commission on *Gauthier*; while adding several additional submissions of their own. First, they point out that the Quebec *Charter* contains no language which would suggest the victim of discrimination must be alive to be compensated. Second, they suggest that there are parallels in terms of vulnerability and exploitation as between the victims of discrimination in *Gauthier* (nursing home residents) and here (First Nations children). Additionally, they argue that the payment of an award to the victim's children in *Gauthier* was appropriate in the given context. As many of the victims

in this case were children themselves and may not yet have produced heirs, an award to their estates would be more appropriate.

[90] Finally, the AFN submits that an individual who became deceased should still be able to pass on the compensation award to their estate.

C. The Canadian Human Rights Commission's Position

[91] The Commission provided extensive submissions on the issue of payments to estates. They are prefaced by a reminder that, in the view of the Commission, the progress of this case was stalled by multiple lengthy delays, often caused by Canada, and that it was sadly inevitable that some individuals will have died while awaiting the remedies stage.

[92] The Commission argues that the Tribunal's own caselaw is supportive of paying awards to estates, as is a purposive reading of the Tribunal's statutory remedial powers. The Tribunal's ruling in *Stevenson*, is put forward as the only occasion on which the Tribunal has dealt with the question of a complainant's death.

[93] In that case, a matter was settled in principle but the complainant died before the settlement was finalized. While the Tribunal ruled in *Stevenson* that the complaint could continue, there was no explicit ruling as to whether remedies for pain and suffering or wilful and reckless discrimination could also flow to the complainant's estate. The Commission notes that in its ruling in *Stevenson* the Tribunal cited *Barber v. Sears Inc (No. 2)*, (1993) 22 C.H.R.R. D/409 (Ont. Bd. Inq.) [*Barber*]. The *Barber* case was also a preliminary ruling where the Board found that it could continue with a complaint, even though the complainant had died after filing. In the subsequent decision on the merits, the Board found discrimination, and ordered the respondent to pay general damages to the complainant's estate. The Commission points out that two other provincial cases from the same time period similarly awarded remedies to estates, being *Allum v. Hollyburn Properties Management Inc.* (1991), 15 C.H.R.R. D/171 and *Baptiste v. Napanee and District Rod and Gun Club* (1993), 19 C.H.R.R. D/24.

[94] Furthermore, the Commission adds that two additional policy considerations militate in favour of paying estates. First, disallowing payments to estates could create perverse

incentives for respondents to delay cases, contrary to the requirement in 48.9(1) of the *CHRA* that hearings be conducted "as informally and expeditiously as the requirements of natural justice and the rules of procedure allow". Second, the Commission stresses that family separations often have intergenerational impacts, making it ever more important that payments should flow through estates to benefit the heirs to the victims of discriminatory practices.

[95] In addition to the above analysis of the Tribunal's own statute and jurisprudence, the Commission provided submissions on cases from other jurisdictions where human rights adjudicators have considered the impact of a complainant's death on the survival of proceedings/remedies.

[96] In *Gregoire*, the British Columbia Court of Appeal distinguished the CHRT's decision in *Stevenson* and held that the estate of a deceased complainant was not a "person" within the meaning of the BC Code (which, the Commission notes, is worded differently than the federal legislation). This case can and should be distinguished, the Commission argues.

[97] Regarding *Hislop*, the Commission stresses that it should be read contextually and was never meant to lay down a blanket rule. This is echoed by the Manitoba Court of Appeal, who noted that the Supreme Court declined to lay down a clear broad declaration that the right to redress for *Charter* violations ends on death (see *Grant v. Winnipeg Regional Health Authority et al*, 2015 MBCA 44). The Commission stresses that *Hislop* was decided on different facts: there, the individuals whose estates were looking to pursue equality claims had died prior to the passage of the legislation from which they alleged they were discriminatorily excluded. They were not alive at the time of the rights infringements, in contrast to the case at hand. Consequently, the Commission argues that *Hislop* should be distinguished, on the basis of the factual matrix as well as the language found in the differing statutory regimes.

[98] The Commission also cites provincial human rights jurisprudence (from Manitoba, Nova Scotia, Alberta and Ontario), where results on the issue differ. While not binding on the Tribunal, these cases are somewhat persuasive. Of note is *Morrison* where *Stevenson* is followed and *Gregoire* and *Hislop* are distinguished.

[99] With respect to the *Gauthier* case provided by the Panel, generally, the Commission finds the decision supportive of its proposed approach to compensating estates in this case. However, they do point out that there, payments were made to the complainant's successors rather than his estate. Payments to estates would be more appropriate in this case where it may not be possible to determine the proper beneficiaries at the outset of an awards process. The decision is further distinguishable on the basis that the respondents did not attend the hearing or make submissions about remedy. Furthermore, it is unclear when exactly the complainant died, which complicates assessing it in light of *Hislop*. And ultimately, it is persuasive rather than binding, being from a provincial body under a different piece of legislation.

D. The Chiefs of Ontario's Position

[100] The COO did not take any position on this question.

E. The Nishnawbe Aski Nation's Position

[101] NAN adopted the submissions of the Caring Society on this question.

F. Canada's Position

[102] The AGC points to the case of *Hislop* for the proposition that the estate of an individual is not a legal entity capable of experiencing discrimination (see paras. 72-73). *Hislop* was a *Charter* case concerning discrimination against same-sex partners under survivorship rules for the Canada Pension Plan. In *Hislop*, the Court crafted an approach whereby any members of the class who were alive at the time that the first hearing and arguments had concluded could take advantage of the judgement.

[103] The AGC's position is that the estates of individuals who were alive as of the time that the hearing of the original decision on the merits of the discrimination concluded (being October 24, 2014) should be entitled to compensation. Conversely, the AGC argues, those of any individuals who passed away after that date ought not to be. The AGC notes that

such a determination by the Tribunal would not necessarily preclude potential class actions from including such estates in any settlement negotiated between those parties.

[104] Canada does not believe that *Gauthier* provides any assistance to the Tribunal. They point out that it is from a different jurisdiction, under different legislation, and conflicts with more persuasive approaches from guiding courts (namely *Hislop*).

G. Analysis

[105] The specific facts and context of this case and the *CHRA's* objective and purpose are the starting point in the Panel's analysis (*Compensation Decision* at paras. 94-97 and 132): "The proper legal analysis is fair, large and liberal and must advance the *Act*'s objective and account for the need to uphold the human rights it seeks to protect. […] [O]ne should not search for ways and means to minimize those rights and to enfeeble their proper impact." (*Compensation Decision* at para.135).

[106] Furthermore, in the *Compensation Decision*, the Panel relied on this specific quote from the Supreme Court in *CN v. Canada (Canadian Human Rights Commission)*:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (see *CN v. Canada (Canadian Human Rights Commission*), 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, at, p. 1134) cited in 2015 CHRT 14 at, para.13)
>
> (*Compensation Decision* at para. 133)

[107] The Panel also adopts the reasoning in *Canada (Attorney General) v. Morgan*, [1992] 2 FC 401(FCA) at para. 49 where MacGuinan J.A (dissenting on other grounds) wrote "A

strict tort or contract analogy should not be employed, since what is in question is not a common law action but a statutory remedy of a unique nature".

[108] Moreover, the Panel agrees with the Caring Society's position that compensating estates is consistent with the remedial purposes of the *CHRA*, and that human rights legislation is not, according to the Supreme Court of Canada, to be limited or 'read down' in anything but the clearest cases of express legislative intent.

[109] On this point, the Supreme Court of Canada, ruled that human rights tribunals and courts cannot limit the meaning of terms in human rights legislation that are meant to advance the quasi-constitutional purposes of the *CHRA*: "the *Canadian Human Rights Act* is a quasi-constitutional document and we should affirm that any exemption from its provisions must be clearly stated" (*Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81).

[110] What is more, the issue of the Tribunal's ability under the *CHRA* to deal with a complaint after a complainant's death was discussed by the former Tribunal Vice-Chair Grant Sinclair, as he then was, in *Stevenson*. There, the Tribunal emphasized that prohibiting a victim's estate from proceeding with a claim would extinguish all interests of said victim, including the important public interest (see *Stevenson* at para 32). The Tribunal also found in *Stevenson* at paras. 23-35 as follows:

> [23] The core of CN's argument is that this common law principle applies so that the complaint terminates with the death of the Complainant. No provision in the *Act* or any other relevant legislation, nor a liberal interpretation of the *Act* allows for an Estate or Estate representative to continue the complaint before the Tribunal.
>
> [24] The starting point is the *Act*, which must be read in light of its nature and purpose. The purpose of the *Act* as set out in section 2, is to give effect to the principle of equal opportunity for individuals by eradicating invidious discrimination. That task should not be approached in a narrow, literal fashion. Rather the *Act* is to be given a large and liberal interpretation that will best obtain the objectives of the *Act* [(2)].
>
> [25] Reference to section 2 and other relevant provisions of the *Act* demonstrates that the *Act* extends beyond just individual rights and engages the broader public interest of freedom from discrimination.

[26] Section 40 of the *Act* permits an individual or group of individuals alleging discrimination to file a complaint with the Commission. These persons need not be the victims of the alleged discrimination. The Commission itself may initiate a complaint under Section 40(3) of the *Act*.

[27] As well, section 50(1) recognizes there may be "interested parties" to the complaint. The Tribunal has on many occasions given intervenor status to such parties in the hearing of the complaint.

[28] The Commission is a party in the hearing of a complaint. In such case the Commission does not appear as the representative of the individual Complainant but is there to represent the public interest (section 51).

[29] The Commission also exercises a screening role by way of the discretion given to it under sections 40(2) and Section 41 of the *Act*. In the exercise of this discretion, the Commission can determine whether or not a complaint goes forward to a hearing.

[30] The remedies provided by the *Act* are corroborative of the broader reach of the *Act*, beyond the interests of an individual complainant. Thus, under section 53(2), in addition to compensating the complainant, the Tribunal can:

- issue a cease and desist order against the person who committed the discriminatory practice;

- order such person to take or adopt practices in consultation with the Commission to redress the discriminatory practice, including the adoption of a special program under section 16(1) of the *Act* or the making of an application under section 17 of the *Act*.

[31] In my opinion, having regard to the regime of the *Act*, one must conclude that a human rights complaint filed under the *Act* is not in the nature of and does not have the character of an "action" as referenced in the *actio personalis* principle of law. The *Act* is aimed at the removal of discrimination in Canada, not redressing a grievance between two private individuals.

[32] If CN has its way, the death of the complainant would extinguish not only the interests of that complainant, but also all the other interests involved in the complaint, including the very significant public interest.

[33] Should the maxim *actio personalis*, a maxim that has its origins in medieval common law, a maxim whose anachronism is illustrated by the fact that in England and all common law jurisdictions in Canada the rule has been abolished,[(3)] be allowed to override the purpose and objectives of the *Canadian Human Rights Act*? I think not.

[34] Counsel cited a number of authorities. In my opinion, the most relevant case on this issue is *Barber v. Sears Canada Inc. (No.2)*[(4)]. This case supports

> the conclusion that, taking into account public interest considerations, a human rights complaint should not be stayed because of the death of the Complainant.
>
> [35] Accordingly, for the above reasons, I have concluded that the *actio personalis* maxim does not and should not apply to a human rights complaint under the *Act* and this proceeding should not be stayed on that ground.

[111] The Panel agrees with the Tribunal's reasoning in *Stevenson* above and finds it is applicable to this case.

[112] Furthermore, the HRTO, adopted a similar principled analysis to that of this Tribunal in *Stevenson*, ruling that the death of a complainant does not terminate a proceeding under the Ontario *Human Rights Code* and does not abolish the HRTO's jurisdiction to hear the complaint. In fact, the dual purposes of serving public and private interests militated in favour of ultimately allowing the proceedings to continue after the death of a complainant. (see *Clark v. Toshack Brothers (Prescott) Ltd.*, 2003 HRTO 27 at paras. 13-14).

[113] Although it is not bound by the HRTO decision, given the nature of the HRTO's analysis, the Tribunal finds the HRTO's reasoning persuasive in this case.

[114] However, in *Stevenson*, the issue of awards of compensation payments to the estates of complainants or victims for pain and suffering or for wilful and reckless conduct under the *CHRA* was not decided.

[115] Nevertheless, the Tribunal in *Stevenson* relied on an interesting case from the Ontario Board of Inquiry (the "Board") in *Barber* where the Board determined there is certainly a public interest affected immediately by the resolution of this case. This interest does not expire with the death of the complainant.

[116] More importantly here, in the subsequent decision on the merits, the Board found discrimination, and ordered the respondent to pay general damages of $1,000 to the complainant's estate, "…as compensation for the loss to Mrs. Barber's dignity arising out of the infringement." (see *Barber* at para. 18 (ON BOI), and *Barber v. Sears Canada Inc. (No. 3)*, (1994), 22 C.H.R.R. D/415 at para. 98 (ON BOI)). While this case is also not binding on this Tribunal, the Panel agrees with its reasoning. The reasoning is consistent with the objective and purpose of the *CHRA* and is also applicable to this case.

[117] The Panel believes, in the event that a question arises concerning the *CHRA*, the best reference is the *Act* itself, case law interpreting the *Act* and case law that is similar to the case at hand.

[118] The AGC relies on *Hislop* to support its position that only estates of individuals who were alive at the time the hearing of the original decision on the merits of the discrimination concluded (being October 24, 2014) should be entitled to compensation.

[119] Moreover, the AGC submits that the Supreme Court of Canada decided that an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed.

[120] While the AGC's assertion is true, a closer look at the Supreme Court's analysis and selected wording is helpful. Moreover, the Court reiterates a paramount principle to be used in every case: the importance of the specific context of the case. In *Hislop*, this specific context is, as aptly argued by the Commission, that one of the issues was whether a limitation period under the Canada Pension Plan had a discriminatory effect by effectively blocking the estates of deceased same sex survivors from benefitting from remedial legislation that was passed after their deaths. The Supreme Court's statements were made in a context where the deceased survivors whose estates sought to pursue equality claims had died before the passage of the remedial legislation from which they were being excluded. Consequently, the claims were not based on alleged infringements that took place while the survivors were still alive. It was in this particular context that the Supreme Court held that estates do not have standing to "commence" s. 15(1) *Charter* claims:

> […] in the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term "individual" in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) *Charter* claims. In this sense, it may be said that s. 15 rights die with the person
> (see *Hislop* at para. 73)

[121] The Panel agrees with the Commission's position on *Hislop* above and finds that the context of the claim analysed in *Hislop* differs considerably from the case at hand.

[122] Additionally, the Panel distinguishes the Supreme Court of Canada's reasoning in *Hislop,* which is made on specific facts involving persons who desire to commence actions on behalf of alleged victims who are now deceased, and the case at hand, where the complainants [who have standing] are First Nations organizations representing First Nations children and families, the victims in the present case. Of note, in this case, the victims' suffering was already established in the evidence and explained in the findings and reasons of the Tribunal's decisions and rulings. Given the above, the two cases are completely different given the facts, the context, the evidence and the Panel's findings in the present case.

[123] Also, on this point, the Panel agrees with the Manitoba Court of Appeal who has stressed the importance of context when considering the Supreme Court's decision in *Hislop*. As Mainella J.A. stated for a unanimous Court of Appeal:

> I do not read such careful language [from *Hislop*] as endorsement for the broad proposition that redress for a violation of a *Charter* right ends on death, regardless of the context. The court could have easily made such a broad declaration, but chose instead to keep its remarks tailored to the context of claims on behalf of persons who were already deceased at the time the change to the CPP occurred.
> (*Grant v. Winnipeg Regional Health Authority et al*., 2015 MBCA 44 at para. 66).

[124] On the facts that were before it, the Court of Appeal went on to dismiss a motion to strike a *Charter* claim that had been brought in circumstances where the alleged infringement was said to have contributed to the death of the claimant.

[125] Furthermore, the Panel agrees with the Complainants and the Commission that, in any event, while s. 15(1) *Charter* jurisprudence may be of assistance when interpreting analogous human rights statutes such as the *CHRA*, the two regimes are separate and distinct. What is more, the wording of s. 53 of the *CHRA* is more prescriptive than the very general remedial language used in s. 24(1) of the *Charter*. The *CHRA* language arguably creates a stronger presumption that meaningful remedies will flow where it has been found that a victim has experienced a discriminatory practice in his or her lifetime.

[126] Moreover, there is no explicit wording or language in the *CHRA* barring payment of compensation to estates for pain and suffering or wilful and reckless discrimination. In fact, the Panel finds it would be unfair to the victims who have died to deny them and their estates the compensation that they are entitled to.

[127] The Panel finds that misapplying the *Hislop* reasoning to victims may seriously thwart the victims' human rights. While estates may not have standing to commence *Charter* actions, this in no way abolishes the victims' rights to receive compensation for the discrimination found by this Panel. In this instance, one of the worst cases of racial discrimination and suffering was found.

[128] Furthermore, cases before this Tribunal and the case at hand, involve the very important public interest namely, to protect human rights and to deter those who violate those fundamental rights and discriminate on the basis of those fundamental rights.

[129] This important public interest forms part of the Panel's analysis in this case.

[130] Moreover, paying compensation to victims who have suffered discrimination but died before a compensation order is made is consistent with the objectives of the *CHRA*. Human rights laws are remedial in nature. They aim to make victims of discrimination "whole" and to dissuade respondents from discriminating in the future. Both of these important policy goals can be achieved by conferring compensation to the victims in this case who are deceased: it ensures that the estate of the victim is compensated for the pain and suffering experienced by the victim and ensures that Canada is held accountable for its racial discrimination and wilful and reckless discriminatory conduct.

[131] Taking all this into account, it is by no means obvious that the reasoning from *Hislop* should be directly carried over into the present context. Unlike *Hislop*, there is no doubt here that any deceased beneficiaries under the *Compensation Decision* Order actually experienced discriminatory impacts during their lives.

[132] For all these reasons, the Panel does not apply *Hislop* directly to this case and rejects the AGC's argument to only pay compensation to the estates of individuals who were alive at the time the hearing of the original decision on the merits of the discrimination concluded

(being October 24, 2014). The Panel disagrees with the AGC's argument that any individuals who passed away after that date ought not to receive compensation.

[133] In *Gregoire*, the B.C. Court of Appeal found that the *B.C. Human Rights Code* allows claims to be made by an individual "person" or group of "persons," and that the estate of a deceased complainant was not a "person" within the meaning of the statute.

[134] The Panel finds that the *Gregoire* decision can be distinguished from the case at hand. The two cases have a very different factual matrix. In the case at hand, we are dealing with a complaint filed by representative organisations on behalf of children and families who are victims as opposed to the case in *Gregoire* of a single representative of an individual complainant who had passed before the hearing occurred.

[135] Moreover, the B.C. Court of Appeal itself distinguished a complaint on behalf of a group or class of persons alleging a human rights violation against them and a complaint on behalf of an individual:

> *CNR v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 is cited for the proposition that a complaint can be heard absent any allegations of individual violations. The complaint in that case was lodged by a public interest group about what was alleged to be systemic discrimination of women in respect of employment by the Railway without any one of them being specifically named. But the case is of no particular assistance here. The complaint filed by Ms. Gregoire was not filed on behalf of a group or class of persons alleging a human rights violation against them. It was filed on behalf of an individual. I see nothing in the CNR case that is at odds with the judge's conclusion that Mr. Goodwin's rights abated with his death. The question raised here did not arise in that case.
> (*Gregoire* at para. 10).

[136] What is more, the Tribunal already analysed the word "victim" in the *CHRA* and the wording on remedies in the *CHRA* in its recent *Compensation Decision* (see paras. 112-124 and 129-155). The Panel continues to rely on this interpretation of "victim" in the *CHRA*. This Panel found that victims of discrimination in this case have suffered. The fact that some have died and some have not should not be determinative of who receives compensation remedies for the racial discrimination and the pain and suffering that Canada caused or for Canada's wilful and reckless conduct.

[137] Furthermore, the Panel finds there are compelling public interest arguments in favour of awarding compensation to estates of children who have died in care.

[138] The Panel agrees with the Caring Society that Canada should not benefit financially because children, youth and family members have died waiting for Canada's racial discrimination to end. The Panel must not encourage incentives for respondents to delay the resolution of discrimination complaints. Even more so, when the victims are children.

[139] Moreover, the Panel agrees with the Commission that this would be of particular concern in the case of victims who were discriminated against in connection with a terminal illness or advanced old age, where it could be anticipated that death might occur before a hearing can be concluded.

[140] The Panel also agrees with the Commission that in the context of this particular case, it must be remembered that many of the discriminatory practices at stake involved the forced separation of families and communities, and could therefore have intergenerational impacts. In these circumstances, it is entirely appropriate to direct Canada to make payments that will flow through estates to the heirs of the victims of its discriminatory practices. This outcome is responsive to the nature of the harms, and best advances the goal of reconciliation between First Nations peoples and the Crown.

[141] The Panel rejects the AGC's argument on class actions for the same reasons mentioned above in question 2.

[142] Finally, the Panel notes that no party has raised or discussed the important question of what needs to be done if an estate has been closed under Provincial statutes.

[143] The *Indian Act* governs estates for registered "Indians" however, not all First Nations children in care were registered or have kept their status.

[144] This prompts the question as to what should be the guidelines if a First Nations child was adopted in a Non-First Nations' family and lost status or if a First Nations child was not registered?

[145] For example, if there is a need to petition the Superior Court for the appointment of an administrator of the estate in case of intestacy (absence of a will) should funding and assistance be provided to avoid placing burdens on beneficiaries?

[146] The Panel believes this should be addressed in the parties' discussions on the compensation process especially given the possibility that numerous victims who have died did not have wills.

[147] Additionally, in deciding which date should be considered for compensation payments to estates of victims, the Tribunal must consider the claim, the specific facts of the case, the evidence and the *CHRA*. In this case, representatives of complainant organizations successfully proved that First Nations children and their families were harmed by Canada's discriminatory practices and have suffered before and after the original cut-off date of January 1, 2006 found in the *Compensation Decision*. This is demonstrated as early as the year 2000, as explained above. The Panel already found in the *Compensation Decision* that the complainant organizations were speaking on behalf of a group of victims in this case. The fact that some victims in the group were alive and others deceased at the time the complaint was filed does not change the fact that all victims of Canada's discriminatory practices found in this case have suffered. Moreover, all victims should be compensated or have their estates compensated. The Panel finds that the fact that some victims have suffered and died prior to and during these proceedings should not preclude them from receiving some form of vindication in having their suffering recognized and their estates compensated. This reasoning becomes even more important if victims have died as a result of the discriminatory practices. A technical argument distinguishing living victims and deceased victims in this case does not advance the remedial purposes of the *CHRA*.

[148] There is no doubt that the Tribunal has the ability under the *CHRA* to make compensation orders considering the discriminatory practices that took place prior to the filing of the complaint. The Tribunal has already explained above and, in the *Compensation Decision,* that the claim is broader than the complaint form.

[149] Furthermore, the Panel agrees with the Commission that Canada should pay compensation in respect of all the victims of its discriminatory practices, including those who

passed away after experiencing suffering that would make them eligible under the *Compensation Decision* Order. The Panel also finds it should also include the further orders contained within this ruling. Paying compensation awards for pain and suffering (s. 53(2)(e)) and special compensation (s. 53(3)) to the victims' estates will further the remedial purposes of the quasi-constitutional *CHRA*.

[150] Finally, for those reasons, the Panel's chosen temporal scope for compensation to estates of victims of Canada's discriminatory practices is the same as for all victims/survivors in the *Compensation Decision* and this ruling. Consequently, the Panel sets aside the other alternative proposed dates of 2008 (filing of the complaint), 2014 (final arguments) and 2016 (*Merit Decision*).

H. Order

[151] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further order:

[152] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to the estates of all First Nations children and parents or caregiving grandparents who have died after suffering discriminatory practices described in the *Compensation Decision* Order, including the referenced period in the Order above mentioned in Question 2.

I. Other Important Considerations

[153] The AGC made arguments on the issue of the temporal scope for the compensation order under Jordan's Principle (see para.48 above). For the Panel, this raises an important point concerning victims who have experienced discrimination found in these proceedings prior to December 12, 2007 or on December 12, 2007. The Panel strongly believes that in light of the above reasons and further orders, the parties should now consider whether compensation to the estate of Jordan River Anderson and the estate of his deceased mother and, First Nations peoples in similar situations, should be paid as part of this Tribunal's compensation process. While the Panel is not making a final determination on this issue,

the evidence and findings in this case may support it and Jordan River Anderson is the reason why Jordan's Principle exists. While *Motion 296* on Jordan's Principle did not yet exist, the life story of Jordan River Anderson and his family and the discrimination that they have experienced prior to December 12, 2007 birthed Jordan's Principle. This is the very reason why *Motion 296* was brought forward and adopted. This forms part of the Tribunal's evidence. The Panel also believes that Jordan River Anderson's father should also be considered for compensation in a similar fashion as the parents/grandparents discussed in question 2.

[154] Furthermore, the Panel requests submissions on this point and, on whether First Nations children living on reserve or off-reserve who, as a result of Canada's racial discrimination found in this case, experienced a gap, delay and/or denial of services, were deprived of essential services and were removed and placed in out-of-home care in order to access services prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should receive compensation. The Panel also requests submissions on whether First Nations children living on reserve or off-reserve who were not removed from the home but experienced a gap, delay and/or denial of services, were deprived of essential services as a result of the discrimination found in this case prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should be compensated.

[155] The Panel will establish a schedule for parties to make submissions on the questions and comments identified in the two preceding paragraphs.

[156] Additionally, the interested parties, the Chiefs of Ontario and the Nishnawbe Aski Nation have requested further amendments to the compensation orders to broaden the compensation orders to include off-reserve First Nations children and to include a broader class of caregivers reflecting caregiving practices in many First Nations communities including aunties, uncles, cousins, older siblings, or other family members/kin who were acting in a primary caregiving role, amongst other things. The Panel has questions for the interested parties and parties on these issues. The Panel will establish a schedule for parties to make submissions on the Panel's questions and will make a determination once the

questions are fully answered. Depending on the outcome, the Panel may further amend the compensation orders.

V. Retention of Jurisdiction

[157] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
April 16, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: April 16, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton and Max Binnie, counsel for the Respondent

Maggie Wente and Sinéad Dearman counsel for the Chiefs of Ontario, Interested Party

Julian Falconer and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 2
Date: January 26, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Decision

Members: Sophie Marchildon and Edward Lustig

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À la douce mémoire de Réjean Bélanger

In loving memory of Réjean Bélanger

I. Acknowledgement

[1] This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.

[2] These proceedings included extensive evidence on the history of Indian Residential Schools and the experiences of those who attended or were affected by them. The Tribunal also heard heartfelt testimony from someone who attended and was directly impacted by attending a residential school. At the outset of these reasons, the Panel Members (the Panel) believe it important to acknowledge the suffering of all residential school survivors, their families and communities. We recognize the courage of those who have spoken about their experiences over the years and before this Tribunal. We also wish to honour the memory and lives of the many children who died, and all who were harmed, while attending these schools, along with their families and communities. We wish healing and recognition for all Aboriginal peoples across Canada for the individual and collective trauma endured as a result of the Indian Residential Schools system.

II. Complaint and background

[3] Child welfare services, or child and family services, are services designed to protect children and encourage family stability. The main aim of these services is to safeguard children from abuse and neglect (see Annex, ex. 1 *s.v.* "child welfare"). Hence the **best interest of the child** is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children.

[4] Each province and territory has its own child and family services legislation and standards and provides those services within its jurisdiction. However, the provision of child and family services to First Nations on reserves and in the Yukon is unique and is the subject of this decision.

[5] At issue are the activities of Indian and Northern Affairs Canada (INAC), known at the time of the hearing as Aboriginal Affairs and Northern Development Canada (AANDC), in managing the First Nations Child and Family Services Program (the FNCFS Program), its corresponding funding formulas and a handful of other related provincial and territorial agreements that provide for child and family services to First Nations living on reserve and in the Yukon Territory. Pursuant to the FNCFS Program and other agreements, child and family services are provided to First Nations on-reserve and in the Yukon by First Nations Child and Family Services Agencies (FNCFS Agencies) or by the province/territory in which the community is located. In either situation, the child and family services legislation of the province/territory in which the First Nation is located applies. AANDC funds the child and family services provided to First Nations by FNCFS Agencies or the province/territory.

[6] Pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*), the Complainants, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN), allege AANDC discriminates in providing child and family services to First Nations on reserve and in the Yukon, on the basis of race and/or national or ethnic origin, by providing inequitable and insufficient funding for those services (the Complaint). On October 14, 2008, the Canadian Human Rights Commission (the Commission) referred the Complaint to this Tribunal for an inquiry.

[7] In a decision dated March 14, 2011 (2011 CHRT 4), the Tribunal granted a motion brought by AANDC for the dismissal of the Complaint on the ground that the issues raised were beyond the Tribunal's jurisdiction (the jurisdictional motion). That decision was subsequently the subject of an application for judicial review before the Federal Court of Canada.

[8] On April 18, 2012, the Federal Court rendered its decision, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (*Caring Society FC*), setting aside the Tribunal's decision on the jurisdictional motion. The Federal Court remitted the matter to a differently constituted panel of the Tribunal for redetermination in accordance with its reasons. The Respondent's appeal of that decision was dismissed by the Federal

Court of Appeal in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (*Caring Society FCA*).

[9] A new panel, composed of Sophie Marchildon, as Panel Chairperson, and members Réjean Bélanger and Edward Lustig, was appointed to re-determine this matter (see 2012 CHRT 16). It dismissed the Respondent's motion to have the jurisdictional motion re-heard, and ruled the Complaint would be dealt with on its merits (see 2012 CHRT 17).

[10] The Complaint was subsequently amended to add allegations of retaliation (see 2012 CHRT 24). In early June 2015, the Panel found the allegations of retaliation to be substantiated in part (see 2015 CHRT 14).

[11] The present decision deals with the merits of the Complaint. During deliberations our friend and colleague, Tribunal Member Réjean Bélanger, passed away. Despite his valued contributions to the hearing and consideration of this matter, he sadly was not able to see the final result of his work. While this decision is signed on behalf of the remaining Members of the Panel, **we dedicate it in his honour and memory**.

III. Parties

[12] The Caring Society is a non-profit organization committed to research, policy development and advocacy on behalf of First Nations agencies that serve the well-being of children, youth and families. The AFN is a national advocacy organization that works on behalf of over 600 First Nations on issues such as Treaty and Aboriginal rights, education, housing, health, child welfare and social development. The Commission, in appearing before the Tribunal at a hearing, represents the public interest (see section 51 of the *CHRA*). AANDC is the federal government department primarily responsible for meeting the Government of Canada's obligations and commitments to Aboriginal peoples.

[13] Additionally, two organizations were granted "Interested Party" status for these proceedings: Amnesty International and the Chiefs of Ontario (COO). Amnesty International is an international non-governmental organization committed to the advancement of human rights across the globe. It was granted interested party status to

assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the Complaint. The COO is a non-profit organization representing the 133 First Nations in the Province of Ontario. It was granted interested party status to speak to the particularities of on-reserve child welfare services in Ontario.

IV. The hearing, disclosure and admissibility of documents

[14] The hearing of the Complaint spanned 72 days from February 2013 to October 2014. Throughout the hearing, documentary disclosure and the admissibility of certain documents as evidence became an issue.

[15] All arguably relevant documents were not disclosed prior to the commencement of the hearing. Despite agreeing to complete its disclosure prior to the start of the hearing, and subsequently confirming that it had, AANDC knew of the existence of a number of arguably relevant documents in the summer of 2012 and yet failed to disclose them prior to the hearing. Only after the completion of an *Access to Information Act* request made by the Caring Society, and shortly before the third week of hearings, did AANDC inform the parties and the Tribunal of the existence of over 50,000 additional documents and an unspecified number of emails, which were potentially relevant to the Complaint, but had yet to be disclosed. As a result, the Tribunal vacated hearing dates in June 2013, re-arranged the proceedings to hear the allegations of retaliation in July and August 2013, and, following a deadline for AANDC to complete its disclosure by August 31, 2013, resumed the hearing on the merits on dates from August 2013 to January 2014 (see 2013 CHRT 16).

[16] Following the disclosure of over 100,000 additional documents by AANDC, the hearing resumed. However, AANDC did not complete the disclosure of all arguably relevant documents until August 2014 due to an objection under section 37(1) of the *Canada Evidence Act*. Specifically, certain documents were characterized as being subject to Cabinet confidence privilege. All the parties agreed to have the Clerk of the Privy Council review the documents to determine if the privilege applied. This review process was completed fairly quickly once the Clerk was provided with the documents.

[17] An issue arose as to how the 100,000 additional documents could be admitted into evidence. The Caring Society requested an order that any additionally disclosed documents upon which it wished to rely be admitted as evidence for the truth of their contents, regardless of whether or not the author or recipient of the document was called as a witness, and whether or not they were put to any other witness. For reasons outlined in 2014 CHRT 2, the Panel ruled as follows:

> a. Rule 9(4) of the Tribunal's Rules of Procedure will continue to apply. As such, documents will continue to be admitted into evidence, on a case-by case basis, once they are introduced during the hearing and accepted by the Panel;
>
> b. There will be no need to call witnesses for the sole purpose of authenticating documentary evidence. Any issues raised relating to authentication will be considered by the Panel at the weighing stage;
>
> c. For the purposes of Rule 9(4), a document has not been fully "introduced" at the hearing until counsel or a witness for the party tendering it has indicated:
>
> i. which portions of the document are being relied upon; and
>
> ii. how these portions of the document relate to an issue in the case.
>
> d. Should a party wish to rely on evidence during its final argument that was not introduced according to the procedure above (either prior to or subsequent to this order), appropriate curative measures may be taken by the Panel, and in particular, the opposing party may be allotted additional time to adequately prepare a response, including calling additional witnesses and bringing forward additional documentary evidence, in accordance with the principles of procedural fairness. This may result in an adjournment of the proceedings.

[18] Following the completion of the hearing, further issues arose as to which documents ought to form part of the record before the Tribunal. AANDC raised concerns regarding the admissibility of documents relied on by counsel for the Complainants and Commission, but not referred to orally during the hearing. In 2015 CHRT 1, the Panel ordered:

> Documents listed in Appendix B of the Commission's December 1, 2014 letter (including Documents Referred to Only in Final Written Submissions

> (which were Adopted Orally) found at page 9) will be considered as forming part of the evidentiary record. The Respondent will be granted an opportunity to respond to the Complainant's documents listed in Appendix B and supporting submissions with the exception of tab-66. Should the Respondent decide to benefit from this opportunity, the Respondent is to advise the parties and the Tribunal of its intention and form of response by no later than January 21, 2015, following which the Respondent will have until February 4, 2015 to file its response.

[19] In response to the Panel's order, AANDC provided written representations with respect to the documents at issue. According to AANDC, the Panel should place little, if any, weight on those documents in determining the merits of the Complaint. It also provided a chart summarizing its position on each of the documents.

[20] AANDC's submissions on the documents subject to the Panel's order in 2015 CHRT 1, along with its other submissions regarding the weight to ascribe to the evidence in this matter, have been taken into consideration by the Panel, together with the submissions of the other parties, in making the findings that follow.

V. Analysis

[21] As mentioned above, the present Complaint alleges the provision of child and family services in on-reserve First Nations communities and in the Yukon is discriminatory. Namely that there is inequitable and insufficient funding for those services by AANDC. In this regard, the Complainants have the burden of proof of establishing a *prima facie* case of discrimination. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent" (see *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC) at para. 28).

[22] In the context of this Complaint, under section 5 of the *CHRA*, the Complainants must demonstrate (1) that First Nations have a characteristic or characteristics protected from discrimination; (2) that they are denied services, or adversely impacted by the provision of services, by AANDC; and, (3) that the protected characteristic or

characteristics are a factor in the adverse impact or denial (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]).

[23] The first element is relatively simple in this case: race and national or ethnic origin are prohibited grounds of discrimination under section 3 of the *CHRA*. There was no dispute that First Nations possess these characteristics.

[24] The second element requires the Complainants to establish that AANDC is actually involved in the provision of a "service" as contemplated by section 5 of the *CHRA*; and, if so, to demonstrate that First Nations are denied services or adversely impacted by AANDC's involvement in the provision of those services.

[25] For the third element, the Complainants have to establish a connection between elements one and two. A "causal connection" is not required as there may be many different reasons for a respondent's acts. That is, it is not necessary that a prohibited ground or grounds be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that a prohibited ground or grounds be one of the factors in the actions in issue (see *Holden v. Canadian National Railway Co.*, (1991) 14 C.H.R.R. D/12 (F.C.A.) at para. 7; and, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras. 44-52 [*Bombardier*]).

[26] In this regard, it should be kept in mind that discrimination is not usually practiced overtly or even intentionally. Consequently, direct evidence of discrimination or proof of intent is not required to establish a discriminatory practice under the *CHRA* (see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT); and; *Bombardier* at paras. 40-41).

[27] In response to the Complaint, AANDC led its own evidence and arguments to refute the Complainants' claim of discrimination. It did not raise a statutory exception under sections 15 or 16 of the *CHRA*. Therefore, the Tribunal's task is to consider all the evidence and argument presented by the parties to determine if the Complainants have proven the three elements of a discriminatory practice on a balance of probabilities (see *Bombardier* at paras. 56 and 64; see also *Peel Law Association v. Pieters*, 2013 ONCA 396 at paras. 80-90).

[28] It is through this lens, and with these principles in mind, that the Panel examined the evidence and arguments advanced by the parties in this case. For the reasons that follow, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon; that First Nations are adversely impacted by the provision of those services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and; that race and/or national or ethnic origin are a factor in those adverse impacts or denial.

A. AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon

i. Meaning of "service" under section 5 of the *CHRA*

[29] Section 5 of the *CHRA* provides:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> > (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
> >
> > (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

[30] Pursuant to the wording of this section, the Complainants must establish that the actions complained of are "…in the provision of…services…customarily available to the general public". The first part of this analysis involves determining what constitutes the "service" based on the facts before the Tribunal (see *Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC) per La Forest J. at para. 68 [*Gould*]). In other words, what is the "benefit" or "assistance" being held out (see *Watkin v. Canada (Attorney General)*, 2008 FCA 170 at para. 31 [*Watkin*]; and, *Gould* per La Forest J. at para. 55). In making this determination, "[r]egard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services" (see *Watkin* at para. 33). In this respect, it may be useful to inquire whether the benefit or assistance is the

essential nature of the activity (see *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555 at para. 42).

[31] The next step requires a determination of whether the service creates a public relationship between the service provider and the service user. The fact that actions are undertaken by a public body for the public good is not determinative. In fact, no one factor is determinative. Rather, in ascertaining whether a service creates a public relationship, the Tribunal must examine all relevant factors in a contextual manner (see *Gould* per La Forest J. at para. 68; and, *Watkin* at paras. 32-33). As part of this determination, the Tribunal must decide what constitutes the "public" to which the service is being offered. A public is defined in relational as opposed to quantitative terms. That is, the public to which the service is being offered does not need to be the entire public. Rather, clients of a particular service could be a very large or very small segment of the "public" (see *University of British Columbia v. Berg*, [1993] 2 SCR 353 at pp. 374-388; and, *Gould* per La Forest J. at para. 68). A public relationship is created where this "public" is extended a "service" by the service provider (see *Gould* per La Forest J. at para. 55).

ii. Evidence indicating AANDC provides a "service"

[32] Both the Commission and the Caring Society characterize the FNCFS Program, its corresponding funding formulas and the related provincial/territorial agreements as a service provided by AANDC to First Nations children and families on reserves and in the Yukon.

[33] On the other hand, AANDC submits that its role in the provision of child and family services to First Nations is strictly limited to funding and being accountable for the spending of those funds. According to AANDC, funding does not constitute a "service". Furthermore, AANDC argues the funding it provides is not "customarily available to the general public". Rather, it is provided on a government to government; or, government to agency basis.

[34] In AANDC's view, the benefit held out as a service is the provincially mandated child welfare services provided to First Nations by the FNCFS Agencies or the

provinces/territory. AANDC does not exert control over the services and programs provided. Rather, decisions as to which services to provide, how they will be provided and whether the delivery is in compliance with statutory and regulatory requirements rests with the agencies and the provinces/territory. In this regard, AANDC relies on *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (*NIL/TU,O*), to argue that child welfare services are a matter within provincial jurisdiction and that it only became involved in First Nations child and family services as a matter of social policy under its spending power. According to AANDC, its funding does not change the provincial/territorial nature of child and family services.

[35] As explained in the following pages, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves across Canada and in the Yukon. Specifically, AANDC offers the benefit or assistance of funding to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations on reserves and in the Yukon. With specific regard to the FNCFS Program, the objective is to ensure the delivery of culturally appropriate child and family services, in the best interest of the child, in accordance with the legislation and standards of the reference province/territory, and provided in a reasonably comparable manner to those provided to other provincial/territorial residents in similar circumstances and within FNCFS Program authorities. This benefit or assistance is held out as a service by AANDC and provided to First Nations in the context of a public relationship.

a. Jurisdiction of the *CHRA* over the activities of AANDC

[36] With regard to the *NIL/TU,O* decision, the question in that case was whether the labour relations of a FNCFS Agency should be regulated under provincial or federal jurisdiction. Labour relations are presumptively a provincial matter. In this regard, the Supreme Court found the NIL/TU,O Agency was a child welfare agency regulated by the province in all aspects. Neither the fact that it received federal funding, the Aboriginal identity of its clients and employees, nor its mandate to provide culturally appropriate services to Aboriginal clients, displaced the operating presumption that labour relations are provincially regulated.

[37] The present case raises human rights issues in the context of AANDC's activities. As opposed to labour relations matters, human rights matters are not presumptively provincial. The *CHRA* applies to "…matters coming within the legislative authority of Parliament" (see *CHRA* at s. 2). While the activities of FNCFS Agencies and provincial governments may well be within provincial jurisdiction for labour relations purposes, this does not have any bearing on the Tribunal's jurisdiction over AANDC's activities in this case.

[38] The Complaint is filed against, and is focused upon, the activities of AANDC. AANDC is a federal government department created by Parliament through the *Department of Indian Affairs and Northern Development Act*. Its mandate is derived from a number of federal statutes, including the *Indian Act*. Therefore, any actions taken by AANDC come within the legislative authority of Parliament and could be subject to the *CHRA*.

[39] The issue in this case is not whether AANDC's activities fall outside the jurisdiction of the *CHRA* because they do not come within the legislative authority of Parliament. Rather, it is whether the *CHRA* applies to AANDC's activities because its actions are in the provision of a service. The fact that other actors, including provincial actors, may be involved in the provision of the service is not determinative and does not necessarily shield AANDC from human rights scrutiny (see for example *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*]). As mentioned above, it is for the Tribunal to consider all relevant factors to determine the nature and extent of AANDC's involvement and whether that involvement rises to the status of a "service" under section 5 of the *CHRA*.

b. Funding can constitute a service

[40] Similarly, even if AANDC's role in the child and family welfare of First Nations is limited to funding, there is nothing in the *CHRA* that excludes funding from the purview of section 5. That is, funding can constitute a service if the facts and evidence of the case

indicate that the funding is a benefit or assistance offered to the public pursuant to the criteria outlined above.

[41] A similar argument to the one advanced by AANDC was rejected by the British Columbia Human Rights Tribunal in *Bitonti et al. v. College of Physicians & Surgeons of British Columbia et al.*, (1999) 36 CHRR D/263 (BCHRT) (*Bitonti*). Among other things, the complainants in that case argued that the allocation of funding provided by the Ministry of Health did not provide foreign medical school graduates with a real opportunity to obtain internships. The Ministry of Health responded that the expenditure of funds by the provincial government was a legislative act that was immune from the Tribunal's review. While the BCHRT ultimately found there was no service relationship between the Ministry of Health and the complainants, at paragraph 315 it was not prepared to accept the Ministry's argument regarding immunity for funding:

> Carried to its extreme, that position would mean, for example, that if the Ministry of Health provided funding for internships but stipulated that it would only pay male interns, that conduct would be immune from review. I am not prepared to go that far.

[42] Similarly, in *Kelso v. The Queen*, [1981] 1 SCR 199 at page 207 (*Kelso*), the Supreme Court stated (**emphasis added**):

> No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. **The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act***.

[43] Indeed, the Supreme Court has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at pp. 89-90 (*Robichaud*); *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81 (*Vaid*); and, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62 [*Mowat*]). It expresses fundamental values and pursues fundamental goals for our society, such as the fundamental Canadian value of equality (see s. 2 of the *CHRA*; see also *Mowat* at para. 33; and, *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554 at p. 615, per Justice L'Heureux-Dubé).

Therefore, the *CHRA* is to be interpreted in a broad, liberal, and purposive manner befitting of this special status (see *Mowat* at para. 62).

[44] Conversely, any exemption from its provisions must be clearly stated (see *Vaid* at para. 81). Again, there is no indication in the *CHRA* or otherwise that Parliament intended to exclude funding from scrutiny under the *Act*, subject of course to the funding being determined to be a service. In line with *Kelso*, where the Government of Canada is involved in the provision of a service, including where the service involves the allocation of funding, that service and the way resources are allocated pursuant to that service must respect human rights principles.

[45] Therefore, the Panel dismisses the argument that funding cannot constitute a "service" within the meaning of section 5 of the *CHRA*. In any event, as will be examined in the following pages, the evidence in this case indicates the essential nature of the "assistance" or "benefit" offered by AANDC for the provision of child and family services on First Nations reserves is something more than funding.

c. The "assistance" or "benefit" provided by AANDC

[46] AANDC's FNCFS Program applies to FNCFS Agencies in all provinces and the Yukon Territory, except Ontario. In Ontario, AANDC has a cost-sharing agreement with the province for the provision of child and family services on First Nations reserves. AANDC also has agreements with the provinces of Alberta and British Columbia to provide child and family services to certain First Nations reserves. A similar agreement is also in place with the Yukon Territory. The provision of child and family services to First Nations in the Northwest Territories and Nunavut were not the subject of this Complaint.

[47] The FNCFS Program were developed to address concerns over the lack of child and family services provided by the provinces to First Nations reserves. Traditionally, assistance to First Nations children and their families was provided informally, by custom, within the network of their extended family. However, over time, this informal assistance became insufficient to meet the needs of children and families living on First Nations reserves.

[48] The Joint Committees of the Senate and the House of Commons in 1946-1948 and again in 1959-1961 urged provinces to increase their involvement in providing services to First Nations people in order to fill in the gaps resulting from disruptions to traditional patterns of community care. However, provincial governments were reluctant to provide those services for financial concerns and given federal jurisdiction over "Indians, and lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*. This led to disparity in the quantity and quality of services provided to First Nations children and families on reserve from province to province, where some provinces only provided services if they were compensated by the federal government or only in life-and-death situations (see Annex, ex. 2 at p. 39 [the *NPR*]).

[49] In 1965, Canada entered into the agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations children and families on reserve. Other provinces entered into bilateral agreements whereby AANDC would reimburse them for the delivery of child and family services (see Annex, ex. 3 at ss. 1.1.2 - 1.1.3 [*2005 FNCFS National Program Manual*]).

[50] In the 1970's and early 1980's, concerns began being raised over the child and family services being provided to First Nations by the provinces. Namely, the services were minimal, not culturally appropriate and there were an alarming number of First Nations children being removed from their communities. This started a move towards the creation of community-specific FNCFS Agencies. AANDC funded these agencies through *ad hoc* arrangements, but authorities for doing so were unclear and funding was inconsistent (see the *NPR* at p. 24).

[51] In 1986, AANDC put a moratorium on the *ad hoc* arrangements for the development of FNCFS Agencies. This moratorium remained in place until 1990 when AANDC implemented the FNCFS Program (see *2005 FNCFS National Program Manual* at s. 1.1.6; and, the *NPR* at p. 24).

[52] At section 1.3 of the *2005 FNCFS National Program Manual*, the objective and principles of the FNCFS Program are outlined and include:

> 1.3.2 The primary objective of the FNCFS program is to support culturally appropriate child and family services for Indian children and families resident on reserve or Ordinarily Resident On Reserve, in the best interest of the child, in accordance with the legislation and standards of the reference province.
>
> […]
>
> 1.3.4 FNCFS will be managed and operated by provincially mandated First Nations organizations (Recipients), which provide services to First Nations children and families Ordinarily Resident On Reserve. FNCFS Recipients will manage the program in accordance with provincial or territorial legislation and standards. INAC will provide funding in accordance with its authorities.
>
> 1.3.5 The child and family services offered by FNCFS on reserve are to be culturally relevant and comparable, but not necessarily identical, to those offered by the reference province or territory to residents living off reserve in similar circumstances.
>
> 1.3.6 Protecting children from neglect and abuse is the main objective of child and family services. FNCFS also provide services that increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities.
>
> 1.3.7 First Nation agencies and other Recipients will ensure that all persons Ordinarily Resident On Reserve and within their Catchment Area receive a full range of child and family services reasonably comparable to those provided off reserve by the reference province or territory. Funding will be provided in accordance with INAC authorities.

[53] In 2012, following the filing of the Complaint, the wording of the objective of the FNCFS Program was modified, but is still similarly described as follows:

> 1.1 Objective
>
> The FNCFS program provides funding to assist in ensuring the safety and well-being of First Nations children ordinarily resident on reserve by supporting culturally appropriate prevention and protection services for First Nations children and families.
>
> These services are to be provided in accordance with the legislation and standards of the province or territory of residence and in a manner that is

> reasonably comparable to those available to other provincial residents in similar circumstances within Program Authorities.
>
> (see Annex, ex. 4 at p. 30 [*2012 National Social Programs Manual*])

[54] The other provincial and territorial agreements for the provision of child and family services in First Nations communities have a similar purpose to the FNCFS Program. In Ontario, the *Memorandum of Agreement Respecting Welfare Programs for Indians* (see Annex, ex. 5 [the *1965 Agreement*]), at page 1, provides:

> WHEREAS the 1963 Federal-Provincial Conference, in charting desirable long-range objectives and policies applicable to the Indian people, determined that the principal objective was the provision of provincial services and programs to Indians on the basis that needs in Indian Communities should be met according to standards applicable in other communities;
>
> AND WHEREAS Canada and Ontario in working towards this objective desire to make available to the Indians in the Province the full range of provincial welfare programs;

[55] In Alberta, the *Arrangement for the Funding and Administration of Social Services* (see Annex, ex. 6 [the *Alberta Reform Agreement*]) at page 1 states:

> *WHEREAS:*
>
> *Canada continues to have a special relationship with and interest in the Indian people of Canada arising from history, treaties, statutes and the Constitution;*
>
> *Canada and Alberta recognize and agree that this arrangement will not prejudice the treaty rights of Indian people, nor alter any obligations of Canada to Indian people pursuant to treaties, statutes and the Constitution, including any rights protected by section 35 of the Constitution Act, 1982, nor affect any self-government rights that may be negotiated in future constitutional negotiations;*
>
> *Canada and Alberta recognize that Indians and Indian Families should be provided with Social Services which take into account their cultures, values, languages and experiences;*

> *Canada and Alberta are desirous of developing an arrangement in respect of the funding and administration for Social Services which would be applicable to Indians in the Province of Alberta; and*
>
> *Canada and Alberta acknowledge that Indians have aspirations towards self-government and both therefore wish to support the establishment, management, and delivery by Indians and Indian organizations of child and family services and other community-based Social Services for Indians in Alberta.*

[56] At section 3 of the *Alberta Reform Agreement*, Canada's role is described as:

> 3. Canada will by this arrangement and in accordance with Appendix II:
>
> (a) arrange for the delivery of Social Services comparable to those provided by Alberta to other residents of the Province directly or through negotiated agreements with Indian Bands, Indian agencies, Indian organizations, or with Alberta, to persons ordinarily residing on a Reserve; and
>
> (b) fund Social Services for Indians and Indian Families ordinarily residing on a Reserve comparable to those provided by Alberta to other residents of the Province; and in particular, reimburse Alberta for those Social Services which Alberta delivers to Indians and Indian Families ordinarily residing on a Reserve.

[57] In British Columbia, the *Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve* (see Annex, ex. 7 [the *BC Service Agreement*]), which in 2012 replaced a previous memorandum of understanding between the two parties (see Annex, ex. 8 [the *BC MOU*]), provides:

> **1.0 Vision**
>
> Governments working together in British Columbia to ensure that First Nation children, youth and their families live in strong, healthy families and sustainable communities where they are connected to their culture, language and traditions.
>
> DIAND and MCFD will contribute to this vision through a strong focus on providing funding and effective services respectively, to achieve meaningful outcomes for vulnerable First Nations children, youth and their families ordinarily resident on reserve.

[58] Finally, in the Yukon, there is the *Funding Agreement* (see Annex, ex. 9 [the *Yukon Funding Agreement*]). The *Yukon Funding Agreement* applies to all First Nations children and families ordinarily resident in the Territory. Pursuant to Schedule "DIAND-3" of the *Yukon Funding Agreement*, "[t]he Territory will administer the First Nation Child and Family Services Program in accordance with DIAND's First Nation Child and Family Services Program – National Manual or any other program documentation issued by DIAND as amended from time to time".

[59] The history and objectives of the FNCFS Program and other related provincial/territorial agreements indicate that the benefit or assistance provided through these activities is to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations children and families on reserve and in the Yukon. Without the FNCFS Program, related agreements and the funding provided through those instruments, First Nations children and families on reserve and in the Yukon would not receive the full range of child and family services provided to other provincial/territorial residents, let alone services that are suitable to their cultural realities. The activities of the provinces/territory alone were insufficient to meet the child and family services needs of First Nations children and families on reserve and in the Yukon.

[60] Therefore, the essential nature of the FNCFS Program is to ensure First Nations children and families on reserve and in the Yukon receive the "assistance" or "benefit" of culturally appropriate child and family services to that are reasonably comparable to the services provided to other provincial residents in similar circumstances. The other related provincial/territorial agreements provide a similar "assistance" or "benefit". AANDC extends this "assistance" or "benefit" to First Nations children and families on reserves and in the Yukon Territory.

d. First Nations children and families are extended the "assistance" or "benefit" by AANDC

[61] First Nations and, in particular, First Nations on reserve, are a distinct public. AANDC extends the assistance or benefit of the FNCFS Program and other related

provincial/territorial agreements to this public through FNCFS Agencies and/or the provinces/territory.

[62] Section 1.5 of the *2005 FNCFS National Program Manual* defines the roles and responsibilities of AANDC's headquarters and regional offices in ensuring the safety and well-being of First Nations children ordinarily resident on reserve. At section 1.5.2, the role of Headquarters includes: "to provide […] funding on behalf of children and families as authorized by the approved policy and program authorities"; "to lead in the development of FNCFS policy"; and, "to provide oversight on program issues related to the FNCFS policy and to assist regions and First Nations in finding solutions to problems arising in the regions".

[63] The role of AANDC's regional offices is outlined at section 1.5.3 of the *2005 FNCFS National Program Manual* and includes: "to interact with Recipients, Chiefs and Councils, Headquarters, the reference province or territory"; "to manage the program and funding on behalf of Canada and to ensure that authorities are followed"; "to assure Headquarters that the program is operating according to authorities and Canada's financial management requirements"; and, "to establish, in cooperation with Recipients, a process for dealing with disputes over issues relating to the operation of FNCFS".

[64] The role of the FNCFS Agencies is, among other things, "to deliver the FNCFS program in accordance with provincial legislation and standards while adhering to the terms and conditions of their funding agreements" (*2005 FNCFS National Program Manual* at section 1.5.4). The provinces mandate, regulate and oversee the FNCFS Agencies (see *2005 FNCFS National Program Manual* at section 1.5.5).

[65] In a more summary fashion, the *2012 National Social Programs Manual* defines the differing roles of AANDC, the provinces/territory and the FNCFS Agencies as follows, at page 30:

> 1.2 Provincial Delegations
>
> Child welfare is an area of provincial responsibility whereby each province, in accordance with their legislation, delegates authority to FNCFS agencies to manage and deliver child welfare services on reserve.

> The FNCFS agencies, delegated by the province, provide protection services to eligible First Nation children, ordinarily resident on-reserve in accordance with provincial legislation and standards.
>
> The Program funds FNCFS agencies to deliver protection (out of the home) and prevention services (in-home) to First Nation children, youth, and families ordinarily resident on reserve.

[66] AANDC has a "Shared Responsibility for Child Welfare" with the FNCFS Agencies and the provinces/territory (see the *NPR* at p.88). It not only provides funding, but policy and oversight as well. It works as a partner with the FNCFS Agencies and provinces/territory to deliver adequate child and family services to First Nations on reserves. It is not a passive player in this partnership, whereby it only provides funding: it strives to improve outcomes for First Nations children and families. In this regard, Ms. Sheilagh Murphy, Director General of the Social Policy and Programs Branch of AANDC, testified about the goal of AANDC social programs:

> Well, I mean we have this broad objective or goal to make sure that First Nations on Reserve -- men, women, and children -- are safe, that they are healthy and that they have the means to become productive members of their communities and can contribute to those communities and to Canada more generally as citizens.
>
> (StenoTran Services Inc.'s transcript of *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)* (CHRT), Ottawa, Vol. 54 at pp. 17-18 [*Transcript*])

[67] The FNCFS Program is one of the social programs meant to achieve this objective. A "Fact Sheet" developed in October 2006 and previously posted on AANDC's website (see Annex, ex. 10 [*Fact Sheet*]), demonstrates how the department previously held out the FNCFS Program:

> **The First Nations Child and Family Services Program** is one component of a suite of Social Programs that addresses the well-being of children and families. The main objective of the Program is to assist First Nations in providing access to culturally sensitive child and family services in their communities, and to ensure that the services provided to them are comparable to those available to other provincial residents in similar circumstances.

[68] AANDC works directly with its partners, including First Nations, to ensure the objectives of the FNCFS Program and other related provincial/territorial agreements are being met. The *2005 FNCFS Program Manual* provides for consultation among AANDC and First Nations communities with regard to disputes over the program (see ss. 1.5.2-1.5.3). The *Alberta Reform Agreement* specifically provides for consultation with First Nations communities in reviewing the effectiveness of the arrangement (see ss. 13-14). Similarly, the agreements in British Columbia and the Yukon provide for evaluation and review by AANDC of the effectiveness of the programs, services and activities it funds (see ss. 9.2 and 10.1 of the *BC Service Agreement*; and, s. 13.4.1 of the *Yukon Funding Agreement*).

[69] In its previous website *Fact Sheet*, AANDC held out this partnership as follows:

> The Government of Canada is committed to working with First Nations, provincial/territorial, and federal partners and agencies to implement a modernized vision of the First Nations Child and Family Services Program, a program that strives for safe and strong children and youth supported by healthy parents.

[70] Ms. Murphy provided some insight into the nature of AANDC's role and partnership in ensuring adequate child and family services to First Nations reserves:

> I mean, we continue to be a funder, we don't espouse to be experts in the area of child welfare practice. I mean, our role I think has changed in some ways in that when you look at the progression of this program -- we do audits and we do evaluations, the Auditor General looked at this program in 2008 and again in 2011. We do need to have – we don't just want to be writing cheques, we actually do have a genuine interest in making sure that First Nation Agencies are delivering the program according to the legislation and regulation, that they have the capacity to do that, that we are getting to outcomes.
>
> So we are not a passive player in terms of being interested in how First -- I mean, it's program risk management, it is financial risk management, to make sure that they are delivering the program that is within the authorities, that they are paying for the right things that we have been given the money for.
>
> (*Transcript* Vol. 54 at pp. 51-52)

[71] As the above indicates, AANDC plays a significant role in the effort to improve outcomes for First Nations children and families residing on reserve. While AANDC argues that it does not control services, the manner and extent of AANDC's funding significantly shapes the child and family services provided by the FNCFS Agencies and/or the provinces/territory. This will be further elaborated upon in section B of this Analysis below. For the purposes of this "service" analysis, suffice it to say AANDC's involvement in the FNCFS Program and other related provincial/territorial agreements determines whether and to what extent child and family services are provided to First Nations reserves and in the Yukon.

[72] For example, a document entitled *First Nations Child and Family Services British Columbia Transition Plan (Decision by Assistant Deputy Minister – ESDPP)* authored by three AANDC employees and signed by the Assistant Deputy Minister at the time, Ms. Christine Cram (see Annex, ex. 11), at page 2, explains the ultimate consequence that AANDC's funding can have on FNCFS Agencies:

> For the majority of these FNCFS agencies, a permanent reduction of unexpended maintenance balances and the absence of additional resources for operations on a go forward basis will render them financially unviable and will likely result in many agency closures.

[73] It is AANDC that created the FNCFS Program and its corresponding funding formulas, and who negotiated and administers the provincial/territorial agreements. While the FNCFS Program is set up to work in a tripartite fashion, and the other agreements in a bilateral fashion, at the end of the day it is AANDC's involvement that is needed to improve outcomes for First Nations on reserves and in the Yukon. AANDC holds a considerable degree of control in this regard. Again, this will be elaborated upon in section B of this Analysis. However, by way of example, in a document entitled *Reform of the FNCFS Program in Québec (Information for the Deputy Minister)*, at pages 1-3 (see Annex, ex. 12), two AANDC employees explain the Department's decision not to transition Québec to a new funding methodology:

> INAC has been in discussion with the First Nations of Québec and Labrador Health and Social Services Commission (Commission) and Québec's Ministry of Health and Social Services since June, 2007 regarding

> transitioning the Quebec FNCFS Agencies to an enhanced prevention approach.
>
> The three parties have developed a Partnership for Results Framework that outlines the strategic direction, key outcomes and performance indicators for FNCFS on reserve in Québec. Both the First Nations leadership and the Province have submitted letters of endorsement for this initiative.
>
> In November of 2007, a number of issues were raised by the First Nations of Québec and Labrador Health and Social Services Commission. The issues largely pertain to the overall funding formula that was proposed as a model for the Québec First Nations agencies (See Annex A for detailed list of concerns and our proposed action).
>
> A decision was made in December 2007, to move forward in the transition to the enhanced prevention focused approach without Québec in order to give the Department time to address First Nations' concerns with the transition process.
>
> The Department has not yet informed Québec First Nations and the Province of Québec of the decision to delay the transition to the Enhanced Prevention Focused Approach in Québec.
>
> […]
>
> There is a risk that once the Commission and Québec First Nations are informed of the decision that was made; they will not want to proceed with the transition to the new enhanced prevention-focused approach. It is hoped that the delivery of messaging from a senior official will reassure the First Nations of the Department's commitment and enable the working level to address concerns raised and move the transition forward.

[74] This document is an official position to be adopted by AANDC's Deputy Minister, informed by high level AANDC employees. It illustrates that, despite a tripartite relationship where its partners support a new funding approach, AANDC is the one who controls the process and makes the final decision in determining the approach to be taken.

[75] Furthermore, AANDC has the power to withhold funds if FNCFS Agencies and/or the provinces/territory do not comply with its funding requirements. This could result in agencies closing their doors and, as a consequence, inadequate child and family services being provided to First Nations children and families on reserves and in the Yukon (see

testimony of William McArthur, Manager, Social Programs, British Columbia Regional Office, AANDC, *Transcript* Vol. 64 at pp. 45-47).

[76] All the above indicates a public relationship between AANDC and First Nations children and families in the provision of child and family services. In sum, AANDC extends the FNCFS Program and other related provincial/territorial agreements as a partnership, including with First Nations, to improve outcomes for First Nations children and families on reserve. Ultimately, through the FNCFS Program, its funding formulas and the related provincial/territorial agreements, AANDC has a direct impact on the child and family services provided to First Nations children and families living on reserves and in the Yukon Territory.

[77] This public relationship between AANDC and First Nations on reserves and in the Yukon in the provision of child and family services is reinforced by the federal government's constitutional responsibilities and its special relationship with Aboriginal peoples.

e. Section 91(24) of the *Constitution Act, 1867*

[78] The fact that AANDC does not directly deliver First Nations child and family services on reserve, but funds the delivery of those services through FNCFS Agencies or the provincial/territorial governments, does not exempt it from its public mandate and responsibilities to First Nations people. AANDC argues that child welfare services fall within provincial jurisdiction and that it only became involved as a matter of social policy to address concerns that the provinces were not providing the full range of services to First Nations children and families living on reserves. However, that position does not take into consideration Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act, 1867*.

[79] In Canada, legislative power is divided between the federal government and the provincial/territorial governments. As stated by the Supreme Court in *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paragraph 22 (*Central Western Bank*):

> …federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

[80] The Supreme Court also noted that "the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society" (*Central Western Bank* at para. 23). This is referred to as the "living tree" doctrine.

[81] The legislative powers defined in the *Constitution Act, 1867* are deemed to be exclusive to the extent that, even if Parliament does not legislate in its fields of jurisdiction, the provinces/territories are not allowed to do so (see *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.) at p. 588). However, the Court has indicated clearly that this doctrine of inter-jurisdictional immunity is to be construed narrowly, among other reasons, so as not to allow any legal vacuum. It is used "…to protect that which makes certain works or undertakings, things (e.g., Aboriginal lands) or persons (e.g., Aboriginal peoples and corporations created by the federal Crown) specifically of federal jurisdiction" (*Central Western Bank* at para. 41). As also noted in *Central Western Bank* at paragraph 42:

> Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.

[82] Despite the doctrine of inter-jurisdictional immunity, cooperative federalism can exist in situations where federal and provincial authorities connect. In the recent case of *Quebec (A.G.) v. Canada (A.G.)*, 2015 SCC 14 (*Canadian Firearms Registry*), where

Quebec challenged the constitutionality of the federal government's decision to destroy the firearms registry, the Supreme Court found itself divided on the scope of cooperative federalism. Nonetheless, the majority in *Canadian Firearms Registry* held that cooperative federalism cannot override or modify the constitutional division of powers:

> [17] Cooperative federalism is a concept used to describe the "network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process […] From this descriptive concept of cooperative federalism, courts have developed a legal principle that has been invoked to provide flexibility in separation of powers doctrines, such as federal paramountcy and interjurisdictional immunity. It is used to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action […] With respect to interjurisdictional immunity, for example, the principle of cooperative federalism has been relied on to explain and justify relaxing a rigid, watertight compartments approach to the division of legislative power that unnecessarily constrains legislative action by the other order of government: "In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest" (*Canadian Western Bank*, at para. 37).
>
> [18] However, we must also recognize the limits of the principle of cooperative federalism. The primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 53. This is especially the case with regard to the division of powers:
>
> > . . . the text of the federal constitution as authoritatively interpreted in the courts remains very important. It tells us who can act in any event. In other words, constitutionally it must always be possible in a federal country to ask and answer the question — What happens if the federal and provincial governments do not agree about a particular measure of co-operative action? Then which government and legislative body has power to do what?
>
> (Emphasis added; footnote omitted)

[83] Instead of legislating in the area of child welfare on First Nations reserves, pursuant to Parliament's exclusive legislative authority over "Indians, and lands reserved for

Indians" by virtue of section 91(24) of the *Constitution Act, 1867*, the federal government took a programing and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the *Indian Act*. However, this delegation and programing/funding approach does not diminish AANDC's constitutional responsibilities. In a comparable situation argued under the *Canadian Charter of Rights and Freedoms* (the *Charter*), the Supreme Court stated in *Eldridge* at paragraph 42:

> …the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

[84] Similarly, AANDC should not be allowed to evade its responsibilities to First Nations children and families residing on reserve by delegating the implementation of child and family services to FNCFS Agencies or the provinces/territory. AANDC should not be allowed to escape the scrutiny of the *CHRA* because it does not directly deliver child and family services on reserve.

[85] As explained above, despite not actually delivering the service, AANDC exerts a significant amount of influence over the provision of those services. Ultimately, it is AANDC that has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on First Nations reserves and in the Yukon. This is the assistance or benefit AANDC holds out and intends to provide to First Nations children and families.

[86] Parliament's constitutional responsibility towards Aboriginal peoples, in a situation where a federal department dedicated to Aboriginal affairs oversees a social program and negotiates and administers agreements for the benefit of First Nations children and families, reinforces the public relationship between AANDC and First Nations in the provision of the FNCFS Program and the related provincial/territorial agreements.

f. The Crown's fiduciary relationship with Aboriginal peoples

[87] Furthermore, AANDC's commitment to ensuring the safety and well-being of children and families living on reserves and in Yukon must be considered in the context of the special relationship between the Crown and Aboriginal peoples.

[88] The Complainants submit that the relationship between the Crown and Aboriginal peoples is a fiduciary relationship that gives rise to a fiduciary duty in relation to the FNCFS Program. While AANDC acknowledges there is a general fiduciary relationship between the federal Crown and the Aboriginal peoples of Canada, it argues that fiduciary duty principles are not applicable to the Complaint.

[89] It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16 [*Haida Nation*]). It is also well established that there exists a special relationship between the Crown and the Aboriginal peoples of Canada, qualified as a *sui generis* relationship. This special relationship stems from the fact that Aboriginal peoples were already here when the Europeans arrived in North America (see *R. v. Van der Peet*, [1996] 2 SCR 507, at para. 30).

[90] In 1950, in a case about the application of section 51 of the *Indian Act, 1906* and concerning reserve lands, the Supreme Court stated that the care and welfare of First Nations people are a "political trust of the highest obligation":

> The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.
>
> (*St. Ann's Island Shooting And Fishing Club v. The King*, [1950] SCR 211 at p. 219 [per Rand J.])

[91] However, this "political trust" was not enforceable by the courts. This changed when the Supreme Court moved away from the political trust doctrine. In the context of a case dealing with the sale of surrendered land at conditions quite different from those agreed to

at the time of the surrender, the Supreme Court qualified the relationship between the Crown and Aboriginal peoples as a fiduciary relationship in *Guerin v. The Queen*, [1984] 2 SCR.335, at page 376 (*Guerin*):

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.

[92] This special relationship is also rooted in the large degree of discretionary control assumed by the Crown over the lives and interests of Aboriginal peoples in Canada:

> English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow*, *supra*. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
>
> (*Mitchell v. M.N.R.*, 2001 SCC 33, at para. 9)

[93] After the entry into force of section 35 of the *Constitution Act, 1982*, in *R.* v. *Sparrow*, [1990] 1 SCR 1075, at page 1108, the Supreme Court further confirmed and defined the duty of the Crown to act in a fiduciary capacity as the "general guiding principle" for section 35:

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial and, contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[94] This general guiding principle is not limited to section 35(1) of the *Constitution Act, 1982*, but has broader application as confirmed by the Supreme Court in *Wewaykum Indian Band* v. *Canada*, 2002 SCC 79, at paragraph 79 (*Wewaykum*).

[95] First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (*Wewaykum* at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in *Haida Nation*, at paragraph 17:

> Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

[96] That being said, it is also well established that this fiduciary relationship does not always give rise to fiduciary obligations. While the fiduciary relationship may be described as general in nature, requiring that the Crown act in the best interest of Aboriginal peoples, fiduciary obligations are specific, related to precise aboriginal interests:

> This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically […]
>
> But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
>
> (*Wewaykum* at paras. 80-81)

[97] The Supreme Court has relied on private law concepts to define circumstances that can give rise to a fiduciary obligation because, although the Crown's obligation is not a

private law duty, it is nonetheless in the nature of a private duty, susceptible of giving rise to enforceable obligations :

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.
>
> (*Guerin* at p. 385)

[98] *Guerin* stands for the principle that a fiduciary obligation on the Crown towards Aboriginal peoples arises from the fact that their interest in land is inalienable except upon surrender to the Crown. In another case where the Supreme Court found that the Crown has a fiduciary obligation to prevent exploitative bargains in the context of a surrender of reserve land, in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at paragraph 38, it referred to private law criteria to define a situation that could give rise to a fiduciary obligation:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

[99] The present case does not raise land related issues. The Panel is aware that fiduciary obligations have yet to be recognized by the Supreme Court in relation to Aboriginal interests other than land outside the framework of section 35(1) of the *Constitution Act, 1982* (see *Wewaykum* at para. 81). However, the Panel is also aware that in *Frame v. Smith*, [1987] 2 SCR 99, at paragraph 60, Wilson J. held that fiduciary duties did not apply only to legal and economic interests but could extend to human and personal interests:

> To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme.

[100] In fact, in *Wewaykum* the Supreme Court noted that since the *Guerin* case the existence of a fiduciary obligation has been argued in a number of cases raising a variety of issues (see at para. 82). While it did not comment on these cases, the Court in *Wewaykum*, at paragraph 83, did state that a case by case approach would have to focus on the specific interest at issue and whether or not the Crown had assumed discretionary control giving rise to a fiduciary obligation:

> I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature […], and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[101] Recent case law from the Supreme Court confirms that a fiduciary obligation may also arise from an undertaking. The following conditions are to be met:

> In summary, for an ad hoc fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in Frame: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

> (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para. 36 (*Elder Advocates Society*); see also *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para. 50 [*Manitoba Metis Federation*])

[102] AANDC argues that there must be an undertaking of loyalty by the Crown to the point of forsaking the interests of all others in favour of those of the beneficiaries for a fiduciary obligation to apply (see *Elder Advocates Society* at para. 31; and, *Manitoba Metis Federation* at para. 61).

[103] However, in *Elder Advocates Society*, at paragraph 48, it should be noted that the Supreme Court held that the necessary undertaking was met with respect to Aboriginal peoples:

> In sum, while it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare. The necessary undertaking is met with respect to Aboriginal peoples by clear government commitments from the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1) to the *Constitution Act, 1982* and considerations akin to those found in the private sphere.

[104] In view of the above and the evidence presented on this issue, the relationship between the federal government and First Nations people for the provision of child and family services on reserve could give rise to a fiduciary obligation on the part of the Crown. Arguably the three criteria outlined in *Elder Advocates Society* have been met in this case.

[105] The FNCFS Program and other related provincial/territorial agreements were undertaken and are controlled by the Crown. This undertaking is explicitly intended to be in the best interests of the First Nations beneficiaries, including that the "best interests of the child" and the safety and well-being of First Nations children are objectives of the program. The Crown has discretionary control over the FNCFS Program through policy and other administrative directives. It also exercises discretionary control over the application of the other related provincial/territorial agreements as First Nations are not party to their negotiation. The FNCFS Program and other related provincial/territorial agreements also have a direct impact on a vulnerable category of people: First Nations children and families in need of child and family support services on reserve.

[106] The legal and substantial practical interests of First Nations children, families, and communities stand to be adversely affected by AANDC's discretion and control over the FNCFS Program and other related provincial/territorial agreements. The Panel agrees with the AFN, Caring Society and the COO that the specific Aboriginal interests that stand to be adversely affected in this case are, namely, indigenous cultures and languages and their transmission from one generation to the other. Those interests are also protected by section 35 of the *Constitution Act, 1982*. The transmission of indigenous languages and cultures is a generic Aboriginal right possessed by all First Nations children and their families. Indeed, the Supreme Court highlighted the importance of cultural transmission in *R. v. Côté*, [1996] 3 SCR 139 at paragraph 56:

> In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.

[107] Similarly, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paragraph 26 (*Doucet-Boudreau*), the Supreme Court stated the following with regard to the relation between language and culture:

> This Court has, on a number of occasions, observed the close link between language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:
>
> > . . . any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

[108] In certifying a class action based on the operation of the child welfare system on reserve in Ontario, Justice Belobaba on the Ontario Superior Court of Justice, in *Brown v. Canada (AG)*, 2013 ONSC 5637 at paragraph 44, expressed his views on the existence of a fiduciary duty based on the discretionary Crown control over Aboriginal interests in culture:

> it is at least arguable that a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were "wards of the state whose care and welfare are a political trust of the highest obligation"; and (iv) who were potentially being exposed to a provincial child welfare regime that could place them in non-aboriginal homes.

[109] The Panel agrees with the Caring Society that it is not necessary for the purposes of this case to further define the contours of Aboriginal rights in language and culture or a fiduciary duty related thereto. It is enough to say that, by virtue of being protected by section 35 of the *Constitution Act, 1982* indigenous cultures and languages must be considered as "specific indigenous interests" which may trigger a fiduciary duty. Accordingly, where the government exercises its discretion in a way that disregards indigenous cultures and languages and hampers their transmission, it can breach its fiduciary duty. However, such a finding is not necessary to make a determination regarding whether or not AANDC provides a service; or, more broadly, to determine whether there has been a discriminatory practice under the *CHRA*.

[110] Suffice it to say, AANDC's development of the FNCFS Program and related agreements, along with its public statements thereon, indicate an undertaking on the part of the Crown to act in the best interests of First Nations children and families to ensure the provision of adequate and culturally appropriate child welfare services on reserve and in the Yukon. Whether or not that gives rise to a fiduciary obligation, the existence of the fiduciary relationship between the Crown and Aboriginal peoples is a general guiding principle for the analysis of any government action concerning Aboriginal peoples. In the current "services" analysis under the *CHRA*, it informs and reinforces the public nature of the relationship between AANDC and First Nations on reserves and in the Yukon in the provision of the FNCFS Program and other provincial/territorial agreements.

iii. Summary of findings

[111] Overall, the Panel finds the evidence indicates the FNCFS Program and other related provincial/territorial agreements are held out by AANDC as assistance or a benefit

that it provides to First Nations people. The FNCFS Program and other provincial/territorial agreements were created and negotiated on behalf of First Nations by AANDC, a federal government department with the mandate and mission to do so. First Nations are a distinct public, served by AANDC in the context of a unique constitutional and fiduciary relationship. AANDC has undertaken to ensure First Nations living on reserve receive culturally appropriate child and family services that are reasonably comparable to the services provided to other provincial residents in similar circumstances. Therefore, the Panel finds there is a clear public nature and relationship with First Nations in AANDC's provision of the FNCFS Program and other related provincial/territorial agreements.

[112] This finding is similar to the one made by the Federal Court in *Attawapiskat First Nation v. Canada*, 2012 FC 948. In discussing the nature of funding agreements similar to the ones at issue in the present Complaint, the Federal Court stated at paragraph 59:

> the [Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement] to provide essential services to its members and as a result, the [Comprehensive Funding Agreement] is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the [Comprehensive Funding Agreement]. There is no evidence of real negotiation. The power imbalance between government and this band dependent for its sustenance on the [Comprehensive Funding Agreement] confirms the public nature and adhesion quality of the [Comprehensive Funding Agreement].

[113] As a result, and for the reasons above, the Panel finds AANDC provides a service through the FNCFS Program and other related provincial/territorial agreements. In the following pages, the Panel will examine the impacts of AANDC's service and, specifically, how AANDC's method of funding the FNCFS Program and related provincial/territorial agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

B. First Nations are adversely impacted by the services provided by AANDC and, in some cases, denied services as a result of AANDC's involvement

[114] Before dealing with how the FNCFS Program and other related provincial/territorial agreements are funded, it is helpful to have a basic understanding of how child welfare services are provided in Canada. Dr. Cindy Blackstock, Executive Director of the Caring Society, provided helpful testimony in this regard (see *Transcript* Vol. 1 at pp. 110, 112, 124-129, 132-136, 138-142 and 151; see also Annex, ex. 1).

i. General child welfare principles

[115] As indicated earlier, child welfare in Canada includes a range of services designed to protect children from abuse and neglect and to support families so that they can stay together. The main objective of social workers is to do all they can to keep children safely within their homes and communities. There are two major streams of child welfare services: prevention and protection.

[116] Prevention services are divided into three main categories: primary, secondary and tertiary. Primary prevention services are aimed at the community as a whole. They include the ongoing promotion of public awareness and education on the healthy family and how to prevent or respond to child maltreatment. Secondary prevention services are triggered when concerns begin to arise and early intervention could help avoid a crisis. Tertiary prevention services target specific families when a crisis or risks to a child have been identified. As opposed to separating a child from his or her family, tertiary prevention services are designed to be "least disruptive measures" that try and mitigate the risks of separating a child from his or her family. Early interventions to provide family support can be quite successful in keeping children safely within their family environment, and provincial legislation requires that least disruptive measures be exhausted before a child is placed in care.

[117] Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child welfare workers will make

arrangements for temporary or permanent placement of the child in another home where he or she can be cared for. This is called placing the child “in care”. The first choice for a caregiver in this situation would usually be a kin connection or a foster family. Kinship care includes children placed out-of-home in the care of the extended family, individuals emotionally connected to the child, or in a family of a similar religious or ethno-cultural background.

[118] The child welfare system is typically called into action when someone has concerns about the safety or well-being of a child and reports these concerns to a social worker. The first step is for the social worker to do a preliminary assessment of the report in order to decide whether further investigation is called for. If the social worker concludes that an investigation is warranted, he or she can meet with family members and can interview the child. The child is not removed from the home during the investigation unless his or her safety is at risk. The social worker will develop a plan of action for the child and his or her family in coordination with the child’s extended family and professionals such as teachers, early child care workers and cultural workers. A whole range of services may include personal counselling, mentoring by an Elder, access to childhood development programs or to programs designed to enhance the homemaking and parental skills of the caregiver.

[119] There are circumstances, however, when the risk to the child’s safety or well-being is too great to be mitigated at home, and the child cannot safely remain in his or her family environment. In such circumstances, most provincial statutes require that a social worker first look at the extended family to see if there is an aunt, an uncle or a grandparent who can care for the child. It is only when there is no other solution that a child should be removed from his or her family and placed in foster care under a temporary custody order. Following the issuance of a temporary custody order, the social worker must appear in court to explain the placement and the plan of care for the child and support of the family. The temporary custody order can be renewed and eventually, when all efforts have failed, the child may be placed in permanent care.

[120] The major categories of child maltreatment are: sexual, physical, or emotional abuse, or exposure thereto, and neglect. For First Nations, the main source of child maltreatment is neglect in the form of a failure to supervise and failure to meet basic

needs. Poverty, poor housing and substance abuse are common risk factors on reserves that call for early counselling and support services for children and families to avoid the intervention of child protection services.

ii. The allocation of funding for First Nations child and family services

[121] AANDC funds child and family services on reserves and in the Yukon in various ways. At the time of the complaint, there were 105 FNCFS Agencies in the 10 provinces across Canada (104 at the time of the hearing). The FNCFS Program, applies to most of the FNCFS Agencies in Canada, uses two funding formulas: Directive 20-1 and the Enhanced Prevention Focused Approach (the EPFA). In Ontario, funding is provided through the *1965 Agreement*. In certain parts of Alberta and British Columbia, funding is provided through the *Alberta Reform Agreement* and the *BC MOU* and, since 2012, the *BC Service Agreement*. Finally, in the Yukon funding is allocated pursuant to the *Yukon Funding Agreement* (see testimony of Ms. Barbara D'Amico, Senior Policy Analyst at the Social and Policy Branch of AANDC, *Transcript* Vol. 50 at p. 141). Each method of funding is addressed in turn.

a. The FNCFS Program

[122] Beginning with the FNCFS Program, AANDC's authorities require that, before entering into a funding arrangement with an FNCFS Agency (or Recipient), an agreement be in place between the province or territory and the agency that meets the requirements of AANDC's national FNCFS Policy (see *2005 FNCFS National Program Manual* at s. 4.1). Thereafter, funding is provided through a comprehensive funding arrangement (CFA), which is "…a program-budgeted funding agreement that [AANDC] enters into with Recipients…" (*2005 FNCFS National Program Manual* at s. 4.4.1). According to the *2005 FNCFS National Program Manual* at section 4.4.1:

> [A CFA] contains components funded by means of a Contribution, which is a reimbursement of eligible expenses and Flexible Transfer Payments, which are formula funded. Surpluses from the Flexible Transfer Payment may be retained by the Recipient provided the terms and conditions of the CFA have

> been fulfilled. The FNCFS program expects that all surplus money will be used for FNCFS. It is also expected that Recipients will absorb any deficits.

[123] Funding for FNCFS Agencies is determined in accordance with AANDC "authorities" (see *2005 FNCFS National Program Manual* at s. 1.4). Those "authorities" are obtained from the federal government through Cabinet and Treasury Board and "…are reflected in the […] Program Directive" (*2005 FNCFS National Program Manual* at s. 1.4.5). The Program Directive, also called Directive 20-1 and found at Appendix A of the *2005 FNCFS National Program Manual*, "…interprets the authorities and places them into a useable context" (*2005 FNCFS National Program Manual* at s. 1.4.5). Directive 20-1 is AANDC's "…national policy statement on FNCFS" (see definition of "Program Directive 20-1 CHAPTER 5 (Program Directive)", *2005 FNCFS National Program Manual* at s. 7, p. 51). It is also:

> …a blueprint on how INAC will administer the FNCFS program from a national perspective, it is also intended to be a teaching document, for new staff at both INAC Headquarters and Regions. The combination of the national manual and the regional manuals should create a clear picture of INAC's role in FNCFS in Canada
>
> (*2005 FNCFS National Program Manual* at Introduction, p. 2)

[124] Prior to 2007, around the time of the Complaint, all provinces and the Yukon, except Ontario, functioned under Directive 20-1. Currently, New Brunswick, British Columbia, Newfoundland and Labrador and the Yukon are subject to the application of Directive 20-1.

[125] In line with the FNCFS Program, the principles of Directive 20-1 include a commitment to "…expanding First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances […] in accordance with the applicable provincial child and family services legislation" (see *2005 FNCFS National Program Manual* at Appendix A, ss. 6.1 and 6.6). Furthermore, Directive 20-1 supports "…the creation of First Nations designed, controlled and managed services" (see *2005 FNCFS National Program Manual* at Appendix A, s. 6.2). Under Directive 20-1, funding for FNCFS agencies is determined through two separate categories: operations and maintenance.

[126] Operational funding is intended to cover operations and administration costs for such items as salaries and benefits for agency staff, travel expenses, staff training, legal services, family support services and agency administration, including rent and office expenditures (see *2005 FNCFS National Program Manual* at s.2.2.2 and at Appendix A, s. 19.1). It is calculated using a formula based on the on-reserve population of children aged 0-18 as reported annually by First Nations bands across Canada. The calculation of the operations funding is done annually by AANDC as of December 31 of each year, based on the population statistics of the preceding year (see *2005 FNCFS National Program Manual* at s. 3.2). FNCFS Agencies are eligible to receive a fixed administrative allocation pursuant to the following formula:

> A fixed amount $143,158.84 per organization + $10,713.59 per member band + $726.91 per child (0-18 years) + $9,235.23 x average remoteness factor + $8,865.90 per member band x average remoteness factor + $73.65 per child x average remoteness factor + actual costs of the per diem rates of foster homes, group homes and institutions established by the province or territory.
>
> (see *2005 FNCFS National Program Manual* at Appendix A, s. 19.1(a); see also *2005 FNCFS National Program Manual* at ss. 3.2.1-3.2.3)

[127] The adjustment factor is multiplied by $9,235.23, the remoteness factor is multiplied by $8,865.90 times the number of bands within the agency's catchment area and the child population (0 to 18 years) is multiplied by $73.65 times the remoteness factor (see *2005 FNCFS National Program Manual* at s. 3.2.3). The remoteness factor takes into account such things as the distance between the First Nation and a service centre, road access, and availability of services. It can range from 0 to 1.9. If multiple communities are served by an FNCFS Agency, the remoteness factors of each of the communities is averaged to come to the 'average remoteness factor' (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 28-29).

[128] The amounts in the operational funding formula are based on certain assumptions emanating from the time it was put in place in the early 1990's:

- On average, 6% of the on reserve child population is in care;

- On average, 20% of families on reserve require child and family services or are classified as multi-problem families;
- One child care worker and one family support worker for every 20 children in care;
- One supervisor and one support staff for every 5 workers;
- Wages based on average salaries in Ontario and Manitoba

(see Annex, ex. 13 at pp. 7-8 [*Wen:De Report One*]).

[129] According to Ms. D'Amico, the 6% assumption regarding children-in-care is based on the 2007 national average and it provides FNCFS Agencies with stability. That is, even if an agency has or later achieves a smaller percentage of children-in-care, their budget is not affected. The 20% of families requiring services is determined using an assumption that there are on-average three children per family. By dividing the total on-reserve child population by three, AANDC arrives at the number of families it believes would normally be served by the applicable FNCFS Agency. It then takes 20% of that population calculation as a variable in determining the FNCFS Agency's budget (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 25-31).

[130] In the first four years of operation of a new FNCFS Agency, the funding formula is gradually implemented at a rate of 75% in the first year, 85% the second year, 95% the third year and 100% in the fourth year [see *2005 FNCFS National Program Manual* at section 3.2.1 and Appendix A, s. 19.1(c)]. Furthermore, for agencies that serve less than 1,000 children, the fixed maximum amount of $143,158.84 is decreased as follows: $71,579.43 (501-800 children); $35,789.10 (251-500); and, regions with a child population of 0 to 250 receive no administrative allocation [see *2005 FNCFS National Program Manual* at Appendix A, s. 19.2(b)]. However, in British Columbia, the full allocation for population begins with at least 801 children (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 23).

[131] Maintenance funding is intended to cover the actual costs of eligible expenditures for maintaining a First Nations child ordinarily resident on reserve in alternate care out of parental home. Children must be taken into care in accordance with provincially or

territorially approved legislation, standards and rates for foster home, group home and institutional care. FNCFS Agencies are required to submit monthly invoices for children in care out of the parental home and are to be reimbursed on the basis of actual expenditures (see *2005 FNCFS National Program Manual* at ss. 3.3.1-3.3.2 and Appendix A, s. 20.1).

[132] Until 2011, FNCFS Agencies in British Columbia were funded on a per diem structure, but have since transitioned to reimbursement for maintenance expenses based on actual costs. However, if funding based on actuals provides for less funding, the previous per diem funding levels are maintained as part of a plan to eventually transition FNCFS Agencies in that province to the EPFA (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 35-36; and, testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 150-151).

[133] FNCFS Agencies also have the option of applying for "flexible" funding for maintenance under Directive 20-1 (see *2005 FNCFS National Program Manual* at Appendix A, s. 20.2). This option allows agencies to receive a payment of their total operational funding allocation, along with a historically based estimate of their maintenance costs. This flexible funding option is meant to provide FNCFS Agencies with increased flexibility to re-profile maintenance funding to provide increased resources for prevention. To access this flexible funding option an FNCFS Agency must undergo an assessment and receive approval from AANDC's regional office, along with approval from AANDC Headquarters. In 2006, only 7 out of 105 FNCFS Agencies utilized the flexible funding option (see Annex, ex. 14 at p. 5 [*2007 Evaluation of the FNCFS Program*]).

[134] The monetary amounts reflected in Directive 20-1 reflect 1995-1996 values and have not been significantly modified since that time, despite the directive providing for them to be increased by 2% every year, subject to the availability of resources (see *2005 FNCFS National Program Manual* at Appendix A, s. 22.00; and, testimony of W. McArthur, *Transcript* Vol. 64 at pp. 3-4). Furthermore, maximum funding by AANDC is 100 percent of eligible costs. FNCFS Agencies may be required to repay funds to AANDC if their total funding from all sources, including from voluntary sector sources, exceeds eligible expenditures and when AANDC's contribution thereto is in excess of $100,000 (see *2012 National Social Programs Manual* at p. 10, s. 11.0 [the stacking provisions]).

[135] Since 2005, an 8.24 percent increase has been applied to each FNCFS Agency's total allocation under Directive 20-1 (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 32; and, testimony of B. D'Amico, *Transcript* Vol. 51 at p. 17). Additional funding is also provided in New Brunswick for the Head Start program and for in-home care as a precursor to the transition to the EPFA (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 169-173).

[136] That is, since 2007, AANDC has transitioned the funding model for certain provinces under the FNCFS Program from Directive 20-1 to the EPFA. An agreement was reached to implement the EPFA in Alberta and Saskatchewan in 2007, Nova Scotia in 2008, Québec in 2009, Prince Edward Island in 2009 and Manitoba in 2010.

[137] Under EPFA, prevention is included as a third funding stream to operations and maintenance. Prevention services are "…designed to reduce the incidence of family dysfunction and breakdown or crisis and to reduce the need to take children into Alternate Care or the amount of time a child remains in Alternate Care" (*2012 National Social Programs Manual* at p. 33, s. 2.1.17; see also p. 38, s. 4.4.1). Eligible expenses under this prevention funding stream include: salaries and benefits for prevention and resource workers, travel, paraprofessional services, family support services, mentoring services for children, home management services, and non-medical counselling services not covered by other funding sources (see *2012 National Social Programs Manual* at p. 38, s. 4.4.2).

[138] Implementation of the EPFA begins with tri-partite discussions between the province, First Nation community and AANDC. From the tripartite discussions, a Tripartite Accountability Framework is developed outlining the goals, objectives, performance indicators, and roles and responsibilities of the parties. Using the Tripartite Accountability Framework as a benchmark, the FNCFS Agency prepares an initial 5-year business plan, which is subject to AANDC review and acceptance by the province. The business plan is a pre-requisite in order to receive funding under the EPFA (see *2012 National Social Programs Manual* at p. 37, s. 4.3; see also testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 146-152).

[139] Once the framework and business plan are in place, the costing discussions take place. According to the *2012 National Social Programs Manual*, funding for operations and prevention services are based on a cost-model developed at regional tri-partite tables and are consistent with reasonable comparability to the respective province within AANDC's program authority (see *2012 National Social Programs Manual* at p. 38, s. 4.4.1). That is, the EPFA is to be tailored to each jurisdiction using a formula made-up of line-items that are identified at tripartite tables. The determination of staffing numbers and which line items to include in the formula, and the dollar values assigned to each of those line items, is based on variables provided by the province (for example staffing ratios, caseload ratios, and salary grades). Those amounts are then worked into AANDC's operations and prevention cost-model. A cost-model is utilized because the provinces do not always use a funding formula that AANDC can replicate (see testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 56, 150-151; and, Vol. 51 at pp.18-66, 153-154).

[140] Similar to Directive 20-1, the formula for the EPFA is based on the child population served by the FNCFS Agency and the assumptions that a minimum of 20% of families are in need of child and family services and that 6% of children are in care (although in Manitoba an assumption of 7% of children in care is used in the EPFA formula). The prevention focused services component of the EPFA formula is largely based on the salaries needed for service delivery staff, where the amount of staff needed is calculated based on the assumed amount of children in care and families in need of services. The estimated amount of children in care is calculated by multiplying the child population served by the FNCFS Agency by the assumed percentage of children in care. As mentioned above, the number of families in need of services is calculated by taking the total child population served by the FNCFS Agency, dividing it by the average amount of children per First Nation family (3), and then multiplying that number by the assumed percentage of families in need of prevention services (20%) (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 24-31).

[141] The calculated estimates of children in care and families in need of care are then used to determine the amount of service delivery staff needed for the FNCFS Agency. Similar to Directive 20-1, provincial ratios in terms of social workers per children in care or

families in need, supervisors per amount of socials workers, and support staff per amount of workers are used to estimate the staff needed for specific positions. The average salaries for those positions within the province, at the time EPFA is implemented, then make up the bulk of funding provided for the prevention focused services component of the funding formula (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 32-79). As Ms. Murphy explained:

> We are from a funding perspective, so how the provinces fund is what we want to stay comparable with, not the types of services that the province funds -- or provides, excuse me.
>
> […]
>
> And the only way that we could find that, a way to be comparable, was to identify the variables, those calculation variables; so the salary grids, the ratios – the staffing ratios, the caseload ratios. Those were the only funding tools that we could find to be comparable, and that is why we had incorporated that into the EPFA formula.
>
> (*Transcript* Vol. 51 at pp. 178-179)

[142] Eligible expenditures for maintenance and operations under the EPFA are outlined at sections 3.4 and 3.5 of Directive 20-1 (see *2012 National Social Programs Manual* at p. 38, s. 4.4.1). AANDC expects FNCFS Agencies to manage their operations and prevention costs within the budgets they have (see testimony of S. Murphy, *Transcript* Vol. 54 at p. 170). However, the EPFA does allow agencies flexibility in moving funding from one stream (operations, maintenance or prevention) to another "…in order to address needs and circumstances facing individual communities" (*2012 National Social Programs Manual* at p. 38, s. 4.4.1).

[143] Under EPFA, funding for prevention and operations is determined at the beginning of a five year period on a fixed cost basis (see testimony of B. D'Amico, *Transcript* Vol. 53 at p.16). EPFA funding is then rolled-out over a 3-4 year period, where the FNCFS Agency receives 40% of funding in year 1, 60% in year 2 and between 80% and 100% in year 3. The full funding amount is provided by year 4 (see testimony of B. D'Amico, *Transcript* Vol. 52 at pp. 145-146). Once EPFA is fully implemented, the only revision in the funding formula from year to year is to account for the child population served by the FNCFS

Agency. EPFA does not provide additional funding for increases in operations or prevention costs over time, such as for changes to professional services rates or incremental increases in salaries (see testimony of B. D'Amico, *Transcript* Vol. 52 at pp. 147-150; see also *2012 National Social Programs Manual* at p. 37, s. 4.1)

[144] For example, in Alberta, where the EPFA was first implemented in 2007, the average salaries for service delivery staff from that initial implementation of the EPFA, based on 2006 values, are still being applied eight years later to the calculation of 2014 budgets (see testimony of B. D'Amico, *Transcript* Vol. 52 at p. 153; and, testimony of Ms. Carol Schimanke, Manager of Social Development, Child and Family Services Program, AANDC Alberta Regional Office, *Transcript* Vol. 61 at pp. 115-116). According to Ms. D'Amico, the rationale behind this is as follows:

> Because what the idea of EPFA was that if you placed more money in prevention and did a lot more early intervention work, your maintenance costs would go down. When those maintenance costs go down, that money could be reinvested into operations.
>
> So the idea -- and this is not in practice, but the idea behind this was for it -- for the Agencies to be self-sufficient and be able to move the monies from one stream to another. So that's why there was no escalator included in here.
>
> This is an issue we are now reviewing about what happens after year five if the maintenance isn't supplying the operations anymore, or never did, so, what if that theory doesn't work?
>
> (*Transcript* Vol. 52 at pp. 150-151)

[145] Ms. D`Amico specified that in practice, given that some FNCFS Agencies are doing more intake and investigations as part of their prevention strategies, this has led to more kids in care and no reduction in maintenance costs (see *Transcript* Vol. 51 at pp. 91-92). The EPFA funding formula also does not include funds for intake and investigation.

[146] Maintenance funding under the EPFA is budgeted annually based on actual expenditures from the previous year (see *2012 National Social Programs Manual* at p. 38, section 4.4.1). AANDC "re-bases" an agency's maintenance budget each year. For example, if an agency's maintenance budget is $100 in year one, but its expenditures for

that year total only $80, AANDC will reduce its maintenance budget in the second year to $80. If in the second year that agency's number of children in care increases unexpectedly, the agency must work within its existing budget to manage those costs in the interim.

[147] In other words, if maintenance costs are greater than the set amount of maintenance funding, the FNCFS Agency must recover the deficit from its operations and/or prevention funding streams. If there is still a deficit in maintenance, AANDC has some funds that it holds back centrally at the beginning of each fiscal year to help manage those types of situations. When that fund is depleted, AANDC reallocates money from other programs within AANDC to cover the maintenance costs. If an FNCFS Agency has a surplus from its maintenance budget, the agency can keep it and re-apply it to other eligible expenses (see testimony of C. Schimanke, *Transcript* Vol. 61 at pp. 91, 96-98; testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 174-181; and, testimony of S. Murphy, *Transcript* Vol. 54 at pp. 167-168, 172-174).

[148] AANDC receives a 2% increase in its budget for Social Programs every year. However, for the FNCFS Program, that 2% increase is calculated based on the budget of the FNCFS Program prior to the implementation of the EPFA, at about $450 million. Ms. Murphy estimated the current budget of the FNCFS Program, with the implementation of the EPFA, to be approximately $627 million. In her words:

> So the difference in that, between that 450 million has been made up of some of the two percent -- the portion of growth, some of it's the incremental investments that have come to the Department through the EPFA for those six jurisdictions and the rest of it is resource re-allocations.
>
> (*Transcript* Vol. 54 at pp. 177, 189-191; see also, Vol. 55 at pp. 188-189)

b. Reports on the FNCFS Program

[149] The FNCFS Program has been examined in multiple reports: the First Nations Child and Family Services Joint National Policy Review, referred to above as the *NPR*, in 2000; three related studies from 2004-2005 referred to as the Wen:De reports; and, two

Auditor General of Canada reports in 2008 and 2011, along with follow-up reports thereon by the House of Commons Standing Committee on Public Accounts.

First Nations Child and Family Services Joint National Policy Review Final Report

[150] The *NPR* was published in 2000. It is a collaborative report by AANDC and the Assembly of First Nations. Although the *NPR* pre-dates the complaint by about 8 years, its study of the impacts of Directive 20-1 is still relevant given that the funding formula still applies to many FNCFS Agencies and in the Yukon. The report also outlines a rigorous methodology and consultation in arriving at its conclusions. The Panel finds this early study of Directive 20-1 informative and a useful starting point in understanding the impacts of AANDC's funding formula on First Nations children and families on reserves.

[151] The *NPR* describes the context of First Nations child and family services as including several experiences of massive loss, resulting in identity problems and difficulties in functioning for many First Nations and their families. These experiences include the historical experience of residential schools and its inter-generational effects, and the migration of First Nations out of reserves causing disruption to the traditional concept of family (see *NPR* at pp. 32-33). As the *NPR* puts it at page 33:

> First Nation families have been in the centre of a historical struggle between colonial government on one hand, who set out to eradicate their culture, language and world view, and that of the traditional family, who believed in maintaining a balance in the world for the children and those yet unborn. This struggle has caused dysfunction, high suicide rates, and violence, which have had vast inter-generational impacts.

[152] According to the NPR, "Program Directive 20-1 was developed to provide equity, predictability and flexibility in the funding of first nations child and family services agencies" (at p.10). A principle of Directive 20-1 is that AANDC is committed to the expansion of child and family services on reserve to a level comparable to the services off reserve in similar circumstances (see *NPR* at p. 20). This is AANDC's own standard and it expects FNCFS Agencies to abide by it:

> FNCFS Agencies are expected through their delegation of authority from the provinces, the expectations of their communities and by DIAND, to provide a

> comparable range of services on reserve with the funding they receive through Directive 20-1.
>
> (*NPR* at p. 83, emphasis added)

[153] However, the *NPR* found the funding formula under Directive 20-1 inhibited FNCFS Agencies' ability to meet the expectation of providing a comparable range of child and family services on reserve for a number of reasons:

- The formula provides the same level of funding to agencies regardless of how broad, intense or costly, the range of service is (at p. 83).
- Variance in the definition of maintenance expenses from region to region, resulting in AANDC rejecting maintenance expenses that ought to have been reimbursed in accordance with provincial/territorial legislation and standards (at pp. 13-14, 84).
- Insufficient funding for staff and not enough flexibility in the funding formula for agencies to adjust to changing conditions (increases in number of children coming into care; development of new provincial/territorial programs; or, routine price adjustments for remoteness) (at pp. 13-14, 65, 70, 92-93, 96-97).
- There has not been an increase in cost of living since 1995-1996 (at pp. 18, 26).
- Funding only provided to new FNCFS agencies for 3 year and 6 year evaluations; however, provincial legislation requires on-going evaluations (at p. 11).
- First Nations have to comply with the same administrative burden created by change in provincial legislation but have not received any increased resources to meet those responsibilities, contradicting the principle of Directive 20-1 (at p. 12).
- Unrealistic amount of administration support to smaller agencies, often compounded by remoteness (at pp. 14, 97).
- The maximum annual budgetary increase of 2% did not reflect the average annual increase of 6.2% in the FNCFS Agencies (at p. 14).

- The average per capita per child in care expenditure was 22% lower than the average in the provinces (at p. 14).

- The formula does not provide adequate resources to allow FNCFS Agencies to do legislated/targeted prevention, alternative programs and least disruptive/intrusive measures for children at risk (at p. 120).

[154] The *NPR* made 17 recommendations to address these areas of concern with respect to Directive 20-1, including investigating a new methodology for funding operations. It was recommended that the new funding methodology consider factors such as work-load case analysis, national demographics and the impact on large and small agencies, and economy of scale (see *NPR* at pp. 119-121). A further recommendation was to develop a management information system in order to ensure the establishment of consistent, reliable data collection, analysis and reporting procedures amongst AANDC, FNCFS Agencies and the provinces/territory (see *NPR* at p. 121).

The Wen:De Reports

[155] The *NPR* led to the establishment of the Joint National Policy Review National Advisory Committee (the NAC) in 2001. The NAC involved officials from AANDC, the AFN and FNCFS Agencies. One of the tasks of the NAC was to explore how to change parts of Directive 20-1 in line with the *NPR* recommendations. Funded by AANDC, the NAC commissioned further research in order to establish that revisions of the FNCFS Program and Directive 20-1 were warranted. Three reports were produced on the subject: the Wen:De Reports. Each of the three reports outlines clearly the methodology used to arrive at its findings and explains those findings in great detail. Three important contributing authors of the Wen:De reports, Dr. Cindy Blackstock, Dr. John Loxley, and Dr. Nicolas Trocmé testified at length about the reports at the hearing and confirmed the findings in these reports.

[156] The objective of the first Wen:De report in 2004 was to identify three new options for FNCFS Agency funding and the research agenda needed to inform each of those options (see *Wen:De Report One* at p. 4). The authors explain how they reviewed pertinent literature from Canada and abroad; conducted interviews with informed

observers and participants, including the Operations Formula Funding Design Team; and met with six FNCFS Agencies representing differing agency sizes, service contexts, regions and cultural groups (see *Wen:De Report One* at p. 6).

[157] The authors noted that the concerns and challenges expressed by the FNCFS Agencies that it interviewed were in line with the *NPR* findings and recommendations, such as the lack of funding for prevention services, legal services, capital costs, management information systems, culturally based programs, caregivers, staff salaries and training, and costs adjustments for remote and small agencies (see *Wen:De Report One* at pp. 6, 8).

[158] Notably, the report found FNCFS Agencies "…are not funded on the basis of a determination of need but rather on population levels" resulting in "…significant regional variation in the implementation of Directive 20-1 as funding officials within the department adapted to their local context" (*Wen:De Report One* at p. 5). As a result, it concluded:

> Overall, our findings affirm that the findings and recommendations of the NPR which was completed in June of 2000 continue to be reflective of the concerns that FNCFSA are experiencing today. […] All agencies agreed that immediate redress of inadequate funding was necessary to support good social work practice in their communities.
>
> (*Wen:De Report One* at p. 6)

[159] *Wen:De Report One* presents three options to address this conclusion: (1) redesign the existing funding formula; (2) follow the funding model of the province/territory in which the agency is located; or, (3) a new First Nations based funding formula that funds agencies on the basis of community needs and assets, along with the particular socio-economic and cultural characteristics of the communities and Nations which the agencies serve (see *Wen:De Report One* at pp. 7-13).

[160] The second Wen:De report analyzed the three options presented in the first report (see Annex, ex. 15 [*Wen:De Report Two*]). To do so, the various authors of the report conducted literature reviews and key informant interviews with twelve sample FNCFS Agencies. A key method was to conduct detailed case studies of the twelve sample agencies and the provinces using standardized questionnaires administered by regional

researchers. The research approach involved specialized research projects on the incidence and social work response to reports of child maltreatment respecting First Nations children, prevention services, jurisdictional issues, extraordinary circumstances, management information services and small agencies (see *Wen:De Report Two* at pp. 7, 9-11).

[161] *Wen:De Report Two* begins by examining the experience of First Nations children coming into contact with the child welfare system in Canada. It notes that the key drivers of neglect for First Nations children are poverty, poor housing and substance misuse. The report underscores that two of those three factors are arguably outside the control of parents: poverty and poor housing. As such, parents are unlikely to be able to redress these risks and it can mean that their children are more likely to stay in care for prolonged periods of time and, in some cases, permanently (see *Wen:De Report Two* at p. 13). On this issue, *Wen:De Report Two* indicates:

- There are approximately three times the numbers of First Nations children in state care than there were at the height of residential schools in the 1940s (see at p. 8).
- Aboriginal children are more than twice as likely to be investigated compared to non-Aboriginal children (see at p. 15).
- Once investigated, cases involving Aboriginal children are more likely to be substantiated and more likely to require on-going child welfare services (see at p. 15).
- Aboriginal children are more than twice as likely to be placed in out of home care, and more likely to be brought to child welfare court (see at p. 15).
- The profiles of Aboriginal families differ dramatically from the profile of non-Aboriginal families (see at p. 15).
- Aboriginal cases predominantly involve situations of neglect where poverty, inadequate housing and parent substance abuse are a toxic combination of risk factors (see at p. 15).

[162] Overall, with regard to funding under the FNCFS Program, at page 7, *Wen:De Report Two* found that:

> First Nations child and family service agencies are inadequately funded in almost every area of operation ranging from capital costs, prevention programs, standards and evaluation, staff salaries and child in care programs. The disproportionate need for services amongst First Nations children and families coupled with the under-funding of the First Nations child and family service agencies that serve them has resulted in an untenable situation.

[163] Based on its research findings, the report indicates that Directive 20-1 would need substantial alteration in order to meet the requirements of the FNCFS Program and to ensure equitable child welfare services for First Nations children resident on reserve. There are a number of issues causing an inadequacy in funding. The lack of an adjustment to funding levels for increases in the cost of living is identified as one of the major weaknesses of Directive 20-1. Although Directive 20-1 contains a cost of living adjustment, it has not been implemented since 1995. According to *Wen:De Report Two*, not adjusting funding for increases in cost of living "…leads to both under-funding of services and to distortion in the services funded since some expenses subject to inflation must be covered, while others may be more optional (at p. 45). *Wen:De Report Two* calculates prices increased by 21.21% over the ten year period since Directive 20-1 was last adjusted for cost of living (see a p. 45). To restore the loss of purchasing power since 1995, it found $24.8 million would be needed to meet the cost of living requirements for 2005 alone (see *Wen:De Report Two* at p. 51).

[164] Similarly, Directive 20-1 contains no periodic reconciliation for inflation. For example, since Directive 20-1 was introduced in 1990, there has been no adjustment for salary increases. Two thirds of FNCFS Agencies participating in *Wen:De Report Two* reported funding for salaries and benefits was not sufficient (see at pp. 35, 57). *Wen:De Report Two* estimates the loss of funds due to inflation for the operations portion of Directive 20-1 to be $112 million (at p. 57). It adds, any increases in funding only come with increases in the number of children served. Therefore, in the circumstances, "either the quality of services must have declined if child and family needs grew proportionately

with population or, increases in costs of services can have been covered, if at all, only from a reduction in the proportion of children or families receiving services" (at p. 121).

[165] The population thresholds were also found by all agencies to be an inadequate means of benchmarking operations funding levels. Approximately half of the respondents to the study stated funding should be based on community needs not child population. Some added that the entire community population should be taken into account, not just that of children, since it is the entire family that needs support when a child is at risk or is unsafe. In fact, small agencies (those serving child populations of less than 1,000) represent 55% of the total number of FNCFS Agencies. According to 75% of the small agencies who participated in *Wen:De Report Two*, their salary and benefits levels for staff were not comparable to other child welfare organizations (see at pp. 46-48, 213).

[166] In addition, Directive 20-1 provides no adjustment for the different content of provincial/territorial legislation and standards. While the FNCFS Program includes a guiding principle that services should be reasonably comparable to those provided to children in similar circumstances off reserve, it contains no mechanism to ensure this is achieved (see *Wen:De Report Two* at p. 50).

[167] Aside from the above, *Wen:De Report Two* found consensus among FNCFS Agencies it canvassed that Directive 20-1 makes inadequate provision for travel, legal costs, front-line workers, program evaluation, accounting and janitorial staff, staff meetings, Health and Safety Committee meetings, security systems, human resources staff for large agencies, quality assurance specialists and management information systems. Furthermore, *Wen:De Report Two* comments that funding has not reflected the significant technology changes in computer hardware and software over the past decade. Moreover, liability insurance premiums have increased substantially over that same period and are not reflected in Directive 20-1 (see at p. 122). *Wen:De Report Two* also identified management information systems as not meeting minimum standards in the vast majority of cases (see at p. 57).

[168] Of particular note, funds for prevention and least disruptive measures were identified as inadequate, along with 84% of reporting FNCFS Agencies feeling that current

funding levels were insufficient to provide adequate culturally based services (see *Wen:De Report Two* at p. 57). In this regard, the report found that "the present funding formula provides more incentives for taking children into care than it provides support for preventive, early intervention and least intrusive measures" (*Wen:De Report Two* at p. 114). This is because the funding formula provides dollar-for-dollar reimbursement of "maintenance" expenditures and prevention services are often not deemed to fall under "maintenance" (see *Wen:De Report Two* at p. 19-21). As a result, prevention funding was identified as being inadequate, in spite of the fact that such services are mandated under most provincial child welfare legislation (see *Wen:De Report Two* at p. 91). On this basis, the report states:

> This means that agencies in this situation effectively have no money to comply with the statutory requirement to provide families with a meaningful opportunity to redress the risk that resulted in their child being removed. More importantly, the children they serve are denied an equitable chance to stay safely at home due to the structure and amount of funding under the Directive. In this way the Directive really does shape practice – instead of supporting good practice.
>
> (*Wen:De Report Two* at p. 21)

[169] *Wen:De Report Two* concludes option three, a new First Nations based funding formula that funds agencies based on needs and assets, is the most promising way to address these deficiencies because of the "…possibility of re-conceptualizing the pedagogy, policy and practice in First Nations child welfare in a way that better supports sustained positive outcomes for First Nations children" (*Wen:De Report Two* at p. 9). In sum, *Wen:De Report Two* recommends: targeted funding for least disruptive measures; funds for adequate culturally based policy and standards development; ensure that human resources funds are sufficient; increased investment in research to inform policy and practice for FNCFS Agencies; and, introduce financial review and adjustment to account for changes to provincial child welfare legislation (see *Wen:De Report Two* at p. 56).

[170] The third Wen:De report involved the development and costing of the recommended changes arising from the second report (see Annex, ex. 16 [*Wen:De Report Three*]). A national survey instrument was developed and sent out to 93 FNCFS

Agencies. Thirty-five surveys were completed, representing 32,575 children, 146 First Nations and $28.6 million in operating funds. This covered 38% of all FNCFS Agencies, 49% of all bands, 31.4% of all children 0-18 and 28.7% of all funding for operations (see *Wen:De Report Three* at pp. 9-10).

[171] *Wen:De Report Three* reiterates the weaknesses in Directive 20-1 as follows at pages11-12:

> 1) uncertainty in what the original rationale was underlying the development of the formula 2) regional interpretations of sometimes vaguely worded guidelines, 3) a failure to implement certain elements of the formula such as the annual inflation adjustment and 4) a failure of the policy to keep pace with advances in social work evidence based practice, child welfare liability law and the evolution of management information systems and 5) the policy appeared to leave out some child welfare expenses altogether or fund them inadequately such as the failure of the policy to support agencies to provide in home interventions to abused and neglected children to keep them safely at home as opposed to bringing them into care.

[172] Despite these weaknesses, *Wen:De Report Three* also indicates Directive 20-1 has some positive features, including that it is national in scope, has undergone two national studies, has enabled the development of FNCFS Agencies throughout Canada, and offers a baseline for judging the impacts of possible changes to the current regime.

[173] These reasons were the principle basis forming the recommendation in *Wen:De Report Three* to implement both options 1 and 3. That is, redesign Directive 20-1 now, with a priority on funding prevention services and providing redress for losses in funding due to inflation, while providing a foundation for the development of a First Nations based formula over time (see *Wen:De Report Three* at pp. 11-12). In also pursuing option 1, the report noted the development of a First Nations funding model would not provide a quick fix to the problems with the existing funding formula (see *Wen:De Report Three* at p. 14).

[174] Option two, tying FNCFS Agency funding to provincial formulae, was found to be the least promising option, notably because in several provinces it is not clear what their formula is and First Nation communities do not have the same degree of infrastructure of programs, services and volunteer agencies. Moreover, provincial funding traditions are not based on the particular needs and conditions faced by First Nation families living on

reserve, including that it costs more to service First Nations children and families due to their high needs levels (see *Wen:De Report Three* at p. 13).

[175] In recommending reforms to Directive 20-1, *Wen:De Report Three* noted that "[a] shift in funding mentality is vital" (at p. 20). That is, as stated at page 20 of *Wen:De Report Three*:

> An approach that invests in the community and engages the community at all levels – children, adolescents, youth, parents and Elders means directing resources at growth and development of the people rather than the breakdowns of the people in the community. This approach demonstrates long term commitment to the growth of a child and family and invests in the future of contributing members to society.

[176] Furthermore, at page 15, *Wen:De Report Three* provides the following caution:

> Although each suggested change element is presented as a separate item, it is important to understand that these elements are interdependent and adoption in a piece meal fashion would undermine the overall efficacy of the proposed changes. For example, providing least disruptive measures funding for at home child maltreatment interventions without providing the cost of living adjustment would result in agencies not having the infrastructure and staffing capacity to maximize outcomes. Similarly, these recommendations assume that there will be no reductions in the First Nations child and family service agency funding envelope. Situations where funds in one area are cut back and redirected to other funding streams in child and family services should be avoided as our research found that under funding was apparent across the current formula components.

[177] *Wen:De Report Three* recommends certain economic reforms to Directive 20-1, along with policy changes to support those reforms. The recommended economic reforms from *Wen:De Report Three*, include: a new funding stream for prevention/least disruptive measures (at pp. 19-21); adjusting the operations budget (at pp. 24-25); reinstating the annual cost of living adjustment on a retroactive basis back to 1995 (at pp. 18-19); providing sufficient funding to cover capital costs (buildings, vehicles and office equipment) (at pp. 28-29); and, funding for the development of culturally based standards by FNCFS Agencies (at p. 30).

[178] Of particular note, *Wen:De Report Three* recommends a new funding stream for prevention/least disruptive measures (at pp. 19-21). At page 35, *Wen:De Report Three* indicates that increased funding for prevention/least disruptive measures will provide costs savings over time:

> Bowlus and McKenna (2003) estimate that the annual cost of child maltreatment to Canadian society is 16 billion dollars per annum. As increasing numbers of studies indicate that First Nations children are over represented amongst children in care and Aboriginal children in care they compose a significant portion of these economic costs (Trocme, Knoke and Blackstock, 2004; Trocme, Fallon, McLaurin and Shangreaux, 2005; McKenzie, 2002). A failure of governments to invest in a substantial way in prevention and least disruptive measures is a false economy – The choice is to either invest now and save later or save now and pay up to 6-7 times more later (World Health Organization, 2004.)

[179] For small agencies the report found that the fixed amount per agency or the provision for overhead did not provide realistic administrative support for two reasons. The first is that no agency representing communities with a combined total of 250 or fewer children receives any overhead funding whatsoever. The second problem is that available funding is currently fixed in three large blocks: 251-500 = $ 35,790; 501-800 = $ 71,580; and, 801 and up = $143,158. A slight increase or decrease in child population can result in a huge increase or decrease in overhead funding available to an agency (see *Wen:De Report Three* at p. 23).

[180] Therefore, *Wen:De Report Three* recommends two reforms. First, that overhead funding be extended to agencies serving populations of 125 and above. The report proposes a minimum of $20,000 be made available to the smallest agency representing 125 children. Thereafter, the second proposal is to give agencies additional funding for every 25 children in excess of 125. Under this approach, 6 agencies would still be too small to receive any fixed amount; 8 small agencies which never before received a fixed amount of overhead funding would now do so; 23 agencies of medium size would receive funding increases; and, 56 large agencies would receive no change in their funding. In the future, *Wen:De Report Three* believes a minimum economy of scale for small agencies will be required to provide a basic level of child and family services (see at p. 23-24).

[181] In terms of the remoteness factor in Directive 20-1, *Wen:De Report Three* identified a number of weaknesses, including that the average adjustment is considered by 90% of the agencies canvassed to be too small to compensate for the actual costs of remoteness; and, that the remoteness index is usually based on accessibility to the nearest business centre, which are not necessarily able to offer specialized child welfare services. According to *Wen:De Report Three*, these weakness have led to some communities receiving less than their population warrants and some receiving more. As such, it proposes an across the board increase in remoteness allowances and to adjust the index from the current service centre base to a city centre base (see at pp. 25-26).

[182] Other policy recommendations from *Wen:De Report Three* include: that AANDC clarify that legal costs related to children in care are billable under "maintenance"; that support services related to reunifying children in care with their families be eligible "maintenance" expenses, since they are mandatory services according to provincial child welfare statutes; validation of the need for research and mechanisms to share best practices at a regional and national level; and, that AANDC clarify the "stacking provisions" in Directive 20-1 in order to make it easier for First Nations to access voluntary sector funding sources (at pp. 16-18).

[183] Finally, *Wen:De Report Three* found jurisdictional disputes between federal government departments and between the federal government and provinces over who should fund a particular service took about 50.25 person hours to resolve, resulting in a significant tax on the limited resources of FNCFS Agencies. As a result, it recommends the immediate implementation of Jordan's Principle for jurisdictional dispute resolution and its integration into any funding agreements between AANDC and the provinces. Jordan's Principle asserts that the government (federal or provincial) or department that first receives a request to pay for a service must pay for the service and resolve jurisdictional issues thereafter (see *Wen:De Report Three* at p. 16).

[184] Total costs of implementing all the reforms recommended in *Wen:De Report Three* were estimated at $109.3 million, including $22.9 million for new management information systems, capital costs (buildings, vehicles and office equipment) and insurance premiums; and, $86.4 million for annual funding needs (see at p. 33).

[185] The EPFA was designed in an effort to address some of the shortcomings of Directive 20-1 identified in the *NPR* and the Wen:De reports. However, despite *Wen:De Report Three*'s caution that the recommended changes are interdependent and adoption in a piece meal fashion would undermine the efficacy of those proposed changes, this is in fact the approach AANDC took. This becomes clear in reviewing the Auditor General of Canada's 2008 report on the FNCFS Program and AANDC's corresponding responses, along with the rest of the evidence to follow.

2008 Report of the Auditor General of Canada

[186] Following a written request from the Caring Society, the Auditor General of Canada initiated a review of AANDC's FNCFS Program and reported the findings to the House of Commons in 2008 (see Annex, ex. 17 [*2008 Report of the Auditor General of Canada*]). The purpose of the review was to examine the "…management structure, the processes, and the federal resources used to implement the federal policy…" on reserves (*2008 Report of the Auditor General of Canada* at p.1).

[187] The *2008 Report of the Auditor General of Canada* echoed the findings of the *NPR* and Wen:De reports. Namely, that "[c]urrent funding practices do not lead to equitable funding among Aboriginal and First Nations communities" (*2008 Report of the Auditor General of Canada* at p.2). The findings of the *2008 Report of the Auditor General of Canada* include:

- The funding formula is outdated and does not take into account any costs associated with modifications to provincial legislation or with changes in the way services are provided (see at p. 20, s. 4.51),
- AANDC has limited assurance that child welfare services delivered on reserves comply with provincial legislation and standards. Funding levels are pre-determined without regard to the services the agency is bound to provide under provincial legislation and standards (see at pp.14-15, ss. 4.30, 4.34).
- There is no definition of what is meant by reasonably comparable services or way of knowing whether the services that the program supports are in fact reasonably

comparable. Furthermore, child welfare may be complicated by other social problems or health issues. Access to social and health services, aside from child welfare services, to help keep a family together differs not only on and off reserves but among First Nations as well. AANDC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services (see at pp. 12-13, ss.4.20, 4.25).

- There are no standards for FNCFS Agencies to provide culturally appropriate child welfare services that meet the requirements of provincial legislation. The number of FNCFS Agencies being funded is the main indicator of cultural appropriateness that AANDC uses. According to AANDC, the fact that 82 First Nations agencies have been created since the current federal policy was adopted means there are more First Nations children receiving culturally appropriate child welfare services. However, the Auditor General found that many agencies provide only a limited portion of the services while provinces continue to provide the rest. Further, AANDC does not know nationally how many of the children placed in care remain in their communities or are in First Nations foster homes or institutions (see at p. 13, ss. 4.24-4.25).

- The formula is based on the assumption that each FNCFS Agency has 6% of on-reserve children placed in care. This assumption leads to funding inequities among FNCFS Agencies because, in practice, the percentage of children that they bring into care varies widely. For example, in the five provinces covered by the report, that percentage ranged from 0 to 28% (see at p. 20, s. 4.52).

- The funding formula is not responsive to factors that can cause wide variations in operating costs, such as differences in community needs or in support services available, in the child welfare services provided to on-reserve First Nations children, and in the actual work performed by FNCFS Agencies (see at p. 20, s. 4.52).

- The formula is not adapted to small agencies. It was designed on the basis that First Nations agencies would be responsible for serving a community, or a group of communities, where at least 1,000 children live on reserve. The Auditor General found 55 of the 108 agencies funded by AANDC were small agencies serving a population of less than 1000 children living on reserve who did not always have the funding and capacity to provide the required range of child welfare services (see at p. 21, ss. 4.55-4.56).

- The shortcomings of the funding formula have been known to AANDC for years (see at p. 21, s. 4.57).

[188] As certain provinces were transitioned to the EPFA at the time of the report, the *2008 Report of the Auditor General of Canada* also comments on the new funding formula. It found that while the new funding formula provides more funds for the operations of FNCFS Agencies and offers more flexibility to allocate resources, it does not address the inequities noted under the current formula. It still assumes that a fixed percentage of First Nations children and families need child welfare services and, therefore, does not address differing needs among First Nations (see *2008 Report of the Auditor General of Canada* at p. 23, ss. 4.63-4.64).

[189] Overall, the Auditor General of Canada was of the view that:

> the funding formula needs to become more than a means of distributing the program's budget. As currently designed and implemented, the formula does not treat First Nations or provinces in a consistent or equitable manner. One consequence of this situation is that many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves.
>
> (*2008 Report of the Auditor General of Canada* at p. 23, s. 4.66)

[190] The Auditor General further noted that because the FNCFS Program's expenditures were growing faster than AANDC's overall budget, funds had to be reallocated from other programs, such as community infrastructure and housing. This means spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate. In the Auditor General's view, AANDC's

budgeting approach for the FNCFS Program is not sustainable and needs to minimize the impact on other important departmental programs (see *2008 Report of the Auditor General of Canada* at p. 25, ss. 4.72-4.73).

[191] The Auditor General of Canada made 6 recommendations to address the findings in its report. AANDC agreed with all the recommendations and indicated the actions it has taken or will take to address the recommendations (see *2008 Report of the Auditor General of Canada* at p. 6 and Appendix). AANDC's response to the *2008 Report of the Auditor General of Canada* demonstrates its full awareness of the impacts of its FNCFS Program on First Nations children and families on reserves, including that its funding is not in line with provincial legislation and standards. Furthermore, despite the flaws identified with the new funding formula, AANDC still viewed EPFA as the answer to the problems with the FNCFS Program:

> 4.67 **Recommendation.** Indian and Northern Affairs Canada, in consultation with First Nations and provinces, should ensure that its new funding formula and approach to funding First Nations agencies are directly linked with provincial legislation and standards, reflect the current range of child welfare services, and take into account the varying populations and needs of First Nations communities for which it funds on-reserve child welfare services.
>
> **The Department's response.** Indian and Northern Affairs Canada's current approach to Child and Family Services includes reimbursement of actual costs associated with the needs of maintaining a child in care. The Department agrees that as new partnerships are entered into, based on the enhanced prevention approach, funding will be directly linked to activities that better support the needs of children in care and incorporate provincial legislation and practice standards.
>
> (*2008 Report of the Auditor General of Canada* at pp. 23-24, s. 4.67)

[192] The flaws with Directive 20-1 and the EPFA would subsequently be scrutinized by the Standing Committee on Public Accounts.

2009 Report of the Standing Committee on Public Accounts

[193] In February 2009, the House of Commons Standing Committee on Public Accounts held a hearing on the *2008 Report of the Auditor General of Canada*. This hearing was held with officials from the Office of the Auditor General of Canada and AANDC "[g]iven

the importance of the safety and well-being of all Canadian children and the disturbing findings of the audit" (Annex, ex.18 at p.1 [*2009 Report of the Standing Committee on Public Accounts*]).

[194] The Committee noted the *2008 Report of the Auditor General of Canada* made 6 recommendations and that it fully supports those recommendations. As AANDC agreed with all the recommendations, "the Committee expects that the Department will fully implement them" (*2009 Report of the Standing Committee on Public Accounts* at p. 3).

[195] AANDC's Deputy Minister Michael Wernick acknowledged the flaws in the older funding formula and pointed to the new approach:

> What we had was a system that basically provided funds for kids in care. So what you got was a lot of kids being taken into care. And the service agencies didn't have the full suite of tools, in terms of kinship care, foster care, placement, diversion, prevention services, and so on. The new approach that we're trying to do through the new partnership agreements provides the agencies with a mix of funding for operating and maintenance--which is basically paying for the kids' needs--and for prevention services, and they have greater flexibility to move between those.
>
> (*2009 Report of the Standing Committee on Public Accounts* at pp. 7-8 [footnote omitted])

[196] Assistant Deputy Minister Christine Cram's testimony before the Standing Committee echoed that of the Deputy Minister:

> We currently have two formulas in operation. We have a formula for those provinces where we haven't moved to the new model. Under that formula, we reimburse all charges for kids who are actually in care, and that's why the costs have gone up so dramatically over time. There were comments made about the fact that under the old formula there wasn't funding provided to be able to permit agencies to provide prevention services. That's a fair criticism of the old formula. Under the new formula, as the deputy was mentioning, we have three categories in the funding formula. We have operations, prevention, and maintenance. So those are each determined on a different basis.
>
> (*2009 Report of the Standing Committee on Public Accounts* at p. 8 [footnote omitted])

[197] With regard to the continued application of Directive 20-1 in many provinces and in the Yukon, the Standing Committee expressed concern:

> The Committee is quite concerned that the majority of First Nations children on reserves continue to live under a funding regime which numerous studies have found is not working and should be changed. According to the Joint National Policy Review, "The funding formula inherent in Directive 20-1 is not flexible and is outdated." The 2005 Wen:de report, which undertook a comprehensive review of funding formulae to support First Nations child and family service agencies, found that the current funding formula drastically underfunds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures. The report writes, "The lack of early intervention services contributes to the large numbers of First Nations children entering care and staying in care." An evaluation prepared in 2007 by INAC's Departmental Audit and Evaluation Branch recommended that INAC, "correct the weaknesses in the First Nations Child and Family Service Program's funding formula." The OAG concluded, "As currently designed and implemented, the formula does not treat First Nations or provinces in a consistent or equitable manner. One consequence of this situation is that many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves."
>
> Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren't funded, and all these children are being put into care."
>
> While the Committee appreciates the efforts the Department is making to develop new agreements based on the enhanced prevention model, the Committee completely fails to understand why the old funding formula is still in place. Moving to new agreements should in no way preclude making improvements to the existing formula, especially as it may take years to develop agreements with the provinces. In the meantime, many First Nations children are taken into care when other options are available. This is unacceptable and clearly inequitable.
>
> (*2009 Report of the Standing Committee on Public Accounts* at pp. 9-10 [footnotes omitted])

[198] With regard to the new EPFA funding formula, the Standing Committee agreed with the Auditor General's comments regarding the fact that this new formula does not address

the inequities of Directive 20-1 (i.e. the assumptions built into the formula regarding the percentage of first nations children and families in need of care):

> The Committee could not agree more, especially as the Department has known about this problem in the old formula yet has repeated it in the new formula. The Committee is very disturbed that the Department would take a bureaucratic approach to funding agencies, rather than making efforts to provide funding where it is needed. The result of this approach is that communities that need funding the most, that is, where more than six percent of the children are in care, will continue to be underfunded and will not be able to provide their children the services they need. The Committee strongly believes that INAC needs to develop a funding formula that is flexible enough to provide funding based on need, rather than a fixed percentage.
>
> (*2009 Report of the Standing Committee on Public Accounts* at p. 10)

[199] Finally, with regard to the Auditor General's finding that AANDC has not analyzed and compared the child welfare services available on reserves with those in neighbouring communities off reserve, the Standing Committee made the following observations:

> Nonetheless, it should be possible to compare the level of funding provided to First Nations child and family services agencies to similar provincial agencies, and given their unique and challenging circumstances, it would be reasonable to expect First Nations agencies to receive a higher level of funding. Yet, when asked how the funding for First Nations child and family service agencies compares to agencies for non-natives, the Assistant Deputy Minister said, "I'm sorry, but we don't know the answer." The same question was put to the Deputy Minister and he replied, "Our accountability is for the services delivered by those agencies to the extent that we fund them."
>
> The Committee finds these responses quite disappointing. The Deputy Minister's response was unsatisfactory because the issue under discussion is the extent to which the agencies are funded. Also, to not know how the funding compares to provincial agencies makes the Committee wonder how the level of funding is determined, and how the Department can be assured that it is treating First Nations children equitably.
>
> […]
>
> As the policy requires First Nations child welfare services to be comparable with services provided off reserves and the Committee believes that First Nations children should be treated equitably, the Committee

> believes that INAC must have comprehensive information about the funding level provided to provincial child welfare agencies and compare that to the funding of First Nations agencies. This does not mean that INAC should adopt provincial funding formulae for First Nations agencies as the needs for First Nations agencies are unique and often greater. Nonetheless, at the very least, INAC should be able to compare funding.
>
> (*2009 Report of the Standing Committee on Public Accounts* at pp. 5-6 [footnotes omitted])

[200] After hearing from the officials of the Office of the Auditor General of Canada and AANDC, including Sheila Fraser, the Auditor General of Canada, Michael Wernick, Deputy Minister of AANDC, and Christine Cram, Assistant Deputy Minister of AANDC, the Standing Committee on Public Accounts made 7 recommendations of its own. Those recommendations include: that AANDC provide a detailed action plan to the Public Accounts Committee on the implementation of the recommendations arising out the *2008 Report of the Auditor General of Canada*; that AANDC conduct a comprehensive comparison of its funding under the FNCFS Program to provincial funding of similar agencies; that AANDC immediately modify Directive 20-1 to allow for the funding of enhanced prevention services; that AANDC ensure its funding formula is based upon need rather than an assumed fixed percentage of children in care; that AANDC determine the full costs of meeting all of its policy requirements and develop a funding model to meet those requirements; and, that AANDC develop measures and collect information based on the best interests of children for the results and outcomes of its FNCFS Program (see *2009 Report of the Standing Committee on Public Accounts* at pp. 4-12).

[201] In response to the Standing Committee's report, presented to the House of Commons on August 19, 2009, AANDC generally accepted the recommendations, although with some nuances (see Annex, ex. 19 [*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts*]). For example, AANDC generally responded:

> The Standing Committee on Public Accounts' recommendations speak to the link between provincial comparability, revising Directive 20-1, moving to a needs based formula and to determining the full costs of the FNCFS Program nationally. This suggests INAC should undertake a one-time simultaneous reform of the program in all provinces. INAC is in fact

> undertaking similar steps towards reform, however, it is being done province-by-province. Rather than taking a one-size-fits all approach that would overlook community level needs and compromise partnerships and accountability, INAC is addressing provincial comparability, including a needs component in the formula and finalizing the process with a full costing analysis for each jurisdiction. All of this is done at tripartite tables ensuring buy-in by all partners, reasonable comparability with the respective province and sound accountability aimed at achieving positive outcomes for children and their families. As well, INAC is committing to review Directive 20-1.
>
> (*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Introduction)

[202] With regard to the recommendation that AANDC conduct a comprehensive comparison of its funding to provincial funding, AANDC responded:

> INAC agrees with this recommendation on the understanding that a comparative analysis can only be provided with the limited data we have access to and on a phased basis. This review will require a substantial amount of time and work with the provinces and First Nations. The information available in provincial annual reports is general and the funding provided under their children's services often includes programs beyond child and family services. Overall, these provincial reports do not contain the level of detail required to make the kind of comprehensive comparison expected by the Committee. Relationships must be strengthened with provincial partners as they are key in providing INAC with the necessary information concerning the funding of their child welfare programs. This is what INAC is doing as it proceeds with the Enhanced Prevention Focused Approach. Provinces must also agree to allow INAC to make this information available to the public.
>
> It should also be noted that due to the complexity of child welfare service delivery across the country, comparability between FNCFS agencies and provincial child welfare providers on-reserve, is challenging. Specifically, child welfare services in the provinces are delivered in a variety of ways. The services can vary by jurisdiction based on need; be provided directly by the province; or by provincially delegated authorities or regional/districts. A province can also fund agencies to deliver the services and/or contract third parties.
>
> Therefore, INAC cannot commit to conducting such a comprehensive review nor can it be done for all jurisdictions by the timelines required by the Committee. INAC would be able to provide a basic comparison of jurisdictions that are currently under the Enhanced Prevention Focused Approach and where INAC has basic information on salary rates and

> caseload ratios. INAC expects to complete this first phase by or before December 31, 2009.
>
> As INAC moves forward on transitioning other jurisdictions and as relationships are built with each province at the tripartite tables, INAC will be in a better position to conduct a comparison of funding between FNCFS agencies and provincial systems. This phase will consist of the provinces with whom INAC has not yet developed or completed tripartite accountability frameworks. This phase is expected to be completed by 2012.
>
> (*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Recommendation 2 – Provincial Comparison)

[203] In response to the recommendation that AANDC revise the funding formula to provide funding based on need, AANDC responded:

> It is important to note that the 6% average number of children in care calculation is one of many factors used only to model operations funding which includes the number of protection workers. This is then translated into a portion of the operations funding that agency receives. This 6% number was arrived at through discussions with First Nations Agency Directors and provincial representatives, and was thought to be fairly representative of the overall needs of the communities. Under the Enhanced Prevention Focused Approach, FNCFS agencies have the flexibility to shift funds from one stream to another in order to meet the specific needs of the community. This costing model provides all FNCFS agencies under the new approach with the necessary resources to offer a greater range of child and family services.
>
> Through discussions with provincial and First Nations partners, it is clear that they preferred to create a costing model that would provide recipients stable funding for operations. The majority of partners indicated they would not be supportive of a model that generated more resources for Recipients based upon a higher percentage of children in care. Also, this model ensures that FNCFS agencies supporting communities with lower populations are provided with sufficient funding to operate both prevention and protection programs. Without the fixed percentage formula used to calculate and fund Operations, agencies with a very low percentage of children in care would not have the necessary resources to operate. Moreover, if the operations budget were based upon need rather than a fixed percentage, the agencies could find themselves with widely fluctuating operations budgets year to year which would hamper their ability to plan and provide services. The new costing models provide a stable operating and prevention budget that does not rely on the number of children in care as one of its determinants.

> (*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Recommendation 5 – Funding Formula based on Need)

[204] AANDC's response to the recommendations of the *2008 Report of the Auditor General of Canada* and the *2009 Report of the Standing Committee on Public Accounts* would be revisited in 2011 by the Auditor General.

2011 Status Report of the Auditor General of Canada

[205] In 2011, the Auditor General of Canada assessed AANDC's progress in implementing the recommendations from the *2008 Report of the Auditor General of Canada* and the *2009 Report of the Standing Committee on Public Accounts* (see Annex, ex. 20 [*2011 Status Report of the Auditor General of Canada*]).

[206] With regard to comparability of services, the Auditor General noted that while AANDC had agreed to define what is meant by services that are reasonably comparable, it had not done so. The Auditor General stated that "[u]ntil it does, it is unclear what is the service standard for which the Department is providing funding and what level of services First Nations communities can eventually expect to receive" (see *2011 Status Report of the Auditor General of Canada* at pp. 23-24, s. 4.49). In addition, the Auditor General found AANDC had not conducted a review of social services available in the provinces to assess whether the services provided to children on reserve are the same as what is available to children off reserve (see *2011 Status Report of the Auditor General of Canada* at p. 24, s. 4.49).

[207] Concerning the new EPFA funding formula, the Auditor General reiterated its previous finding that it did not address all of the funding disparities that were noted in the *2008 Report of the Auditor General of Canada*. While the Auditor General acknowledged that the EPFA enables additional services beyond those offered by Directive 20-1, it noted that:

> without having defined what is meant by comparability, the Department has been unable to demonstrate that its new Enhanced Prevention Focused Approach provides services to children and families living on reserves that are reasonably comparable to provincial services.

> (*2011 Status Report of the Auditor General of Canada* at p. 24, ss. 4.50-4.51)

[208] With respect to the recommendation that AANDC determine the full costs of meeting the policy requirements of the FNCFS Program, the Department agreed to regularly update the estimated cost of delivering the program with the new EPFA funding approach on a province-by-province basis and to periodically review the program budget. The Auditor General reported that AANDC had identified the costs it would have to pay for services in each province before transitioning to EPFA. AANDC determined that it needed an increase of between 50 and 100% in its funding for operations and prevention services in each of the provinces that transitioned to EPFA. With all cost components taken into consideration, on average, EPFA led to an increase of over 40% in the cost of the FNCFS Program in the participating provinces (see *2011 Status Report of the Auditor General of Canada* at pp. 24-25, ss. 4.53-4.54). In this regard, the Auditor General noted the FNCFS Program budget has increased by 32% since the 2005-2006 fiscal year, partly reflecting the increased funding levels needed to implement EPFA (see *2011 Status Report of the Auditor General of Canada* at p. 25, s. 4.55).

[209] On the comprehensive comparison of funding to FNCFS Agencies with provincial funding to similar agencies requested by the Standing Committee on Public Accounts, the Auditor General reported that AANDC had compared some elements of child and family services programs on and off reserve, such as social workers' salaries and benefits in preparation for framework negotiations with the provinces. However, AANDC did not provide any information about social workers' caseloads, stating that it is not public information. In addition, AANDC asserted certain services provided by the provinces, such as services related to health issues and youth justice, were not within AANDC's mandate (see *2011 Status Report of the Auditor General of Canada* at p. 25, ss. 4.56- 4.57).

[210] In general, the Auditor General's review of programs for First Nations on reserves, including its follow-up on the status of AANDC's progress in addressing some of the recommendations from the *2008 Report of the Auditor General of Canada*, was as follows:

> Despite the federal government's many efforts to implement our recommendations and improve its First Nations programs, we have seen a

> lack of progress in improving the lives and well-being of people living on reserves. Services available on reserves are often not comparable to those provided off reserves by provinces and municipalities. Conditions on reserves have remained poor. Change is needed if First Nations are to experience more meaningful outcomes from the services they receive. We recognize that the issues are complex and that solutions will require concerted efforts of the federal government and First Nations, in collaboration with provincial governments and other parties.
>
> We believe that there have been structural impediments to improvements in living conditions on First Nations reserves. In our opinion, real improvement will depend on clarity about service levels, a legislative base for programs, commensurate statutory funding instead of reliance on policy and contribution agreements, and organizations that support service delivery by First Nations. All four are needed before conditions on reserves will approach those existing elsewhere across Canada. There needs to be stronger emphasis on achieving results.
>
> We recognize that the federal government cannot put all of these structural changes in place by itself since they would fundamentally alter its relationship with First Nations. For this reason, First Nations themselves would have to play an important role in bringing about the changes. They would have to become actively engaged in developing service standards and determining how the standards will be monitored and enforced. They would have to fully participate in the development of legislative reforms. First Nations would also have to co-lead discussions on identifying credible funding mechanisms that are administratively workable and that ensure accountable governance within their communities. First Nations would have to play an active role in the development and administration of new organizations to support the local delivery of services to their communities.
>
> Addressing these structural impediments will be a challenge. The federal government and First Nations will have to work together and decide how they will deal with numerous obstacles that surely lie ahead. Unless they rise to this challenge, however, living conditions may continue to be poorer on First Nations reserves than elsewhere in Canada for generations to come.
>
> (*2011 Status Report of the Auditor General of Canada* at pp. 5-6)

2012 Report of the Standing Committee on Public Accounts

[211] In February 2012, the Standing Committee on Public Accounts issued a report following the *2011 Status Report of the Auditor General of Canada* (see Annex, ex. 21 [*2012 Report of the Standing Committee on Public Accounts*]).

[212] Deputy Minister of AANDC, Michael Wernick, testified before the Committee and "…agreed, without reservation, with the OAG's diagnosis of the problem…" (*2012 Report of the Standing Committee on Public Accounts* at p. 3). Mr. Wernick stated to the Committee:

> One of the really important parts of the Auditor General's report is that it shows there are four missing conditions. The combination of those is what's likely to result in an enduring change. You could pick any one of them, such as legislation without funding, or funding without legislation, and so on. They would have some results, but they would probably, in our view, be temporary. If you want enduring, structural changes, it's the combination of these tools." He also said, "With all due respect, I want to send the message that, if Parliament demands better results, it has to provide us with better tools.
>
> (*2012 Report of the Standing Committee on Public Accounts* at p. 3 [footnotes omitted])

[213] With specific regard to the FNCFS Program, the Deputy Minister stated:

> We have fixed the funding formula. We make sure resources are available for prevention services. And we've put in place these kinds of tripartite agreements, because these are creatures of the provincial child protection statutes. In six of the provinces, I think it is, we have $100 million or more in funding over several budgets. They go at the pace at which we can conclude agreements with the provinces--I can certainly provide the list--but we're now covering about 68% of first nations kids with this prevention approach.
>
> (*2012 Report of the Standing Committee on Public Accounts* at p. 9 [footnote omitted])

[214] The Standing Committee concluded its report with the following statements:

> The Committee notes that the government is taking a number of concrete actions to improve conditions for First Nations on reserves, and the Deputy Minister of AANDC expressed his commitment to address the structural impediments identified by the OAG. Like the Deputy Minister, the Committee is optimistic that progress can be made, but it will require significant structural reforms and sustained management attention. The Committee believes that AANDC, in coordination with other departments, needs to develop and commit to a plan of action to take the necessary steps, and the Committee intends to monitor the government's progress to

> ensure that First Nations on reserves experience meaningful improvements in their social and economic conditions.
>
> (*2012 Report of the Standing Committee on Public Accounts* at p. 12)

[215] The then Minister of AANDC, Mr. John Duncan, responded to the *2012 Report of the Standing Committee on Public Accounts* (see Annex, ex. 22 [*AANDC's Response to the 2012 Report of the Standing Committee on Public Accounts*]). Of note, Minister Duncan acknowledged the following:

> I would also like to acknowledge the work of the Office of the Auditor General in providing Parliament, the Government of Canada, and Canadians with valuable insights into Canada's approach to program delivery for First Nations on reserves. I consider the six-page preface to Chapter 4 of the 2011 Status Report of the Auditor General of Canada to be an important roadmap for Parliament in moving forward on First Nation issues.
>
> […]
>
> I agree that many of the problems faced by First Nations are due to the structural impediments identified – the lack of clarity about service levels, lack of a legislative base, lack of an appropriate funding mechanism, and a lack of organizations to support local service delivery.
>
> […]
>
> Through the Enhanced Prevention Focused Approach for First Nations Child and Family Services clarity about service levels and comparability of services and funding levels have been addressed at tripartite tables with the six provinces that have transitioned to the new approach.
>
> […]
>
> The Office of the Auditor General observed that there are challenges associated with the use of contribution agreements to fund programs and services for First Nations. For instance, agreements may not always focus on service standards or the results to be achieved; agreements must be renewed yearly and it is often unclear who is accountable to First Nations members for achieving improved outcomes. In addition, contribution agreements involve a significant reporting burden, and communities often have to use scarce administrative resources to respond to the numerous reporting requirements stipulated in their contribution agreements.

> The Government of Canada recognizes that reliance on annual funding agreements and multiple accountabilities when funding is received from multiple sources can impede the provision of timely services and can limit the ability of First Nations to implement longer term development plans.
>
> To address these concerns, Aboriginal Affairs and Northern Development Canada is implementing a risk-based approach to streamlining funding agreements, and reporting requirements. The General Assessment tool supports increased flexibility by assessing the capacity of recipients to access a wider range of funding approaches, including multi-year funding agreements. In addition, a pilot initiative with 11 First Nations communities is currently being implemented using a new approach to reporting which is increasing transparency and accountability at the community level by using the First Nations website as a reporting tool and addressing capacity issues created by the reporting burden.
>
> (*AANDC's Response to the 2012 Report of the Standing Committee on Public Accounts*)

[216] The *NPR*, Wen:De reports and the Auditor General and the Standing Committee reports all have identified shortcomings in the funding and structure of the FNCFS Program. This was further demonstrated in other evidence presented to the Tribunal and to which the Panel will return to below. First, however, we will outline the evidence advanced with regard to the funding of child and family services under the *1965 Agreement* in Ontario, along with the other provincial agreements in Alberta and British Columbia.

c. 1965 Agreement in Ontario

[217] There is also evidence indicating shortcomings in the funding and structure of the *1965 Agreement* in Ontario.

[218] In 1965, the federal government entered into an agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations communities on reserve. Around the same time, child welfare authorities in Ontario began the large-scale removal of Aboriginal children from their homes and communities, commonly referred to as part of the "Sixties Scoop". Ms. Theresa Stevens, Executive Director for Anishinaabe Abinoojii Family Services in Kenora, Ontario, described

how buses would drive into communities and take all the children away (see *Transcript* Vol. 25 at pp. 28-30). As will be explained in more detail below, the collective trauma experienced by many First Nations in Ontario as a result of the Sixties Scoop informs the climate for the provision of child and family services in the province. The Panel acknowledges the suffering of Aboriginal children, families and communities as a result of the Sixties Scoop.

[219] The *1965 Agreement* is a cost-sharing agreement where Ontario provides or pays for eligible services up front and invoices Canada for a share of the costs of those services pursuant to a cost-sharing formula. Eligible services for cost sharing under the *1965 Agreement* are described in its Schedules. Mr. Phil Digby, Manager of Social Programs at AANDC's Ontario Regional Office, testified at the hearing and explained how the *1965 Agreement* works. At the beginning of each fiscal year, Ontario provides AANDC with a cash flow forecast. Once approved, AANDC provides Ontario with a one-month cash advance, followed by monthly instalments. There is a 10% holdback on the payments, which is paid out (with any adjustments) at the end of the year after an audit. There is no overall cap on expenditures under the *1965 Agreement*.

[220] The cost-sharing formula is set out at clause 3 of the *1965 Agreement* and is based on two elements: the "per capita cost of the Financial Assistance Component of the Aggregate Ontario Welfare Program provided to persons other than Indians with Reserve Status in Ontario"; and, the "per capita cost of the Financial Assistance Component of the Aggregate Ontario Welfare Program provided to Indians with Reserve Status in Ontario".

[221] According to Mr. Digby, social assistance is the area where there was the best data that gave a good proxy for the proportionate share of costs and relative share of costs in First Nations communities vis-à-vis the rest of Ontario. As of 2011-12 the average cost of providing social assistance to persons living off reserve was approximately $200. For First Nations living on reserve it was about $1,200. AANDC's share of the costs is calculated by taking 50% of the average cost of providing social assistance to persons living off reserve (200 x 0.50 = 100) and dividing it by the average cost of providing social assistance to persons living on reserve (100/1200 = 0.0833); subtracting the average cost of providing social assistance to persons living off reserve from the average cost of providing social

assistance to persons living on reserve (1200 – 200 = 1000) and dividing that amount by the average cost of providing social assistance to persons living on reserve (1000/1200 = 0.8333); and then, adding those two numbers together to arrive at the cost-sharing ratio (0.0833 + 0.8333 = 0.9166). Pursuant to these numbers, AANDC paid approximately 92% of the eligible costs under the 1965 Agreement in 2011-12. According to Mr. Digby, the *1965 Agreement* cost-sharing formula recognizes the higher per capita costs of providing social assistance to First Nations on reserves and AANDC's agreement to take the financial responsibility for these additional costs (see testimony of P. Digby, *Transcript* Vol. 59 at pp. 24-28).

[222] There are two mechanisms used by the province of Ontario to provide child welfare services on reserve: (i) child welfare societies, including provincial child welfare agencies and FNCFS Agencies; and (ii) service contracts for prevention services. There are seven fully-mandated FNCFS Agencies in Ontario and they are funded according to the same funding model as provincial child welfare agencies in Ontario. There are also six pre-mandated FNCFS Agencies who do not have a full protection mandate and are in the process of developing their capacity to become fully-mandated FNCFS Agencies. There are also approximately 25 First Nations reserves that receive prevention services via service contract.

[223] The *1965 Agreement* has never undergone a formal review by AANDC. The sections of the agreement dealing with child and family services have not been updated since 1981, and the Schedules to the agreement have not been updated since 1998. This is significant given in 1984 Ontario implemented the *Child and Family Services Act*, which incorporated elements from other pieces of legislation (for example, youth justice and mental health) to address the child and family services needs of Ontarians. At that time, the Government of Canada took the position that AANDC did not have the mandate or resources to start funding justice and health programs, as those types of programs would fall under a different department (see testimony of P. Digby, *Transcript* Vol. 59 at p. 69).

[224] In 2000, the *NPR* recommended a tripartite review be done of the *1965 Agreement* (see at pp. 18 and 121). The *2008 Report of the Auditor General of Canada* also noted that there are provisions in the *1965 Agreement* to keep it up-to-date and that they could

be used to ensure both the *1965 Agreement* and the services that the federal government pays for are current.

[225] The fact that the *1965 Agreement* has not been kept up-to-date with Ontario's *Child and Families Services Act* was highlighted by Mr. Digby in a 2007 discussion paper (see Annex, ex. 23 [*1965 Agreement Overview*]). The Panel finds the *1965 Agreement Overview* document to be relevant and reliable, especially given Mr. Digby's involvement in its authorship. According to the *1965 Agreement Overview* discussion paper, at page 4, issues raised by various stakeholders with regard to the *1965 Agreement* and its implementation include:

> Concern that the agreement is bilateral, not tripartite, since First Nations were not asked to be signatories in 1965. While clause 2.2 of the 1965 Agreement indicates that bands are to signify concurrence to the extension of provincial welfare programs, this does not reflect the type of intergovernmental relationship sought by many First Nations.
>
> […]
>
> First Nations and the provincial government have, from time to time, expressed interest in INAC cost-sharing additional provincial social service programs to be extended on reserve. INAC has generally not had the resources to 'open up' new areas for cost-sharing. […] There has been no update to the agreement schedule with regard to cost-sharing child welfare. As several programs within the provincial Child and Family Services Act (CFSA) fall outside of INAC's mandate, the department is not in a position to 'open up' discussion on cost-sharing the full CFSA.

[226] In 2011, the Commission to Promote Sustainable Child Welfare (the CPSCW) prepared a discussion paper regarding Aboriginal child welfare in Ontario (see Annex, ex. 24 [*CPSCW Discussion Paper*]). The CPSCW was created by the Minister of Children and Youth Services in Ontario to develop and implement solutions to ensure the sustainability of child welfare. It reports to the Minister thereon. In light of this public mandate, the Panel finds the discussion paper relevant and reliable to the issue of the provision of child and family services to First Nations on reserve in Ontario.

[227] The *CPSCW Discussion Paper*, at page 4, begins by noting the impact of history on many Aboriginal communities:

> The combination of colonization, residential schools, the Sixties Scoop, and other factors have undermined Aboriginal cultures, eroded parenting capacity, and challenged economic self-sufficiency. Many Aboriginal people live in communities that experience high levels of poverty, alcohol and substance abuse, suicides, incarceration rates, unemployment rates, and other social problems. Aboriginal children are disproportionately represented in the child welfare system and in the youth justice system. Suicide rates for Aboriginal children and youth surpass those of non-Aboriginals by approximately five times. Aboriginal youth are 9 times more likely to be pregnant before age 18, far less likely to complete high school, far more likely to live in poverty, and far more likely to suffer from emotional disorders and addictions.

[228] Despite these specific risk factors for Aboriginal peoples, the *CPSCW Discussion Paper* notes that many provincial child welfare agencies give little attention to the requirements for providing services to Aboriginal children set out in Ontario's *Child and Families Services Act* (see at p. 26). Specifically, the discussion paper points to sections 213 and 213.1 of the *Child and Families Services Act* whereby a society or agency that provides services with respect to First Nations children must regularly consult with the child's band or community, usually through a Band Representative, about the provision of the services, including the apprehension of children and the placement of children in care; the provision of family support services; and, the preparation of plans for the care of children.

[229] According to the *CPSCW Discussion Paper*, Band Representatives can be crucial and tend to fulfill the following functions: serving as the main liaison between a Band and Children's Aid Societies [CASs]; providing cultural training and advice to CASs; monitoring Temporary Care Agreements and Voluntary Service Agreements with CASs; securing access to legal resources; attending and participating in court proceedings; ensuring that the cultural needs of a child are being addressed by the CAS; and, participating in the development of a child's plan of care (see at p. 26).

[230] The *CPSCW Discussion Paper* indicates that, in the past, First Nations were funded on a claims basis by the federal government to hire a Band Representative. However, since 2003, that funding was discontinued. Therefore, some First Nations divert

resources from prevention services to cover the cost of a Band Representative, while others simply do not have one (see *CPSCW Discussion Paper* at p. 26).

[231] Providing child welfare services in remote and isolated Northern Ontario communities was also identified by the *CPSCW Discussion Paper* as a challenge for CASs. Those challenges include the added time and expense to travel to the communities they serve, where some communities do not have year round road access and where flying-in can be the only option for accessing a community. In fact, one agency was required to make up to 80 flights in a day.

[232] Another challenge for remote and isolated communities is recruiting and retaining staff, especially qualified staff from the community. The legacy of the Sixties Scoop and the association of CASs with the removal of children from the community have caused some First Nations community members to resent or resist CAS workers and can create a hostile working environment.

[233] Other challenges for remote and isolated communities are a lack of suitable housing, which makes it difficult to hire staff from outside the community and to find suitable foster homes; limited access to court; and, the lack of other health and social programs, which impacts the performance and quality of child and family services (see *CPSCW Discussion Paper* at pp. 28-29). On this last point, the *CPSCW Discussion Paper* emphasizes that "[p]romoting positive outcomes for children, families and communities, requires a full range of services related to the health, social, and economic conditions of the community: child welfare services alone are not nearly enough" (at p. 29).

[234] The *CPSCW Discussion Paper* also notes that there are many distinct differences between designated Aboriginal and non-Aboriginal CASs: they serve significantly larger and less inhabited geographic areas with lower child and youth populations, they have significantly larger case volumes per thousand, they serve more of their children and youth in care versus in their own homes, and they have smaller total expenditures, but significantly higher expenditures per capita and higher expenditures per case (see *CPSCW Discussion Paper* at p. 29).

[235] Finally, in discussing the federal-provincial dynamics of providing child and family services on reserve, the *CPSCW Discussion Paper* comments that instead of working collaboratively towards providing effective service delivery to Aboriginal peoples, the federal government has devolved some of its responsibilities for Aboriginal peoples to the provincial governments, which contributes to some confusion over ultimate jurisdiction (see *CPSCW Discussion Paper* at pp. 34-35).

[236] On this last point, in 2007 the Ontario Ministry of Children and Youth Services wrote to AANDC expressing their concern over AANDC's decision to no longer provide funding for Band Representatives: "with the withdrawal of federal funding, many First Nations do not have the financial resources required to participate in planning for Indian and native children involved with a children's aid society or to take part in child protection legal proceedings" (Annex, ex. 25 at p. 2).

[237] In 2011, the Ontario Ministry of Children and Youth Services again wrote to AANDC on the issue of funding for Band Representatives:

> The paramount purpose of the CFSA is to "promote the best interests, protection and well-being of children." The band representative function supports not only the purpose of the Act but also the other important purposes and provisions to which the Act pertains. A lack of sufficient capacity within First Nation communities limits their ability to respond effectively and in accordance with legislated times frames for action. The withdrawal of [INAC's] funding for band representation functions has eroded First Nations' ability to participate as intended in the CFSA.
>
> (Annex, ex. 26 at p. 2)

[238] Despite the discordance between Ontario's *Child and Families Services Act* and AANDC's policy to no longer fund Band Representatives, Minister Duncan indicated that "it falls within the responsibilities of First Nation governments to determine their level of engagement in child welfare matters" and "we do not foresee the Government of Canada providing funding support in this area" (Annex, ex. 27 at p.1).

[239] Ambiguity surrounding jurisdiction for the provision of mental health services to First Nations youth has also been a cause for concern. When the Anishinaabe Abinoojii Family Services agency sought a mandate to provide children's mental health services, an

AANDC employee prepared a document to provide information to the Regional Director General and Assistant Regional Directors General on the issue (see Annex, ex. 28 [*Abinoojii Mental Health Services Mandate*]). The Executive Director for Anishinaabe Abinoojii Family Services, Ms. Stevens, testified as to the content of the document (see *Transcript* Vol. 25 at pp. 174-178).

[240] According to the *Abinoojii Mental Health Services Mandate* document, there are waiting lists for First Nations children served by the Abinoojii Family Services agency who require mental health services. The document adds that while there is some cooperation between mental health service organizations and the Abinoojii agency to manage these waiting lists, there is also a need for more resources and culturally appropriate assessment tools and counsellors. The Ministry of Children and Youth Services has a Mental Health Policy for Children and Youth and has some resources for mental health counselling, but the needs outstrip the funding (see *Abinoojii Mental Health Services Mandate* at pp. 1-2).

[241] In considering the request, the *Abinoojii Mental Health Services Mandate* document states that AANDC does not have a mandate for mental health services and that these expenditures are not eligible under the *1965 Agreement*. Rather, Health Canada has the federal mandate on mental health and provides funding through a number of programs. However, those programs focus more on prevention and mostly deal with adult issues. Health Canada programs do not specifically deal with children in care and do not cover mental health counselling (see *Abinoojii Mental Health Services Mandate* at p. 2).

[242] In a roundtable meeting between Abinoojii Family Services agency, AANDC, Health Canada and the Ministry of Children and Youth Services for Ontario, Health Canada recognized a need to look at the whole system as services/programs tend to work in silos and raised the possibility of re-prioritizing resources or seeking additional funding. AANDC indicated that the province is the lead on child welfare and Health Canada is the lead on health issues at the federal level, but that it supports the work on examining existing programs, outlining gaps and working together to ensure First Nations receive services that are comparable and culturally appropriate (see *Abinoojii Mental Health Services Mandate* at p. 2).

[243] In 2012, the Ontario Association of Children's Aid Societies (the OACAS) produced a report regarding trends in child welfare in Ontario, including in Aboriginal communities (see Annex, ex. 29 [*Child Welfare Report*]). The OACAS is an advocacy group representing the interests of 45 CASs member organizations. Governed by a voluntary board of directors, OACAS consults with and advises the provincial government on issues of legislation, regulation, policy, standards and review mechanisms. It promotes and is dedicated to achieving the best outcomes for children and families (see *Child Welfare Report* at p. 2). Given the OACAS's mandate and focus, the Panel finds its report relevant and reliable.

[244] According to the *Child Welfare Report*, the current funding model does not reflect the needs of Aboriginal communities and agencies for several reasons including: insufficient resources for services, where they tend to be crisis driven; shortage of funding for administrative requirements; lack of funding to establish infrastructure necessary to deliver statutory child protection services, while operating within the extraordinary infrastructure deficits of many of the communities they serve; and, insufficient funds to retain qualified staff to deliver culturally appropriate services (at p. 7). Among other things, at page 7 of the *Child Welfare Report*, the OACAS asked the Ontario government to:

> Establish an Aboriginal child welfare funding model and adequate funding to support culturally appropriate programs that encompass the unique experiences of diverse Aboriginal populations – on-reserve, off-reserve, remote, rural, and urban. Invest in capacity building to enable the proper recruitment, training and retention of child welfare professionals in emerging Aboriginal Children's Aid Societies.

[245] In terms of infrastructure and capacity building, the *1965 Agreement* has not provided for the cost-sharing of capital expenditures since 1975 (see testimony of P. Digby, *Transcript* Vol. 59 at p. 93). Ms. Stevens explained the impact of this on her organization: many high-risk children are sent outside the community to receive services because there is no treatment centre in the community. Abinoojii Family Services spends approximately 2 to 3 million a year sending children outside their community. According to Ms. Stevens, there are not enough resources to build a treatment centre or develop

programs to assist these high-risk children because those funds are expended on meeting the current needs of those children (see *Transcript* Vol. 25 at p. 32).

[246] Again, the above evidence on the *1965 Agreement* identifies shortcomings in AANDC's approach to the provision of child and family services on First Nations reserves in Ontario. In the provision of child and family services, the Panel finds the situation in Ontario falls short of the objective of the *1965 Agreement*"…to make available to the Indians in the Province the full range of provincial welfare programs".

d. Other provincial/territorial agreements

[247] As mentioned above, two other provinces have agreements with AANDC for the provision of child and family services on reserve: Alberta and British Columbia. While in the Yukon, the *Yukon Funding Agreement* applies.

[248] As mentioned above, the *Yukon Funding Agreement* applies to all First Nations children and families ordinarily resident in the Territory. Schedule "DIAND-3" of the *Yukon Funding Agreement* provides for the application of Directive 20-1 to the funding of child and family services to those First Nations children and families.

[249] In Alberta and British Columbia, AANDC reimburses the provinces for the delivery of child and family services to certain First Nations communities on reserve where there are no FNCFS Agencies. In Alberta, six First Nations communities are served by the *Alberta Reform Agreement* for child and family services. In British Columbia, seventy-two First Nation communities receive services under the *BC Service Agreement*.

[250] Pursuant to the *Alberta Reform Agreement*, AANDC reimburses Alberta for the costs of providing various social services, including child welfare services, to certain First Nations reserves in the province. For those child welfare services, funding is provided at the beginning of the fiscal year based on a funding formula using year-end costs of the preceding fiscal year. Adjustments are made based on actual expenditures during the fiscal year (see *Alberta Reform Agreement* at Schedule A, s. 1).

[251] In British Columbia, the *BC MOU* was in place from 1996 to 2012. Under the *BC MOU*, AANDC reimbursed the province for eligible maintenance expenses based on a per diem formula which accounted for the province's administration, supervision and maintenance costs (see *BC MOU* at s. 5.0; and Appendix B and D). The per diem rates could be adjusted annually and the province could receive an adjustment to the previous year's per diem rates based on actual expenditures (see *BC MOU* at Appendix C). Those adjustments included rate increases based on inflation and increased emphasis on prevention services. For the fiscal year 2006/2007, the recalculation of per diem rates resulted in an invoice to AANDC for over $5 million dollars (see Annex, ex. 30).

[252] In 2012, the *BC MOU* was replaced by the *BC Service Agreement*. The *BC Service Agreement* now provides for reimbursement of maintenance expenses based on actual expenditures. It also provides funding to the province for operations expenses based on a costing model agreed to between the province and AANDC (see *BC Service Agreement* at s. 7; and Appendix A). For fiscal year 2012-2013, operations funding amounted to $15 million.

[253] The *Alberta Reform Agreement,* the *BC MOU* and the *BC Service Agreement* provide reimbursement for actual eligible operating and administrative expenditures, including retroactive adjustments for inflation and increases for changes in programming. This is quite different from FNCFS Agencies in those provinces, including under the EPFA in Alberta, where there is no such adjustments for those types of increases in costs (see testimony of C. Schimanke, *Transcript* Vol. 62 at pp. 53-54). As expressed in the *2008 Report of the Auditor General of Canada* at page 19, these adjustments and reimbursements for actuals are linked directly to provincial child welfare legislation:

> 4.49 INAC funds some provinces for delivering child welfare services directly where First Nations do not. INAC has agreements with three of the five provinces we covered on how they will be funded to provide child welfare services on reserves. We found that in these provinces, INAC reimburses all or an agreed-on share of their operating and administrative costs of delivering child welfare services directly to First Nations and of the costs of children placed in care. […]

> 4.50 INAC funding to cover the costs of operating and administering First Nations agencies is established through a formula. Although the program requires First Nations agencies to meet applicable provincial legislation, we found that INAC's funding formula is not linked to this requirement. The main element of the formula is the number of children aged from 0 to 18 who are ordinarily resident on the reserve or reserves being served by a First Nations agency. […]

[254] The Panel will return to this comparison in the section that follows.

iii. AANDC's position on the evidence

[255] AANDC argues the evidence above is not sufficient to establish adverse treatment in the provision of funding for First Nations child and family services, including that there is a lack of specific examples to support the allegation of a denial of such services. In sum, it claims the reports and evidence regarding the FNCFS Program above should be given little weight, that the choices of FNCFS Agencies in administering their budgets should be considered in evaluating any adverse impacts, along with any additional funding they receive beyond Directive 20-1 or the EPFA, that comparing the federal and provincial/territorial funding systems is not a valid comparison under the *CHRA*, and, even if it were, such comparative evidence is lacking in this case. Each argument is addressed below.

a. The relevance and reliability of the studies on the FNCFS Program

[256] AANDC views the various studies of the FNCFS Program outlined above as having little weight. It questions the comprehensiveness of the studies, noting the experience of a few agencies does not establish differential treatment.

[257] The Panel finds the *NPR* and Wen:De reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of

these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program.

[258] In its October 2006 *Fact Sheet* (see Annex, ex. 10), AANDC acknowledged the impacts and findings of the Wen:De reports, along with the *NPR*, and committed to refocusing the FNCFS Program to improve outcomes for First Nations children and families on reserve:

> Currently, Program funding is largely based on protection services, which encourage Agencies to remove First Nation children from their parental homes, rather than providing prevention services, which could allow children to remain safely in their homes.
>
> - Program expenditures were $417 million in 2005-2006 and are expected to grow to $540 million by 2010-11 if the program continues to operate under the protection-based model.
>
> - From 1996-97 to 2004-05, the number of First Nation children in care increased by 64.34%.
>
> - Approximately 5.8% of First Nation children living on reserve are in care out of their parental homes.
>
> **Current Issues:** First Nation children are disproportionately represented in the child welfare system. Placement rates on reserve reflect a lack of available prevention services to mitigate family crisis.
>
> […]
>
> **Changes in the landscape:** Provinces and territories have introduced new policy approaches to child welfare and a broader continuum of services and programs that First Nations Child and Family Services must deliver to retain their provincial mandates as service providers. However, the current federal funding approach to child and family services has not let First Nations Child and Family Services Agencies keep pace with the provincial and territorial policy changes, and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians. A fundamental change in the funding approach of First Nations Child and Family Services Agencies to child welfare is required in order to reverse the growth rate of children coming into care, and in order for the agencies to meet their mandated responsibilities.

> **The Future:** A Joint National Policy Review on First Nations Child and Family Services, completed in 2000, recommended that the federal government increase prevention services for children at risk-services that must be provided before considering the removal of the child and placement in out of home care-and that it provide adequate funding for this purpose.
>
> - Indian and Northern Affairs Canada funded research undertaken by the First Nations Child and Family Caring Society of Canada in 2004 and 2005. The reports: *WEN: DE: We are coming to the light of day*, and *WEN: DE: The journey continues*, included recommendations for investments and policy adjustments required to address the shortcomings of the current system. This research will form the basis of Indian and Northern Affairs Canada's request for investments and policy renewal.
>
> […]
>
> - The Government of Canada is committed to working with First Nations, provincial/territorial, and federal partners and agencies to implement a modernized vision of the First Nations Child and Family Services Program, a program that strives for safe and strong children and youth supported by healthy parents.
>
> - The strategy is to refocus the program from a protection-based approach towards a preventive-based model, promote a variety of care options to provide children and youth with safe, nurturing and permanent homes, and build on partnerships and implement practical solutions to improve child interventions services.

[259] Ms. Murphy and Ms. D'Amico also testified about AANDC's reliance on the *NPR* and Wen:De reports in implementing the EPFA (see *Transcript* Vol. 53 at pp. 46-47; and, Vol. 54 at pp. 50-51).

[260] Internal AANDC documents presented at the hearing also support the department's adherence to the findings in the *NPR* and Wen:De reports. AANDC submits the Panel should rely on the testimony of its witnesses rather than what is found in internal documents, given that many of the authors did not testify before the Tribunal in order to provide context and the documents may merely reflect the opinion of employees at a specific time. Therefore, AANDC submits that the Tribunal should assess the weight of documents contextually, with reference to oral evidence regarding their proper

interpretation, and considering the scope of the author's authority to prepare the document in question.

[261] The Panel has considered these arguments in weighing the evidence and finds the documents relied upon below to be straightforward and clear. Many of these documents are presentations prepared for, or delivered to, high level AANDC officials. The Panel finds these presentations highly relevant and reliable given they are the means by which information on the FNCFS Program is provided to AANDC management, including Deputy or Assistant Deputy Ministers, in order to inform policy decisions or future requests to Cabinet (see *Transcript* Vol. 54 at pp. 159, 166; and, Vol. 55 at p. 199). Furthermore, the other AANDC documents referred to below corroborate the information found in those presentations.

[262] A 2005 presentation to the 'Policy Committee' refers to the *NPR* by stating: "[a] 2000 review of FNCFS found that Indian Affairs was funding [FNCFS Agencies] 22% less, on average, than their provincial counterparts" (see Annex, ex. 31 at p. 2 [*Policy Committee presentation*]). The *Policy Committee presentation*, at page 3, goes on to state that, despite maintenance expenditures increasing by 7% to 10% annually, the Department only receives a 2% annual adjustment to the departmental budget. According to the *Policy Committee presentation* at page 3, "[a]dditional investments are now required for further stabilization for basic supports with respect to Enhanced Organizational Support, and Maintenance Volume Growth."

[263] The 2005 *Policy Committee presentation* also indicates FNCFS Agencies are threatening to withdraw from service delivery because they cannot deliver provincially mandated services within their current budgets. The presentation continues by stating that provincial governments have written to the Minister of AANDC indicating their concern that the department is not providing sufficient funding to permit FNCFS Agencies to meet provincial statutory obligations. As a result, the *Policy Committee presentation* warns that provinces may refuse to renew the mandates of FNCFS Agencies or give mandates to new agencies (see at p. 4).

[264] In line with the *NPR* and Wen:De reports, the *Policy Committee presentation* states: "In addition to enhanced basic supports for First Nation Child and Family Services, fundamental change in the approach to child welfare is required in order to reverse the growth rate of children coming into care" (at p. 5). In this regard, the presentation proposes transformative measures be put in place to allow investment in prevention services according to provincial legislation and standards (see at p. 6). This "[e]nables the availability of a full spectrum of culturally-appropriate programs and services that would eventually reduce the over representation of First Nations children in the child welfare system" (*Policy Committee presentation* at p. 6). It also "…addresses immediate critical funding pressures and would stabilize the child welfare situation on reserve" (*Policy Committee* presentation at p. 6). Finally, according to the *Policy Committee* presentation, "[i]ncreasing the budget for basic services would enable [FNCFS Agencies] to retain and train staff and meet the increased costs of maintaining operations (e.g. cost of living adjustment, legal fees, insurance, remoteness)" (at p. 6).

[265] Similarly, in another document entitled "First Nations Child and Family Services (FNCFS) Q's and A's", it states:

> Circumstances are dire. Inadequate resources may force individual agencies to close down if their mandates are withdrawn, or not extended by the provinces. This would result in provinces taking over responsibility for child welfare, likely at a higher cost to Indian and Norther Affairs Canada.
>
> […]
>
> Over the past decade the trend in child welfare has been towards prevention or least disruptive measures. INAC recognizes that the current funding formula is not flexible enough to follow this trend and needs to be revised. […]INAC received authority in 2004-2005 to implement a Flexible Funding Option for Maintenance resources. This will permit some agencies to reprofile Maintenance resources to allow for greater flexibility in how these funds are utilized by placing greater emphasis on prevention services.
>
> Incremental Operations funding will assist agencies to a very limited extent in providing additional prevention services. Additional Operations resources will assist agencies in coping with funding pressures resulting from increased legal fees, insurance costs and other operational expenses that have not been adjusted for since Program Review was implemented in 1994-1995.

(Annex, ex. 32 at pp. 1-2, 5)

[266] Similarly, the *2005 National Program Manual*, at page 14, section 2.2.3, outlines some of the cost pressures experienced by FNCFS Agencies in terms of their operational funding:

> Although the authorities are clear on what to be included in the operations formula, First Nations have expressed a concern that because the formula was developed in the late 1980's, legislation, standards and practices have changed significantly. Although the following items are included in the Operations, First Nations have stated that Recipients are under increasing pressures due to changes over time with respect to:
>
> - *Information Technology*: In the late 1980's, use of computers was limited. Today, however, they are vital to operating social programs and services.
> - *Prevention (Least disruptive measures)*: Recent trends in provincial and territorial legislation have placed a greater emphasis on prevention. Although prevention resources were included in the current formula, the level of funding may not provide enough resources to meet current needs.
> - *Liability Insurance*: As with prevention, the Operations formula includes funding for insurance. However, since September 11, 2001 (9/11) insurance costs have increased dramatically.
> - *Legal Costs*: Although legal costs are included in the Operations formula, they have become a larger issue than planned for when the formula was developed. A higher incidence of contested cases plus changes in provincial practice requiring cases to be presented by legal representatives rather than social workers has resulted in higher costs. Further, litigation on behalf of injured children can be very expensive, even when adequate liability insurance is carried.
>
> It is anticipated that the review of the Operational formula will address these issues. <u>At the present time, however, the current authorities must be applied</u>.
>
> (<u>Emphasis added</u>)

[267] In another document dealing with AANDC's expenditures on Social Development Programs on reserves it states that, despite the federal government acting as a province in the provision of social development programs on reserve, federal policy for social programs has not kept pace with provincial proactive measures and thus perpetuates the

cycle of dependency (see Annex, ex. 33 at pp. 1-2 [*Explanations on Expenditures of Social Development Programs* document]). The document describes AANDC's social programs as "…limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances" (*Explanations on Expenditures of Social Development Programs* document at p. 2). It goes on to say that if its current social programs were administered by the provinces this would result in a significant increase in costs for AANDC. The document provides the example of the Kasohkowew Child Wellness Society in Alberta, where it would cost an additional $2.2 million beyond what AANDC currently funds if social services on that reserve reverted back to the province of Alberta (see *Explanations on Expenditures of Social Development Programs* document at p. 2).

[268] Correspondingly, a 2006 presentation regarding AANDC social programs on reserves, including the FNCFS Program, describes those programs as being remedial in focus, not always meeting provincial/territorial rates and standards, and not well-integrated across jurisdictions (see Annex, ex. 34 at p. 5 [*Social Programs presentation*]). With specific regard to the FNCFS Program, the presentation states that "efforts have been concentrated on child protection and removal of the child from the parental home with the result that the children in care rate continues to increase" (see *Social Programs presentation* at p. 5).

[269] In general, the *Social Programs presentation* states that "[m]any First Nation and Inuit children and families are not receiving services reasonably comparable to those provided to other Canadians" (at p. 3). Relatedly, the presentation notes that "[p]rovinces/territories have been critical of [AANDC] funding levels as they do not enable First Nation service providers to meet the standards stipulated in provincial/territorial legislation" (*Social Programs presentation* at p. 6). According to the presentation, the delivery of social programs on reserves is hampered by the absence of legislation, inadequate funding and a division of responsibilities between federal departments which impedes comprehensive program responses (see *Social Programs presentation* at p. 3).

[270] In another presentation, AANDC describes Directive 20-1 as "broken":

> The current system is BROKEN, i.e. piecemeal and fragmented
>
> The current system contributes to dysfunctional relationships, i.e. jurisdictional issues (at federal and provincial levels), lack of coordination, working at cross purposes, silo mentality
>
> […]
>
> The current program focus is on protection (taking children into care) rather than prevention (supporting the family)
>
> […]
>
> Early intervention/prevention has become standard practice in the provinces/territories, numerous U.S. states, and New Zealand
>
> INAC CFS has been unable to keep up with the provincial changes
>
> Where prevention supports are common practice, results have demonstrated that rates of children in care and costs are stabilized and/or reduced
>
> (Annex, ex. 35 at pp. 2-3 [*Putting Children and Families First in Alberta presentation*])

[271] The *Putting Children and Families First in Alberta presentation* touts prevention as the ideal option to address these problems at page 4:

> Early prevention and child-centered outcomes are the missing pieces of the puzzle for FN children and families living on reserve
>
> Early prevention supports the agenda for improving quality of life for children and families thereby leading to improved outcomes in the areas of early childhood development, education, and health

[272] Finally, the *Putting Children and Families First in Alberta presentation* states at page 5:

> The facts are clear:
>
> - *Wen:De* Report - Early intervention/prevention is KEY
>
> […]

- First Nation agencies have been lobbying Canada since 1998 to change the system

[273] AANDC's Departmental Audit and Evaluation Branch also performed its own evaluation of the FNCFS Program in 2007 (see Annex, ex. 14 [*2007 Evaluation of the FNCFS Program*]). The findings and recommendations of the *2007 Evaluation of the FNCFS Program* reflect those of the *NPR* and Wen:De reports. Of note, at page ii, the *2007 Evaluation of the FNCFS Program* makes the following findings:

> Although the program has met an increasing demand for services, it is not possible to say that is has achieved its objective of creating a more secure and stable environment for children on reserve, nor has it kept pace with a trend, both nationally and internationally, towards greater emphasis on early intervention and prevention.
>
> The program's funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care and Program expenditures because it has had the effect of steering agencies towards in-care options - foster care, group homes and institutional care because only these agency costs are fully reimbursed.

[274] In response to these findings, the *2007 Evaluation of the FNCFS Program* made six recommendations at page iii, including that AANDC:

> 1. clarify the department's hierarchy of policy objectives for the First Nations Child and Family Services Program, placing the well-being and safety of children at the top;
>
> 2. correct the weakness in the First Nations Child and Family Services Program's funding formula, which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. Well-being and safety of children must be agencies' primary considerations in placement decisions;

[275] The *2007 Evaluation of the FNCFS Program* goes on to state that the first step in improving the FNCFS Program is to change Directive 20-1 by providing FNCFS Agencies with a new funding stream that ensures adequate support for prevention work (see at p. 35). In discussing the costs and benefits of increasing the FNCFS Program's focus on prevention, the cost estimates provided in *Wen:De Report Three* are outlined, including the $22.9 million for new management information systems, capital costs (buildings,

vehicles and office equipment), and insurance premiums; and, the $86.4 million for annual funding needs for such things as an inflation adjustment to restore funding to 1995 levels, adjusting the funding formula for small and remote agencies, and increasing the operations base amount from $143,000 to $308,751 (see *2007 Evaluation of the FNCFS Program* at pp. 35-36).

[276] In a September 11, 2009 response to questions raised by the Standing Committee on Aboriginal Affairs and Northern Development, Deputy Minister Michael Wernick described the EPFA as an "…approach that will result in better outcomes for First Nation children" (Annex, ex. 36). Mr. Wernick's response indicates AANDC's awareness of the impacts that the structure and funding for the FNCFS Program under Directive 20-1 has on the outcomes for First Nations children.

[277] Similarly, at the hearing, Ms. Murphy described the EPFA as follows:

> MS MacPHEE: Okay. And I think you touched on this earlier, but I wanted to get you to elaborate a little bit more. Could you tell us a little bit how, more specifically maybe, the new Enhanced Prevention Focused Approach was developed? You know, what was the impetus for developing this new approach?
>
> MS MURPHY: We weren't getting good outcomes. MS MURPHY: We were having challenges with First Nations, we were having challenges with the number of children in care, and we wanted to reduce that number and we wanted to have kids be safe and we wanted to avoid having kids having to come into care. I mean, the challenge for first Nations communities -- and I'm sure this has already been outlined here by others, is that, especially for small, remote communities, when child needs to be taken into care, sometimes there's not community-based options, so the child may not stay in that community. And taking a child away from their family and from their community has impacts for sure. So we wanted to find community-based solutions so kids could stay in their communities, be close to – and hopefully have the families be able to be reunited. So we wanted to do that early intervention work which would actually avoid having to have the children actually being removed from their parental home and perhaps being located outside at a distance from their community.
>
> (*Transcript* Vol. 54 at pp.49-50)

[278] However, as the *2008 Report of the Auditor General of Canada*, the *2009 Report of the Standing Committee on Public Accounts*, the *2011 Status Report of the Auditor General of Canada,* and the *2012 Report of the Standing Committee on Public Accounts* pointed out, while the EPFA is an improvement on Directive 20-1, it still relies on the problematic assumptions regarding children in care, families in need, and population levels to determine funding. Furthermore, many provinces and the Yukon remain under Directive 20-1 despite AANDC's commitment to transition those jurisdictions to the EPFA.

[279] AANDC argues the *2008 Report of the Auditor General of Canada,* and the *2011 Status Report of the Auditor General of Canada*, should also be given minimal weight since the authors of the reports were not called to substantiate the documents or provide the context of statements or opinions contained therein. Additionally, AANDC argues these reports are not probative of the facts in issue.

[280] The Panel rejects AANDC's arguments concerning the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*. The Auditor General of Canada did not testify before the Tribunal as she or he is not a compellable witness (see section 18.1 of the *Auditor General Act*). Nevertheless, the Panel is satisfied the *2008 Report of the Auditor General of Canada* and *2011 Status Report of the Auditor General of Canada* are highly reliable, relevant, and clear. They are written to report findings in a comprehensive manner so as to allow Parliament and all Canadians to understand its recommendations. As stated at section 7(2) of the *Auditor General Act*, reports of the Auditor General of Canada are filed annually with the House of Commons in order to "…call attention to anything that he considers to be of significance and of a nature that should be brought to the attention of the House of Commons…".

[281] Given that the Auditor General is an independent public office in Canada, serving the interests of all Canadians, it would be unreasonable to expect the Panel give little or no weight to the report and findings in the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*, especially given the fact that many findings in the reports are specific to the FNCFS Program. In addition, as was outlined above, AANDC publicly accepted the recommendations emanating from the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor*

General of Canada, reinforcing the reports' relevance and reliability in this matter. The Panel accepts the findings of the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada.*

[282] Similarly, the Panel finds the *2009 Report of the Standing Committee on Public Accounts* and the *2012 Report of the Standing Committee on Public Accounts* to be highly relevant and reliable in this case. In addition to the fact that the reports relate directly of the FNCFS Program, they are also authored by elected officials performing public duties for the benefit of all Canadians. High ranking officials from AANDC were able to testify before the Committee and, in doing so, acknowledged the findings in those reports. Again, the Panel accepts the findings of the *2009 Report of the Standing Committee on Public Accounts* and the *2012 Report of the Standing Committee on Public Accounts*.

[283] The statements of the Deputy Minister and Assistant Deputy Minister before the Standing Committee on Public Accounts also indicate that they viewed the EPFA as the solution to address the flaws in Directive 20-1. Again, internal AANDC documents support the findings in the *2008 Report of the Auditor General of Canada*, the *2009 Report of the Standing Committee on Public Accounts*, the *2011 Status Report of the Auditor General of Canada* and the *2012 Report of the Standing Committee on Public* Accounts, regarding the need to transition those jurisdictions still under Directive 20-1 to the EPFA, while also acknowledging the need to improve the EPFA.

[284] In 2010, AANDC's Evaluation, Performance Measurement and Review Branch did its own evaluation of the implementation of the EPFA in Alberta (see Annex, ex. 37 [*AANDC Evaluation of the Implementation of the EPFA in Alberta*]). The evaluation found that the design of the EPFA was a move in the right direction with potential for positive outcomes. However, it identified some challenges with the EPFA model, including: timing, provincial requirements, human resources shortages, salaries, support from government/agency management, community linkages, training and geographical isolation. All these were considered by FNFCS Agencies to be essential to the successful implementation of the approach. An additional challenge identified is ensuring that reliable data is collected to allow for accurate performance measurement and some comparability

of prevention services (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at pp. vi, 11,16-17, 21-24).

[285] Moreover, the evaluation noted that, as the EPFA is based on an annual allocation for most aspects and some pieces being determined by a formula, "there is not the flexibility to respond quickly to changes in provincial policy or other external drivers…" (*AANDC Evaluation of the Implementation of the EPFA in Alberta* at p. 27). According to the evaluation, this lack of flexibility "…is common to INAC programs that adhere to provincial legislation and […] [is] an in-built risk to the program" (*AANDC Evaluation of the Implementation of the EPFA in Alberta* at p. 27).

[286] Furthermore, several jurisdictional issues were identified as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In this regard, the evaluation noted that a common implementation challenge for FNCFS Agencies was the need for specialized services at the community level (for example, Fetal Alcohol Spectrum Disorder assessments, therapy, counselling and addictions support). Moreover, the evaluation found of key importance the availability and access to supportive services for prevention. According to the evaluation, these services are not available through AANDC funding, though they are provided by other government departments and programs either on reserve or off reserve (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at pp. 16-18, 21-24).

[287] The evaluation recommended revisiting the EPFA funding model within the next year to learn from the past two years of implementation and to incorporate additional resources to address some of the issues faced by rural and remote communities. As part of this review, it recommended AANDC also determine if the calculations that are based on assumed population of children in care are relevant in achieving desired outcomes (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at p.i).

[288] In 2012, the Evaluation, Performance Measurement and Review Branch of AANDC also did its own evaluation of the implementation of the EPFA in Saskatchewan and Nova Scotia (see Annex, ex. 38 [*AANDC Evaluation of the Implementation of the EPFA in*

Saskatchewan and Nova Scotia]; see also, Annex, ex. 39). Again, the findings are in line with those of the other reports on the FNCFS Program.

[289] The 2012 evaluation found it was unclear whether the EPFA is flexible enough to accommodate provincial funding changes (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 51). It noted both the Saskatchewan and Atlantic regional offices struggle to effectively perform their work given staffing limitations, including staffing shortages, caseload ratios that exceed the provincial standard, and difficulty recruiting and retaining qualified staff, particularly First Nation staff (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 51). Capital expenditures on new buildings, new vehicles and computer hardware were identified as being necessary to achieve compliance with provincial standards, but also as making FNCFS Agencies a more desirable place to work. However, these expenditures were not anticipated when implementing the EPFA and were identified as often being funded through prevention dollars (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at p. 49).

[290] One of the main challenges identified in the implementation of the EPFA in Saskatchewan and Nova Scotia was unrealistic expectations, largely by community leadership, of what agencies are able to achieve with the funding they receive. According to the evaluation, community leadership occasionally expect agencies to cover costs that are social in nature but that do not fall under the agency's eligible expenditures. That is, the conditions which contribute most to a child's risk are conditions that the child welfare system itself does not have the mandate or capacity to directly address, including economic development, health programing, education and cultural integrity (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at pp. 35, 49, 51). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* states, at page 49: "AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs".

[291] Difficulties based on remoteness were also identified as a main challenge in Saskatchewan and Nova Scotia. One third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner. In Nova Scotia, where there is only one FNCFS Agency with two offices throughout the province, the evaluation noted it can take two to three hours to reach a child in the southwestern part of the province. On the other hand, the provincial model is structured so that its agencies are no more than a half-hour away from a child in urgent need. In extreme cases, the Nova Scotia FNCFS Agency has had to rely on the provincial agencies for assistance. According to the evaluation, because of these issues the province of Nova Scotia has recommended that AANDC provide funding to support a third office in the southwestern part of the province (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at pp. 35-36).

[292] In an August 2012 presentation, entitled "First Nations Child and Family Services Program (FNCFS) The Way Forward", Ms. Odette Johnson, Director of the Children and Family Services Directorate of AANDC outlined to Françoise Ducros, Assistant Deputy Minister, ESDPPS, the need to reassess the EPFA (see Annex, ex. 40 [the *Way Forward presentation*]). The purpose of the presentation was "[t]o provide options and seek approval for next steps in the reform of the FNCFS Program" (*Way Forward presentation* at p. 2). It identifies the drivers behind this reform as: the provincial/territorial shift to prevention, the high numbers/costs of First Nation children in care, AANDC internal audits and evaluations of the FNCFS (along with those of the Auditor General), the reports of Parliamentary Committees, the human rights complaint, and child advocate reports and other research (see the *Way Forward presentation* at p. 5).

[293] According to the *Way Forward presentation*, "[a]udits and evaluations of between 2008 and 2012 demonstrate a need for the EPFA, but also a need to annually review the EPFA formula as constant provincial changes make it difficult to stay current and enable Agencies to provide a full range of child welfare services" (at p. 9). Furthermore, "[p]rovinces have been shifting their caseloads towards greater emphasis on intake and

investigation which may not have been part of original EPFA discussions and are now creating pressures on Agencies" (see the *Way Forward presentation* at p. 9).

[294] At page 13, the *Way Forward presentation* provides a comparative table of "where we are" and "where we need to go":

Where we are		**Where we need to go**
Taking children into care and some work with families in the home	→	Taking children in care for critical cases but more with the families in the home.
Fund agencies and provinces for basic protection services and some prevention with families in the home.	→	Either fund full range of services provided by provinces (differs among jurisdictions) OR transfer child welfare on reserve to the Provincial/Territorial governments.
Initial investments in EPFA in 6 jurisdictions but not necessarily addressing all aspects of child welfare.	→	EPFA in all jurisdictions **fully costed at $108.13M**, supporting all aspects of child welfare including intake, early intervention and allowing for developmental phase.
Developing some capacity for prevention in communities.	→	All communities have capacity in prevention.

[295] The presentation proposes three options to address these issues: (1) implement EPFA in the remaining jurisdictions; (2) expand the EPFA with increased investments to address cost drivers, including implementing the model in the remaining jurisdiction; and, (3) transfer the program to the provinces/territories.

[296] Under option 1, the costs of transferring the remaining jurisdictions to EPFA are estimated at: $21 million for British Columbia; $2 million for the Yukon; $5 million for Ontario; $2 million for New Brunswick; and, $2 million for Newfoundland and Labrador. (see *Way Forward presentation* at p. 15). There is also an additional $4 million listed for "Maintenance" which Ms. Murphy explained as an infusion of additional funds to avoid having to re-allocate money from elsewhere in AANDC to cover additional costs that go beyond the standard funding formula (see *Transcript* Vol. 54 at pp. 167-168). Furthermore, an additional $2 million is estimated for "Strength and Accountability" to allow AANDC to better administer the FNCFS Program internally (see testimony of S. Murphy, *Transcript* Vol. 54 at pp. 168).

[297] The presentation lists as a "PRO" for this option the recognition that the FNCFS Program cannot address all root causes of the over-representation of children in care.

Under “CONS” it states the “5-year EPFA funding envelope may not be addressing provincial cost drivers or funding pressures related to the operational efficiencies of Agencies” (*Way Forward presentation* at p. 15). According to Ms. Murphy, who stated she had signed off on the presentation, the major cost drivers are increases in the rates for maintaining children in care, growth in the number of children that come into care and salary increases (see *Transcript* Vol. 54 at pp. 158-159, 179 and 181). She elaborated on the “CON” for option 1 as follows:

> So with this option we were talking about maintenance, but we weren't necessarily dealing with all of the cost drivers that we were observing.
>
> So, as an example, we know that the cost of foster care is going up and so, Agencies are trying to pay those bills and we hadn't properly calculated that in our model.
>
> This option wasn't trying to re-stabilize the existing EPFA jurisdictions for the cost changes that had happened since we introduced the funding models, it was really about the five. So it was sort of the minimum option at the time.
>
> (*Transcript* Vol. 54 at p. 169)

[298] For option 2, the implementation of the expanded EPFA in the remaining jurisdictions is estimated at $65.03 million, while topping-up the existing EPFA jurisdictions is estimated at $43.10 million, for a total of $108.13 million. In addition to these amounts, the presentation indicates that a 3% escalator will be required every year. The “PROS” of this option are that it ensures agencies are able to meet changing provincial standards and salary rates while maintaining a high level of prevention programming; and, that funding remains reasonably comparable with provinces and territories. Under “CONS”, the presentation states: “Option 2 is more costly than Status Quo EPFA implementation” (*Way Forward presentation* at p. 16). During testimony, Ms. Murphy was asked whether the “PROS” of this option suggest that AANDC is not able to provide a reasonably comparable level of services under the FNCFS Program. Ms. Murphy responded:

> It has always been our intention to provide reasonably comparable services.

> We were noticing trends in increasing kids in care and we were having stresses in our budget to be able to maintain those levels and, of course, the Department's doing re-allocations, but we weren't – we noticed changes for sure and we needed to keep up with those changes and we weren't necessarily being successful in all cases of being able to do that.
>
> (*Transcript* Vol. 54 at pp. 163-164)

[299] Finally, the third option of transferring child welfare on reserve to the provinces/territory does not have an estimated cost, but the presentation indicates there is "[p]otential for dramatic increases in costs" (*Way Forward presentation* at p. 17). As Ms. Murphy put it:

> it's certainly expected that if you were to ask someone else to start to take on the delivery of a program, they're going to have their administrative cost structure, they're going to potentially look for funds to offset the cost of them assuming that role.
>
> […]
>
> It doesn't mean that it would. We didn't -- necessarily hadn't costed any of that, but we wanted to at least highlight that there might be a potential for an increase in costs because we might have to absorb, for instance, increased administrative costs that weren't necessarily there right now in the way that we're funding individual Agencies.
>
> And other costs, we don't know. They may want to negotiate other things as part and parcel of taking on that responsibility and we wouldn't wait until you got to negotiation to find out what that was.
>
> (*Transcript* Vol. 54 at pp. 166-167).

[300] The "PROS" of option 3 include: comparability issue would be resolved and better oversight/compliance of child and family services on reserve. Along with the potential for a dramatic increase in costs, the presentation also includes as "CONS" for this option that support for all First Nations is uncertain, and that it involves complimentary programs, therefore, it is a big task to implement and involves cost implications beyond AANDC (*Way Forward presentation* at p. 17).

[301] Following on the *Way Forward presentation*, in two similar presentations in October and November 2012, Ms. Murphy expanded on the options for reforming the FNCFS

Program (see testimony of S. Murphy, *Transcript* Vol. 55 at p. 199). In these presentations Ms. Murphy proposed that AANDC complete the reform of the FNCFS Program to EPFA in the remaining jurisdictions (estimated at $139.7 million over 5 years and $36.6 million ongoing); stabilize pressures in existing EPFA jurisdictions (estimated at 164.1 million over 5 years); add a 3% escalator per year for all jurisdictions to ensure provincial/territorial comparability (estimated at $105.5 million over 5 years and $23.9 million ongoing); and seek additional resources for increased program management and strengthened accountability (estimated at $11.2 million over 5 years and $2.3 million ongoing) (see Annex, ex. 41 at p. 2 [the *Renewal of the First Nations Child and Family Services Program (October 31, 2012) presentation*]; and, Annex, ex. 42 at pp. 2, 5 [the *Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation*]).

[302] The need for this increased funding is explained as:

> Maintenance rate increases for children in care have far exceeded the two percent AANDC receives annually. As a result, the Department must reallocate funds from other program areas to cover the deficit.
>
> AANDC must pay the costs to support children in care and these costs are still rising dramatically. As maintenance rates are essentially dictated by provinces, AANDC has no choice but to support the costs of children in care based on these rates.
>
> In addition, no program escalator was approved for any funding model used by the FNCFS Program to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve.
>
> […]
>
> Currently, AANDC has very limited human resources dedicated to the FNCFS Program.
>
> No funding for strengthened accountability for results was provided when EPFA was approved in 2007.
>
> AANDC's activities have increased dramatically with the implementation of EPFA in the 6 jurisdictions.
>
> AANDC is currently limited in how effectively it can manage and monitor the program while developing tripartite partnerships to fully implement EPFA.

> (*Renewal of the First Nations Child and Family Services Program (October 31, 2012) presentation* at pp. 5-6)

[303] In Ms. Murphy's view, while positive outcomes from the EPFA have been identified, "the program is losing ground due to increasing provincial costs" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 3). Furthermore, she views her proposal as addressing "…rising maintenance costs in all jurisdictions", it "allows the program to accommodate provincial rate changes thereby maintaining comparability", and "will allow agencies to devote appropriate resources to prevention, which will lead to a decrease in long term care placements in the medium to longer term" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 6). The impacts of no new investments in the FNCFS Program would, according to Ms. Murphy, "…not advance improved outcomes for First Nations children and their families" and "[t]he Government of Canada will not be able to sustain reasonable provincial comparability for child welfare support" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 8). At the hearing, Ms. Murphy was asked to expand on this last point:

> MEMBER BELANGER: "The Government of Canada will not be able to sustain reasonable provincial comparability for child welfare support." What are we comparing here?
>
> MS MURPHY: I think what we were saying there was that we were starting to have issues in terms of being able to match salaries and the costs of keeping children in care, those other elements that I have laid out, and that so we may have trouble paying those bills.
>
> We are paying those bills now, but if you keep going, at some point you hit the wall and you don't have the ability to continue to reallocate, you put at risk that policy concept of comparability.
>
> (*Transcript* Vol. 55 at p. 216)

[304] For reasons that were not elaborated upon at the hearing, the above options and recommendations were not implemented in AANDC's 2013 or 2014 budgets (see *Transcript* Vol. 55 at pp. 206-208, 221; see also *Transcript* Vol. 61 at pp. 159-162).

[305] Overall, on the issue of the relevance and reliability of the reports on the FNCFS Program, the Panel finds that from the years 2000 to 2012 many reliable sources have identified the adverse effects of the funding formulas and structure of the FNCFS Program. AANDC was involved in the *NPR* and Wen:De reports, and acknowledged and accepted the findings and recommendations in the Auditor General and Standing Committee on Public Account's reports, including developing an action plan to address those recommendations. As the internal evaluations and other relevant and reliable AANDC documents demonstrate, those studies and reports became the basis for reforming Directive 20-1 into the EPFA and, subsequently, recommendations to reform the EPFA. It is only now, in the context of this Complaint, that AANDC raises concerns about the reliability and weight of the various reports on the FNCFS Program outlined above. Moreover, the internal documents discussed above support those reports and are AANDC's own evaluations, recommendations and presentations prepared by its high ranking employees. For these reasons, the Panel does not accept AANDC's argument that the reports on the FNCFS Program have little or no weight and accepts the findings in those reports, along with the corroborating information in documents relied on above.

b. The choices of FNCFS Agencies and additional funding provided

[306] AANDC argues the difference between the level of services and programs offered on and off reserve may have little to do with funding and more to do with the choices made by FNCFS Agencies about the type of services and programs they want to provide and other administrative issues affecting the overall budget. For example, some agencies decide to allocate funds to the salaries of their board members when the budget should be spent on front line services. Also, AANDC points out that some agencies are successful with their budget, including some agencies who have posted surpluses. AANDC submits it also provides additional funding or reallocates funds where FNCFS Agencies require further funding. Therefore, if there are gaps in funding, AANDC contends it has bridged those gaps through additional funds.

[307] As outlined above, Directive 20-1 and the EPFA have certain assumptions built into their funding formulas. In general, that the child population they serve is 1000 children

aged 0-18, that 6% of the total on reserve child population is in care, and that 20% of families are in need of services. Ms. D'Amico explained the use of assumptions as providing stability for FNCFS Agencies. That is, even if less than 6% of its children are in care and 20% of its families are in need of services, it would not reduce the agency's budget. That may indeed be a beneficial situation for agencies where these assumptions accurately reflect their clientele and may even result in the agency receiving a surplus of funding. However, on this last point, the Panel notes *Wen:De Report Two* stated: "Not surprisingly, it was only BC agencies that advised that they had surpluses and, in almost all cases, the surplus came from the maintenance per diem arrangement" (at p. 213). More fundamentally though, where the assumptions do not accurately reflect the clientele of an FNCFS Agency - where the percentage of children in care and families in need of services is higher than 6% and 20% respectively - the funding formula is bound to provide inadequate funding.

[308] In 2006, 18 FNCFS Agencies had over 10% of their children in care out of the parental home (see *Social Programs presentation* at p. 13). In the same year, there were 257 First Nations communities on reserves with no access to child care and many more communities did not have enough resources to support 20% of children from birth to six years of age (see *Social Programs presentation* at p. 14).

[309] For Alberta, Ms. Schimanke indicated that most FNCFS Agencies have around 6% of children in care, but there are some that have anywhere from 11 to 14% (see *Transcript* Vol. 61 at pp. 113-115). Also, as stated above in the *2008 Report of the Auditor General of Canada*, in the five provinces covered by the report, the percentage of children in care ranged from 0 to 28%.

[310] In Manitoba, Ms. Elsie Flette, Chief Executive Office of the First Nations of Southern Manitoba Child and Family Services Authority (since retired), described the effects of the assumptions on FNCFS Agencies:

> If you're an Agency that has, you know, five percent of its child population in care, you benefit from that assumption, you're being paid by AANDC as if seven percent of your kids were in care. So, you're getting more money and you don't have the cases, you don't have the children in

> care that you have to spend that money on and, so, you have some flexibility for how else to use that money.
>
> But if you're an Agency that has more than seven percent of its children in care, you have a problem. And we have in the Southern Authority I believe right now four Agencies that exceed those assumptions. And one of them in particular, they have -- 14 percent of their child population is in care, so, they have exactly half of the kids in care for which they receive no money.
>
> When we look at the families and prevention services, I believe there's about five Agencies that exceed that 20 percent. The same Agency that has the 14 percent children has a 40 percent families, so, 40 percent of their families on- Reserve are getting service.
>
> They're funded for 20 percent. So, half their workload both for families and for kids is completely unfunded, they get no money. So, anything they might have for prevention they can't do because all their money has to go – they have these kids, they need workers, they have to service that pop -- that workload and there's no way -- under the funding model itself, there's no way to adjust for that.
>
> […]
>
> So, it's not an accurate -- it is an accurate average percent, but for individual Agencies it's often inaccurate, you can have lower numbers or, in particular, if you have higher than seven percent you have unfunded workload.
>
> (*Transcript* Vol. 20 at pp. 104-105, 118)

[311] While additional funds have been provided or reallocated to cover maintenance expenditures and/or some *ad hoc* exceptional circumstances, FNCFS Agencies are expected to cover their operations and prevention costs within their fixed budgets, including using those funds to cover any deficits in maintenance expenditures. Those budgets are based on the formulas that, again, do not account for the actual needs of the FNCFS Agencies. They are also static formulas. That is, as the years go by, the formulas become more and more disconnected from the actual needs of FNCFS Agencies and the children and families they serve. Specifically, the formulas do not apply an escalator for regular increases in costs, including for salaries, where the bulk of funding is spent. While Directive 20-1 calls for a cost of living increase of 2% every year, that increase has not

been applied since 1995-1996. Similarly, once EPFA is implemented in a jurisdiction, aside from adjustments for population size, yearly increases in costs are not accounted for in the funding formula. In Alberta for example, as indicated above, funding under EPFA is provided based on provincial rates from 2006. According to an AANDC official, it is up to FNCFS Agencies to work with the budgets they have:

> MR. POULIN: So for an Agency that is over 6 percent, where you need more protection workers, that component, all that component will be eaten up, that operations budget will be eaten up with what is essential to meet your immediate needs, and so that leaves very little for anything like brief services.
>
> MS SCHIMANKE: It could be. It depends how they set their budget and how they set their salary grids. Like, again, that is the Agencies that decide that, right, and how they manage that.
>
> MR. POULIN: That means paying -- you know, that means in effect paying your workers less than what the province does.
>
> MS SCHIMANKE: It could be, yes. That could be one example of things, yes.
>
> MR. POULIN: It could be having less workers and therefore having a higher case ratio than your workers -- than the province does.
>
> MS SCHIMANKE: It could be, yes.
>
> I do have to show, though, that there are Agencies who are above the 6 percent who still show surpluses, so I don't know what they are doing differently. It could be their salaries have been adjusted very low; we don't know what they are doing to make that happen. It may be they're short-staffed and they are just not -- and the staff are carrying higher caseloads, yeah. So there are various examples of what different Agencies are doing, yes.
>
> (*Transcript* Vol. 62 at pp. 51-52)

[312] These last statements highlight the dichotomy between the objective of the FNCFS Program and its actual implementation through Directive 20-1 and the EPFA. While the program is premised upon provincial comparability, the funding mechanisms do not allow many FNCFS Agencies, particularly those agencies that do not match AANDC's

assumptions about children in care and families in need, to keep up with provincial standards and changes thereto.

[313] As noted by the reports on the FNCFS Program, given that funding under Directive 20-1 and the EPFA is largely based on population levels, small and remote agencies are also disproportionately affected by AANDC's funding formulas. In British Columbia for example, small agencies are the norm, not the exception, including many that serve rural and isolated communities. Their challenges include added costs for travel, accessing the communities they serve and getting and retaining staff (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 87).

[314] Given these agencies are funded pursuant to Directive 20-1, most do not have the flexibility or resources necessary to provide prevention services, even with additional funds. In these rural and isolated communities, it is also difficult for First Nations people to access services which are available off reserve, including: mental health services; services to strengthen families; and services for family preservation and reunification (see Annex, ex. 43; see also testimony of W. McArthur, *Transcript* Vol. 63 at p. 87 and Vol. 64 at pp. 6, 167). Despite moving FNCFS Agencies in British Columbia to funding based on actuals in 2011, with the intent to transition them to the EPFA shortly thereafter to address some of these concerns; and, despite the repeated requests of FNFCS Agencies and the province of British Columbia, that transition had yet to occur at the time of the hearing and no announcement was made for EPFA in the 2013-2014 budgets (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 96-97, 156, 172-173).

[315] The effects of the population thresholds in Directive 20-1, along with the other assumptions built into Directive 20-1 and the EPFA, indicate that a "one-size fits all" approach does not work for child and family services on reserve. The overwhelming evidence in this case suggests that because AANDC does not fund FNCFS Agencies based on need but, rather, based on assumptions of need and population levels, that funding is inadequate to provide essential child and family services to many First Nations. Moreover, the internal AANDC documents outlined above, namely the *Way Forward presentation* and the *Renewal of the First Nations Child and Family Services Program presentation*, indicate that, despite any additional funds provided or reallocated to FNCFS

Agencies, there is still quite a significant difference in funding levels to bring the FNCFS Program into comparability with the provinces. This point is addressed in more detail in the following section.

c. Comparator evidence

[316] AANDC contends that comparison is an essential part of the analysis under human rights legislation. It submits that no evidence was advanced by the Complainants regarding how the provincial or territorial funding models work or what their respective child welfare budgets are as compared to the federal government. In this regard, AANDC argues that the Tribunal should draw a negative inference from the fact that the Complainants did not call provincial and territorial witnesses to testify.

[317] According to AANDC, the Complainants' case lacks substantive evidence about the level of provincial funding compared to federal funding, including addressing the nature and extent of any research thereon. Moreover, no provincial or territorial witnesses were called to support the allegation that there is a difference in child welfare funding or service levels on or off reserve. Given that comparison between federal and provincial funding was at the heart of their case, AANDC submits the Complainants had to demonstrate how much funding is provided by the federal government and each provincial/territorial government for child welfare services. Only if the amount of funding for both was reliably established, could the Tribunal determine if there is a difference and whether that difference amounts to adverse differentiation or a denial of services. According to AANDC, perceived differences in services on and off reserve are not sufficient to substantiate the Complainants' claims.

[318] In any event, AANDC argues that comparing the federal and provincial/territorial funding systems is not a valid comparison under the *CHRA*.

[319] AANDC's argument regarding the need for comparative evidence, and that comparing the federal and provincial/territorial funding systems is not valid under the *CHRA*, has already been rejected by the Federal Court, the Federal Court of Appeal and this Tribunal. In setting aside the Tribunal's decision on AANDC's jurisdictional motion

(2011 CHRT 4), which advanced this same argument, the Federal Court in *Caring Society FC* found at paragraph 251:

> the Tribunal erred in concluding that the ordinary meaning of the term "differentiate adversely" in subsection 5(b) requires a comparator group in every case in order to establish discrimination in the provision of services. This conclusion is unreasonable as it flies in the face of the scheme and purpose of the Act, and leads to patently absurd results that could not have been intended by Parliament.

[320] The Federal Court explained some of the patently absurd results of requiring a comparator group in every case:

> [256] On the Tribunal's analysis, the employer who consciously decides to pay his or her only employee less because she is a woman, or black, or Muslim, would not have committed a discriminatory practice within the meaning of subsection 7(b) of the Act because there is no other employee to whom the disadvantaged employee could be compared.
>
> [257] Similarly, the shopkeeper who forces his or her employee to work in the back of the shop after discovering that the employee is gay would not have committed a discriminatory practice if no one else was employed in the store.
>
> […]
>
> [259] In the examples cited above, individuals are clearly being treated in an adverse differential manner in their employment because of their membership in a protected group. However, according to the Tribunal's interpretation, no recourse would be available to these individuals under the Act. Such an interpretation does not accord with the purpose of the legislation and is unreasonable.
>
> (*Caring Society FC* at paras. 256-257, 259)

[321] After examining the role of comparator groups in a discrimination analysis and the Supreme Court's decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12 (*Withler*), the Federal Court made the following statements with regard to the use of comparator groups in analyzing alleged discrimination against Aboriginal peoples:

> [332] Aboriginal people occupy a unique position within Canada's constitutional and legal structure.

> […]
>
> [337] By interpreting subsection 5(b) of the *Canadian Human Rights Act* so as to require a mirror comparator group in every case in order to establish adverse differential treatment in the provision of services, the Tribunal's decision means that, unlike other Canadians, First Nations people will be limited in their ability to seek the protection of the Act if they believe that they have been discriminated against in the provision of a government service on the basis of their race or national or ethnic origin. This is not a reasonable outcome.
>
> […]
>
> [340] I also agree with the applicants that an interpretation of subsection 5(b) that accepts the *sui generis* status of First Nations, and recognizes that different approaches to assessing claims of discrimination may be necessary depending on the social context of the claim, is one that is consistent with and promotes Charter values.
>
> (*Caring Society FC* at paras. 332, 337, 340)

[322] On appeal, the Federal Court of Appeal accepted the Federal Court's reasoning regarding the use of comparator groups in a discrimination analysis. In fact, it noted that cases postdating the Federal Court's decision confirmed the reduced role of comparator groups in the analysis:

> In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality, and "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] *Code* is intended to remedy" (at paragraphs 30-31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period" (at paragraph 60).
>
> In *Quebec (Attorney General) v. A.*, 2013 SCC 5 at paragraph 346 (*per* Abella J. for the majority), the Supreme Court has reaffirmed that "a mirror comparator group analysis may fail to capture substantive equality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply": *Withler*, supra at paragraph 60. The Supreme Court went so far as to cast doubt on the authority of *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, an earlier case in which an unduly influential or determinative

> role was given to the existence of a comparator group – similar to what the Tribunal did here.
>
> (*Caring Society FCA* at para. 18)

[323] The Panel agrees with the Federal Court and Federal Court of Appeal's reasoning on the role of comparator groups in a discrimination analysis. AANDC's argument regarding the need for comparative evidence in this case is inconsistent with the *Caring Society FC* and *Caring Society FCA* decisions. Furthermore, there is no authority for its proposition that interjurisdictional comparisons are not valid under the *CHRA*.

[324] While the Supreme Court has previously stated that equality is a comparative concept, it has also recognized that "…every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality" (*Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at p. 164 [*Andrews*]). With regard to this last statement, the Supreme Court in *Withler*, at paragraph 2, stated that equality is about substance, not formalism:

> In our view, the central issue in this and others. 15(1) cases is whether the impugned law violates the animating norm of s. 15(1), substantive equality: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong. The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?

[325] As noted by the Federal Court of Appeal in *Caring Society FCA*, the decisions in *Moore* and *Quebec (Attorney General) v. A.*, 2013 SCC 5 (*A*), echo the approach to comparator groups enunciated in *Withler*. That is, while the use of comparative evidence may be useful in analyzing a claim of discrimination, it is not determinative of the issue. In fact, as the Supreme Court noted in *Withler*, at paragraph 59: "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in

light of their distinct needs and circumstances, no one is like them for the purposes of comparison".

[326] Rather, the full context of the case and all relevant evidence, including any comparative evidence, must be considered (see *Withler* at para. 2). As the Federal Court of Appeal noted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 at paragraph 27 (*Morris*), the legal definition of a *prima facie* case does not require a complainant to adduce any particular type of evidence to prove the existence of a discriminatory practice under the *CHRA*. It is a question of mixed fact and law whether the evidence adduced in any given case is sufficient to prove a discriminatory practice. The Federal Court of Appeal in *Morris*, at paragraph 28, concluded that:

> A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities, and accommodation. Discrimination takes new and subtle forms.

[327] In this vein, the Panel notes the present Complaint was brought under both subsections 5(a) and (b) of the *CHRA*. The interpretation of the wording of subsection 5(b), "to differentiate adversely", has largely been the basis for arguing the need for comparative evidence. That is, "to differentiate" is to treat someone differently in comparison to others. Aside from the French version of subsection 5(b) not having the same comparative connotation, as it simply uses the term "défavoriser", subsection 5(a) also does not use wording implying a comparison. It speaks only of being denied a good or a service. As the Federal Court noted in *Caring Society FC*, requiring comparator evidence under 5(b), but not under 5(a), would create an internal incoherence between the subsections by establishing different legal and evidentiary requirements in order to establish discrimination under each provision (see *Caring Society FC* at paras. 276-279).

[328] Similarly, AANDC's argument that there can be no cross-jurisdictional comparisons or comparisons between different service providers is not supported by anything found in the *CHRA* or in the jurisprudence regarding comparator evidence outlined in the preceding paragraphs. In fact, section 50(3)(c) of the *CHRA* allows the Panel to receive and accept

any evidence and information that is sees fit, as long as it is not privileged information [s. 50(4)] or the testimony of a conciliator appointed to settle the complaint [s. 50(5)]. Furthermore, reasonable comparability with provincial/territorial standards is part of AANDC's own objective in implementing the FNCFS Program and negotiating the other provincial/territorial agreements. While AANDC argues "reasonable comparability" is an administrative term and not a legal term requiring mirror services are provided on and off reserve, that argument has no bearing on the Complainants' ability to bring evidence related thereto. AANDC undertook to ensure First Nations on reserve receive reasonably comparable child and family services to those provided off reserve in similar circumstances. It is unreasonable and unfounded to argue the Complainants should not be able to bring evidence related thereto.

[329] While there is no obligation to bring forward comparative evidence to substantiate a discrimination complaint, there was some comparative evidence brought forward in this case demonstrating a difference between child and family services funding and service levels provided on and off reserve. First, the FNCFS Agencies still under Directive 20-1 receive less funding than those who have transitioned to the EPFA. As indicated in the *2011 Status Report of the Auditor General of Canada*, funding for operations and prevention services increased between 50 and 100% in each of the provinces that transitioned to EPFA (see at p. 25, s. 4.54). Furthermore, as indicated above, AANDC has estimated the difference in annual funding to transfer the remaining jurisdictions to the EPFA as $21 million for British Columbia; $2 million for the Yukon; $5 million for Ontario; $2 million for New Brunswick; and, $2 million for Newfoundland and Labrador (see *Way Forward presentation* at p. 15). As Ms. D'Amico stated at the hearing:

> MEMBER LUSTIG: Okay. So is it fair to say then that while your best efforts are underway and you are attempting to address on various front [the shortcomings in the funding formulas], there isn't comparability yet; this is something you are trying to attain?
>
> MS. D'AMICO: In six jurisdictions, I can tell you that there is comparability. In the other jurisdictions, because we haven't moved to EPFA, the amounts that they are receiving are more than 20-1, but I could not tell you definitively that it is comparable with the province in terms of the funding ratios because 20-1, even with the added dollars, we have run most of the formulas with the

> remaining jurisdictions and they would receive more under EPFA based on all of those ratios.
>
> (*Transcript* Vol. 51 at pp. 179-180)

[330] Second, AANDC has identified that increases in funding are even necessary in EPFA jurisdictions to ensure reasonable comparability with the provinces. Again, in the *Way Forward presentation*, it states the "EPFA funding envelope may not be addressing provincial cost drivers or funding pressures related to the operational efficiencies of Agencies" (at p. 15). To address this, the presentation presents the option of adjusting the EPFA costing model with increased investments to address cost drivers: "EPFA Plus". To implement this increased investment in the jurisdictions that do not function under the EPFA, the *Way Forward presentation* estimates the cost to be $65.03 million. To top-up the existing EPFA jurisdictions, EPFA Plus is estimated to cost $43.10 million. According to the *Way Forward presentation*, EPFA Plus "[e]nsures funding remains reasonably comparable with provinces and territories…" (at p. 16). While AANDC witnesses testified that the amounts in the *Way Forward presentation* are rough estimates that err on the size of magnitude, the Panel still finds they are indicative of the type of investments required to provide more meaningful services to First Nations children and families on reserve and in the Yukon.

[331] Moreover, these amounts are similar to those recommended in *Wen:De Report Three* (see at p. 33). *Wen:De Report Three* also cautioned against implementing its recommendations in a piece meal fashion as doing so would undermine the overall efficacy of its proposed changes (see at p. 15). However, by not addressing all the shortcomings of Directive 20-1 in implementing the EPFA, the overall efficacy of the EPFA model is now undermined as indicated in the *Way Forward presentation*.

[332] A third comparison also arises from the *Way Forward presentation*. To resolve comparability, the presentation recommends AANDC transfer child welfare services on reserve to the provinces/territory. It recognizes that the provinces and territories have expertise in child welfare and that there would be better oversight and compliance of child and family services on reserve if they are given the full range of responsibilities, including the responsibility for funding. However, the presentation notes that this option has the

"[p]otential for dramatic increases in costs" for AANDC (*Way Forward presentation* at p. 17).

[333] In this same vein, another useful comparison in this case is the difference between the delivery of child and family services through the FNCFS Program against the delivery of those services through the *Alberta Reform Agreement*, *BC MOU* and *BC Service Agreement*. AANDC argues these agreements are not evidence of how the province funds the off reserve population or evidence that AANDC underfunds FNCFS Agencies. However, these arguments do not address the fact that FNCFS Agencies are funded in a different manner than the reimbursements provided by AANDC to the provinces. The funding provided to Alberta and British Columbia under these agreements is not based on population levels or assumptions about children in care and families in need. Rather, those provinces are reimbursed for the actual costs or an agreed upon share of the costs for providing child and family services. They receive adjustments for inflation and increases in the costs of services, whereas FNCFS Agencies do not. Most importantly, because of the payment of actuals and adjustments thereof annually, there is a more direct connection between the child and family services standards of those provinces and the delivery of those services to the First Nation communities they serve.

[334] By comparison, neither Directive 20-1 nor the EPFA provide adjustments for the cost of living or for changes in provincial legislation and standards. Both types of adjustments were identified by *Wen:De Report Two* as major flaws in Directives 20-1 and, despite these findings, the EPFA model incorporated these same flaws. As *Wen:De Report Two* specified, not adjusting funding for increases in the cost of living leads to both under-funding of services and to distortion in the services funded (see at p. 45). Furthermore, by not providing adjustments for changing provincial legislation and standards, the FNCFS Program still contains no mechanism to ensure child and family services provided on reserve are reasonably comparable to those provided to children in similar circumstances off reserve (see *Wen:De Report Two* at p. 50).

[335] AANDC's argument about the Complainants' lack of comparative evidence also ignores the fact that the *NPR*, Wen:De reports, Auditor General and Standing Committee reports have all identified a need for AANDC to do this analysis and recommended they do so. Moreover, in response to the Auditor General and Standing Committee reports recommending AANDC perform a comparative analysis of child welfare services provided on and off reserve, AANDC indicated that it has not done so because of inherent difficulties in doing so. Despite said difficulties, "reasonable comparability" remains AANDC's standard for the FNCFS Program.

[336] The difficulties in performing this comparative analysis were also identified in a document entitled *Comparability of Provincial and INAC Social Programs Funding*, authored by AANDC employees and to be included in a Ministerial Briefing Binder (see Annex, ex. 44). The document explains that for a number of reasons, such as differences in the way social programs are delivered in the provinces in terms of types of services, the number of services and the allocation of funding, it is difficult to arrive at conclusive and comparable numbers (see *Comparability of Provincial and INAC Social Programs Funding* at p. 1). In addition, provincial data may not be directly comparable as it could include costs such as overhead or program costs not funded through the FNCFS Program (see *Comparability of Provincial and INAC Social Programs Funding* at p. 4). Where total expenditures per child in care are compared, there is some indication that AANDC funds child and family services at higher levels compared to some provinces. However, the *Comparability of Provincial and INAC Social Programs Funding* document, at page 4, notes that funding levels do not relate to the real needs of children and their families:

> this analysis is not able to recognize that disadvantaged groups may have higher levels of need for services (due to poverty, poor housing conditions, high levels of substance abuse, and exposure to family violence) or that the services or placement options they require may be at a substantially higher cost for services.

[337] Ms. D'Amico also testified about the difficulty in comparing services provided by FNCFS Agencies to those provided by the provinces:

> MS CHAN: […] Can you tell, or is there a way for the Program to know if they are comparable in terms of the services that are being provided on-Reserve?
>
> MS D'AMICO: I don't believe that we can.
>
> […]
>
> Because we are talking about different types of communities, different types of systems and different types of services that are being administered by different service delivery agents. So what I mean by this is, one First Nation community off-Reserve who looks exactly the same as an off-Reserve community isn't actually going to get the same services as that other community, they are going to get culturally specific services that that Agency deems appropriate for the children and families that they are serving.
>
> (*Transcript* Vol. 51 at p. 183)

[338] Because of these difficulties, Ms. D'Amico indicated that AANDC's funding is not premised on comparability of service levels between on and off reserve child and family services, but simply on maintaining comparable funding levels with the province:

> MS D'AMICO: Because in the case of EPFA we have -- we are currently funding at the same salaries and staffing ratios as the province, and that is the only comparable variables that we could find. So it has nothing to do with the service delivery, it has to do with the funding, and that -- and so we have found comparable variables that the province how the province funds is how we fund.
>
> (*Transcript* Vol. 51 at p. 103)

[339] However, as indicated above, even salaries are fixed when the EPFA is implemented and in Alberta, for example, they are still using 2006 salary rates in 2014. Furthermore, as indicated in the *Comparability of Provincial and INAC Social Programs Funding* document, an approach to comparability based on funding and not service levels does not recognize the higher levels of need for services for First Nations or that the services or placement options they require may be at a substantially higher cost.

[340] This last point allows the Panel to make an effective comparison between the child and family services offered on and off reserve based on the principle of the best interest of the child.

iv. Best interest of the child and Jordan's Principle

[341] There is a focus on service levels and the needs of children and families off reserve, namely an emphasis on least disruptive/intrusive measures. On the other hand, under the federal FNCFS Program, there is a focus on funding levels and the application of funding formulas, where funds for prevention/least disruptive measures are fixed and funds to bring a child into care are covered at cost.

[342] Provincial child welfare legislation and standards focus on prevention and least disruptive measures (see for example Ontario's *Child and Family Services Act* at s. 1; Alberta's *Child, Youth and Family Enhancement Act* at s. 2; *The Child and Family Services Act* in Manitoba at Declaration of Principles and s. 2; *The Child and Family Services Act* in Saskatchewan at ss. 3-5; Nova Scotia's *Children and Family Services Act* at Preamble and ss. 2, 13, 20; British Columbia's *Child, Family and Community Service Act* at ss.2-4, 30; and, Quebec's *Loi sur la Protection de la Jeunesse* at ss. 1-4). These statutes recognize that removing a child from his or her family, home or community should only be done when all other least disruptive measures have been exhausted and there is no other alternative.

[343] This focus on least disruptive measures recognizes the significant effect of separating a family. The Supreme Court, in *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 at paragraph 78, outlined the effects of bringing a child into care:

> The most disruptive form of intervention is a court order giving the agency temporary or permanent guardianship of a child. Particularly in the case of a permanent order, this may sever legal ties between parent and child forever. To make such an order, a court must find that the child is in need of protection within the meaning of the applicable statute. In addition, the court must find that the "best interests of the child" dictate a temporary or permanent transfer of guardianship. As Lamer C.J. observed in *G. (J.)*,

> *supra*, at para. 76: "**Few state actions can have a more profound effect on the lives of both parent and child**."
>
> (**Emphasis added**)

[344] As indicated above, the provinces' legislation and standards dictate that all alternatives measures should be explored before bringing a child into care, which is consistent with sound social work practice as described earlier. However, by covering maintenance expenses at cost and providing insufficient fixed budgets for prevention, AANDC's funding formulas provide an incentive to remove children from their homes as a first resort rather than as a last resort. For some FNCFS Agencies, especially those under Directive 20-1, their level of funding makes it difficult if not impossible to provide prevention and least disruptive measures. Even under the EPFA, where separate funding is provided for prevention, the formula does not provide adjustments for increasing costs over time for such things as salaries, benefits, capital expenditures, cost of living, and travel. This makes it difficult for FNCFS Agencies to attract and retain staff and, generally, to keep up with provincial requirements. Where the assumptions built into the applicable funding formulas in terms of children in care, families in need and population levels are not reflective of the actual needs of the First Nation community, there is even less of a possibility for FNCFS Agencies to keep pace with provincial operational requirements that may include, along with the items just mentioned, costs for legal or band representation, insurance premiums, and changes to provincial/territorial service standards.

[345] AANDC officials working in the FNCFS Program have indicated that they are not experts in the field of child welfare and, instead, rely on provincial legislation and standards to dictate the level of funding that should be provided on reserves. Yet, they apply a formula to fund FNCFS Agencies that does not take into account the standards for least disruptive measures set by provincial legislation. Tellingly, in funding child and family services, the provinces do not apply a funding formula:

> MS CHAN: In terms of funding, have you seen provincial funding formulas to calculate child welfare payment that is made by the province?
>
> MS D'AMICO: Not to date.

> MS CHAN: What difficulties does this cause for the Program, if any, in determining how you are going to fund?
>
> MS D'AMICO: So this has been our primary challenge, to try and figure out how to fund equitably or comparably because we have consistently asked the province, give us a funding formula for an Agency or for a regional office in your jurisdiction and show us what that is and we will see if we can replicate it, then we would be assured that, you know, infamous provincial comparability.
>
> […]
>
> The provinces don't have that, they have a chart of accounts, they fund based on a variety of different things. You know, an example would be British Columbia, they have five different regional offices; those five different regional offices have different salary grids, they have different operational budgets that are not based on any particular formula.
>
> So it has been incredibly challenging to find those comparable pieces so that we can ensure comparability. It has just been -- it's literally apples and oranges.
>
> So, like I said, it's those variables […] that we have been able to find with the province to be able to inject in our formula so that at least we could have, first of all, a consistent formula across the country, but one that is tailored to every single jurisdiction based on provincial comparability, provincial variables.
>
> So it's not absolute in terms of service. If a service is provided in one community, it's not necessarily being provided in another community even off-Reserve. It's very difficult and the services vary, there is so many different things that child protection and other community partners provide in the vast spectrum of the social safety net.
>
> (*Transcript* Vol. 51 at pp. 184-186)

[346] A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Lawv. Canada (Attorney General)*, 2004 SCC 4 at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 75 [*Baker*]). As explained by Professor Nicholas Bala:

> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators.
>
> (Bala, Nicholas, "The Best Interests of the Child in the Post-Modernist Era: A Central but Illusive and Limited Concept", in *Special Lectures of the Law Society of Upper Canada 2000: Family Law* (Toronto: LSUC, 1999) at p. 3.1)

[347] With regard to the FNCFS Program, there is discordance between on one hand, its objectives of providing culturally relevant child and family services on reserve, that are reasonably comparable to those provided off reserve, and that are in accordance with the best interest of the child and keeping families together; and, on the other hand, the actual application of the program through Directive 20-1 and the EPFA. Again, while maintenance expenditures are covered at cost, prevention and least disruptive measures funding is provided on a fixed cost basis and without consideration of the specific needs of communities or the individual families and children residing therein.

[348] The discordance between the objectives and the actual implementation of the program is also exemplified by the lack of funding in Ontario, for Band Representatives under the *1965 Agreement*. Not only does the Band Representative address the need for culturally relevant services, but it also addresses the goal of keeping families and communities together and is directly provided for in Ontario's *Child and Family Services Act*.

[349] The adverse impacts outlined throughout the preceding pages are a result of AANDC's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program and *1965 Agreement*. Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner.

[350] In this regard, and in addressing the difference between the allocation of funding by AANDC for First Nations child and family services and that of the provinces, another important consideration brought forward by the Complainants and in the evidence is the application of Jordan's Principle.

[351] Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.

[352] Jordan's Principle is in recognition of Jordan River Anderson, a child who was born to a family of the Norway House Cree Nation in 1999. Jordan had a serious medical condition, and because of a lack of services on reserve, Jordan's family surrendered him to provincial care in order to get the medical treatment he needed. After spending the first two years of his life in a hospital, he could have gone into care at a specialized foster home close to his medical facilities in Winnipeg. However, for the next two years, AANDC, Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs and Jordan remained in hospital. They were still arguing when Jordan passed away, at the age of five, having spent his entire life in hospital.

[353] On October 31, 2007, Ms. Jean Crowder, the Member of Parliament for Nanaimo-Cowichan, brought forward motion 296 in the House of Commons:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

The motion was unanimously passed on December 12, 2007 (see Annex, ex. 45).

[354] In response, AANDC and Health Canada entered into the *Memorandum of Understanding on the Federal Response to Jordan's Principle* (see Annex, ex. 46 [*2009 MOU on Jordan's Principle*]; see also testimony of C. Baggley, *Transcript* Vol. 57 at pp. 9-

13, 23, 40-41, 84-85). In the *2009 MOU on Jordan's Principle*, signed by an Assistant Deputy Minister for each department, both AANDC and Health Canada acknowledge that they have a role to play in Jordan's Principle and a shared responsibility in working together to develop and implement a federal response (see at p. 1). The purpose of the memorandum is to act as a guide for the two departments in addressing/resolving funding disputes as they arise between the federal and provincial governments, as well as between the two departments, "…ensuring that services to children identified in a Jordan's Principle case are not interrupted as a result of disputes" (*2009 MOU on Jordan's Principle* at p. 1).

[355] The memorandum also serves as a guide for AANDC and Health Canada to collaborate on the federal implementation of Jordan's Principle. In this regard, the memorandum indicates that Health Canada's role in responding to Jordan's Principle is by virtue of the range of health-related services it provides to First Nations people, including: nursing services; home and community care; community programs; and, medically necessary non-insured health benefits. AANDC's role in responding to Jordan's Principle is by virtue of the range of social programs it provides to First Nations people, including: special education; assisted living; income assistance; and, the FNCFS Program (see *2009 MOU on Jordan's Principle* at pp. 1-2).

[356] Once a possible Jordan's Principle case is identified, the *2009 MOU on Jordan's Principle* provides for a review of existing federal authorities and program policies to determine whether the expenditures are eligible under an existing program and can be paid through existing departmental funds. If the dispute over funding arises between the federal and provincial governments, Health Canada and AANDC are to work together to engage and collaborate with the province and First Nations representatives to resolve the dispute through a case management approach. To ensure there is no disruption/delay in service, Health Canada was allocated $11 million to fund goods/services while the dispute is being resolved (see *2009 MOU on Jordan's Principle* at p. 2). The funds were provided annually, in $3 million increments, from 2009 to 2012. The funds were never accessed and have since been discontinued (see testimony of C. Baggley, *Transcript* Vol. 57 at pp. 123-125).

[357] According to the *2009 MOU on Jordan's Principle*, a governance structure has been developed to support communication and information-sharing between the two departments on matters related to Jordan's Principle. This governance structure includes "…supporting the resolution of departmental disputes where HC and AANDC are uncertain or do not agree on which department/jurisdiction is responsible for funding the goods/services based on their respective mandates, policies and authorities" (*2009 MOU on Jordan's Principle* at p. 2). The governance structure was also established to ensure that funding disputes are addressed and coordinated in a timely manner: timing to address case needs and make decisions being "…crucial to ensuring that funding disputes do not disrupt services provided to a child (*2009 MOU on Jordan's Principle* at p. 3).

[358] Health Canada and AANDC renewed their *Memorandum of Understanding on the Federal Response to Jordan's Principle* in January 2013 (see Annex, ex. 47 [*2013 MOU on Jordan's Principle*]). Again, signed by an Assistant Deputy Minister from each department, the *2013 MOU on Jordan's Principle* acknowledges that Health Canada and AANDC "…have a role to play in supporting improved integration and linkages between federal and provincial health and social services" (*2013 MOU on Jordan's Principle* at p. 1). The *2013 MOU on Jordan's Principle* now provides that during the resolution of a Jordan's Principle case, the federal department within whose mandate the implicated programs or service falls will seek Assistant Deputy Minister approval to fund on an interim basis to ensure continuity of service.

[359] Ms. Corinne Baggley, Senior Policy Manager for the Children and Family Directorate of the Social Policy and Programs branch of AANDC indicated that the federal response to Jordan's Principle is focused on cases involving a jurisdictional dispute between a provincial government and the federal government and on children with multiple disabilities requiring services from multiple service providers. Furthermore, the service in question must be a service that would be available to a child residing off reserve in the same location (see *Transcript* Vol. 57 at pp. 9-13; see also Annex, ex. 48). While she estimated that approximately half of the cases tracked under the Jordan's Principle initiative involved disputes between federal departments, she indicated that the policy was built specifically around Jordan's case (see *Transcript* Vol. 58 pp. 24-25, 40-41).

[360] The Complainants claim AANDC and Health Canada's formulation of Jordan's Principle has narrowly restricted the principle. Whereas the motion was framed broadly in terms of services needed by children, AANDC and Health Canada's formulation applies only to inter-governmental disputes and to children with multiple disabilities.

[361] On the other hand, AANDC is of the view that Jordan's Principle is not a child welfare concept and is not a part of the FNCFS Program. Therefore, it is beyond the scope of this Complaint. AANDC also argues that the FNCFS Program does not aim to address all social needs on reserve as there are a number of other social programs that meet those needs and are available to First Nations on reserve. Moreover, the FNCFS Program authorities do not allow them to pay for an expense that would normally be reimbursed by another program (i.e. the stacking provisions in the *2012 National Social Programs Manual* at p. 10, section 11.0). In any event, AANDC argues there is no evidence to suggest that its approach to Jordan's Principle results in adverse impacts.

[362] In the Panel's view, while not strictly a child welfare concept, Jordan's Principle is relevant and often intertwined with the provision of child and family services to First Nations, including under the FNCFS Program. *Wen:De Report Three* specifically recommended the implementation of Jordan Principle on the following basis, at page 16:

> Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children […] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSA in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources.
>
> (Emphasis added)

[363] *Wen:De Report Two* indicated that 36% of jurisdictional disputes are between federal government departments, 27% between provincial departments and only 14% were between federal and provincial governments (see at p. 38). Some of these disputes took up to 200 hours of staff time to sort out: "[t]he human resource costs related to

resolving jurisdictional disputes make them an extraordinary cost for agencies which is not covered in the formula" (*Wen:De Report Two* at p. 26).

[364] Jordan's Principle also relates to the lack of coordination of social and health services on reserve. That is, like Jordan, due to a lack of social and health services on reserve, children are placed in care in order for them to access the services they need. As noted in the *2008 Report of the Auditor General of Canada*, at pages 12 and 17:

> 4.20 Child welfare may be complicated by social problems or health issues. We found that First Nations agencies cannot always rely on other social and health services to help keep a family together or provide the necessary services. Access to such services differs not only on and off reserves but among First Nations as well. INAC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services.
>
> […]
>
> 4.40 First Nations children with a high degree of medical need are in an ambiguous situation. Some children placed into care may not need protection but may need extensive medical services that are not available on reserves. By placing these children in care outside of their First Nations communities, they can have access to the medical services they need. INAC is working with Health Canada to collect more information about the extent of such cases and their costs.

[365] The *2008 Report of the Auditor General of Canada*, at page 16, also found that coordination amongst AANDC programs, and between AANDC and Health Canada programs, is poor:

> 4.38 As the protection and well-being of First Nations children may require support from other programs, we expected that INAC would facilitate coordination between the [FNCFS] Program and other relevant INAC programs, and facilitate access to other federal programs as appropriate.
>
> 4.39 We found fundamental differences between the views of INAC and Health Canada on responsibility for funding Non-Insured Health Benefits for First Nations children who are placed in care. According to INAC, the services available to these children before they are placed in care should continue to be available. According to Health Canada, however, an on-

> reserve child in care should have access to all programs and services available to any child in care in a province, and INAC should take full financial responsibility for these costs in accordance with federal policy. INAC says it does not have the authority to fund services that are covered by Health Canada. These differences in views can have an impact on the availability, timing, and level of services to First Nations children. For example, it took nine months for a First Nations agency to receive confirmation that an $11,000 piece of equipment for a child in care would be paid for by INAC.
>
> (Emphasis added)

[366] For example, a four-year-old First Nations child suffered cardiac arrest and an anoxic brain injury during a routine dental examination. She became totally dependent for all activities of daily living. Before being discharged from hospital, she required significant medical equipment, including a specialized stroller, bed and mattress, a portable lift and a ceiling track system. A request was made to Health Canada's Non-Insured Health Benefits Program requesting approval for the medical equipment. However, the equipment was not eligible under the program and required approval as a special exemption.

[367] An intake form disclosed during the hearing and prepared by provincial authorities in Manitoba, but which accords with AANDC's records of the incident, documents how the case proceeded thereafter (*see* Annex, ex. 49 [*Intake Form*]; see also Annex, ex. 50; and, testimony of C. Baggley, *Transcript* Vol. 58 at pp. 58-60). Initial contact was made with AANDC on November 29, 2012. A conference call was held on December 4, 2012, where Health Canada accepted to pay for the portable lift, but would "absolutely not" pay for the specialized bed and mattress. On December 19, 2012, the child was discharged from hospital. Over a month later, the specialized bed and mattress were provided, but only as a result of an anonymous donation. In the concluding remarks of the *Intake Form*, where it asks "[p]lease provide details on the barriers experienced to access the required services" it states at page 8:

> Health Canada does not have the authority to fund hospital or specialized beds and mattresses. NIHB said "absolutely not".
>
> AANDC ineligible through In Home Care (only provide for non medical supports) and family not in receipt of Income Assistance Program to access special needs funding.

> Southern Regional Health Authority (provincial) was approached but indicated they are unable to fund the hospital bed.
>
> Sandy Bay First Nation does not have the funding or has limited funding and is unable to purchase bed.
>
> Jurisdictions lacking funding authority to cover certain items which result in gaps and disparities.

[368] The lack of integration between federal government programs on reserve, in more areas than only with children with multiple disabilities, is highlighted in an AANDC document entitled *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region* (see Annex, ex. 51 [*Gaps in Service Delivery to First Nation Children and Families in BC Region*]). As indicated in the accompanying email message attaching the document, under the subject line "Jordan's Principle: Parallel work with HC", the document represents the views of AANDC's British Columbia regional office, including its Director of Intergovernmental Affairs, and is informed by other experienced officials within the regional office.

[369] The *Gaps in Service Delivery to First Nation Children and Families in BC Region* document indicates at page 1:

> The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve. The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program.

[370] The document goes on to identify gaps based on the first-hand experience of AANDC officials and FNCFS Agencies. For example, once a child is in care, the FNCFS Program cannot recover costs for Non-Insured Health Benefits from Health Canada. In that situation, Health Canada deems that there is another source of coverage (the FNCFS Program); however, AANDC does not have authority to pay for medical-related expenditures. Generally, there is confusion in how to access non-insured health benefits (i.e. where to get the forms; where to send the forms and who to call for questions given

the official website does not give contact information) (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 1-2).

[371] Dental services are also identified as an area of contention for FNCFS Agencies and First Nations individuals. Even in emergency situations, basic dental care is denied by the Non-Insured Health Benefits program if pre-approval is not obtained. If pressed, Health Canada advises clients to appeal the decision which can create additional delays. When a child in care is involved however, the FNCFS Agency has no choice but to pay for the work (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at p. 2).

[372] Another medical related expenditure identified as a concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3).

[373] In some cases, the FNCFS Program is paying for eligible Non-Insured Health Benefits expenditures even though they are not eligible expenses under the FNCFS Program (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3). This is problematic considering AANDC has to reallocate funds from some of its other programs - which address underlying risk factors for First Nations children - in order to pay for maintenance costs. Again, as the *2008 Report of the Auditor General of Canada* pointed out at page 25:

> 4.72 Because the program's expenditures are growing faster than the Department's overall budget, INAC has had to reallocate funding from other programs. In a 2006 study, the Department acknowledged that over the past decade, budget reallocations—from programs such as community infrastructure and housing to other programs such as child welfare—have

> meant that spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate.
>
> 4.73 In our view, the budgeting approach INAC currently uses for this type of program is not sustainable. Program budgeting needs to meet government policy and allow all parties to fulfill their obligations under the program and provincial legislation, while minimizing the impact on other important departmental programs. The Department has taken steps in Alberta to deal with these issues and is committed to doing the same in other provinces by 2012.

[374] As mentioned above, AANDC's own evaluations of the FNCFS Program have also identified this issue. The *2007 Evaluation of the FNCFS Program* identified the FNCFS Program as one of five AANDC programs that have the potential to improve the well-being of children, families and communities. The other four are the Family Violence Prevention Program, the Assisted Living Program, the National Child Benefit Reinvestment Program and the Income Assistance Program. According to the evaluation, "[i]t is possible that, with better coordination, these programs could be used more strategically to support families and help them address the issues most often associated with child maltreatment" (*2007 Evaluation of the FNCFS Program* at p. 38). In addition, the evaluation identifies other federal programs for First Nations who live on reserve offered by Human Resources and Social Development Canada, Justice Canada and Public Safety and Emergency Preparedness Canada, along with Health Canada, that also directly contribute to healthy families and communities (see *2007 Evaluation of the FNCFS Program* at pp. 39-45). On this basis, the *2007 Evaluation of the FNCFS Program*, at pages 47-48, proposes three approaches to FNCFS Program improvement:

> **Approach A**: Resolve weaknesses in the current FNCFS funding formula, Program Directive 20-1, because in its current form, it discourages agencies from a differential response approach and encourages out-of-home child placements.
>
> **Approach B**: Besides resolving weaknesses in Program Directive 20-1, encourage First Nations communities to develop comprehensive community plans for involving other INAC social programs in child maltreatment prevention. The five INAC programs (the FNCFS Program, the Assisted Living Program, the National Child Benefit Reinvestment Program, the Family Violence Prevention Program, and the Income Assistance Program) all target the same First Nations communities, and they all have a role to

> play in improving outcomes for children and families, so their efforts should be coordinated and a performance indicator for all of them under INAC's new performance framework for social programs should be the rate of child maltreatment in on-reserve First Nation communities.
>
> **Approach C**: In addition to approaches A and B, improve coordination of INAC social programs with those of other federal departments that are directed to First Nations on reserve, for example health and early childhood development programs. With greater coordination and a stronger focus on the needs of individual communities, these programs could make a greater contribution to child maltreatment prevention, and could be part of a broader healthy community initiative.

[375] Similarly, the 2010 *AANDC Evaluation of the Implementation of the EPFA in Alberta* found several jurisdictional issues as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In 2012, the *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* found that "[t]here is a need to better coordinate federal programming that affects children and parents requiring child and family services" (at p. 49). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia*, at page 49, goes on to state:

> It is clear that the FNCFS Program does not and cannot work in isolation from other programming. Too many factors affect the overall need for child and family services programming, and it would be unrealistic to assume that agencies can fully deliver services related to all of them. AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs. Economic development, health promotion, education and cultural integrity are key areas where an integration of programming and services has been noted as potentially addressing community well-being in a way that is both effective and necessary for positive long-term outcomes, and ultimately a sustained reduction in the number of children coming into care.

[376] Jordan's Principle was also considered by the Federal Court in *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Pictou Landing Band Council (the PLBC) applied for judicial review of an AANDC decision not to reimburse them for in-home health care to one of its members. The PLBC indicated that Jordan's Principle was at issue. However, after case conferencing with the provincial government

and officials from the PLBC, AANDC and Health Canada determined there was no jurisdictional dispute in the matter as both levels of government agreed that the funding requested was above what would be provided to a child living off reserve.

[377] The Federal Court found AANDC's interpretation of Jordan's Principle to be narrow and the finding that it was not engaged to be unreasonable:

> [96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.
>
> [97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the [*Social Assistance Act*] and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

[378] In determining that AANDC and Health Canada did not properly assess the PLBC request for funding to meet its member's needs, the Federal Court concluded that:

> [111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The [*Social Assistance Act*] and *Regulations* require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.
>
> […]
>
> [116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and costs that meet the needs of the on reserve First Nation child.

[379] Jordan's Principle is designed to address issues of jurisdiction which can result in delay, disruption and/or denial of a good or service for First Nations children on reserve. The 2009 and 2013 Memorandums of Understanding have delays inherently built into them by including a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding is even provided. It should be noted that the case conferencing approach was what was used in Jordan's case, sadly, without success (see testimony of Dr. Cindy Blackstock, *Transcript* Vol. 48 at p. 104).

[380] It also unclear why AANDC`s position focuses mainly on inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers. The evidence above indicates that a large number of jurisdictional disputes occur between federal departments, such as AANDC, Health Canada and others. Tellingly, the $11 million Health Canada fund to address Jordan's Principle cases was never accessed. According to Ms. Baggley, the reasons for this were that the cases coming forward did not meet the criteria for the application of Jordan's Principle; or, were resolved before having to access the fund (see *Transcript* Vol. 57 at pp. 123-125).

[381] In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.

[382] More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made.

v. Summary of findings

[383] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements intend to provide funding to ensure the safety and well-being of First Nations children on reserve by supporting culturally appropriate child and family services that are meant to be in accordance with provincial/territorial legislation and standards and be provided in a reasonably comparable manner to those provided off-reserve in similar circumstances. However, the evidence above indicates that AANDC is far from meeting these intended goals and, in fact, that First Nations are adversely impacted and, in some cases, denied adequate child welfare services by the application of the FNCFS Program and other funding methods.

[384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.

[385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS

Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.

[386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC

maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[390] Notwithstanding budget surpluses for some agencies, additional funding or reallocations from other programs, the evidence still indicates funding is insufficient. The Panel finds AANDC's argument suggesting otherwise is unreasonable given the preponderance of evidence outlined above. In addition, the reallocation of funds from other AANDC programs, such as housing and infrastructure, to meet the maintenance costs of the FNCFS Program has been described by the Auditor General of Canada as being unsustainable and as also negatively impacting other important social programs for First Nations on reserve. Again, recommendations by the Auditor General and Standing Committee on Public Accounts on this point have largely gone unanswered by AANDC.

[391] Furthermore, in areas where the FNCFS Program is complemented by other federal programs aimed at addressing the needs of children and families on reserve, there is also a lack of coordination between the different programs. The evidence indicates that federal government departments often work in silos. This practice results in service gaps,

delays or denials and, overall, adverse impacts on First Nations children and families on reserves. Jordan's Principle was meant to address this issue; however, its narrow interpretation by AANDC and Health Canada ignores a large number of disputes that can arise and need to be addressed under this Principle.

[392] While seemingly an improvement on Directive 20-1 and more advantageous than the EPFA, the application of the *1965 Agreement* in Ontario also results in denials of services and adverse effects for First Nations children and families. For instance, given the agreement has not been updated for quite some time, it does not account for changes made over the years to provincial legislation for such things as mental health and other prevention services. This is further compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under Ontario's *Child and Family Services Act*. The lack of surrounding services to support the delivery of child and family services on-reserve, especially in remote and isolated communities, exacerbates the gap further. There is also discordance between Ontario's legislation and standards for providing culturally appropriate services to First Nations children and families through the appointment of a Band Representative and AANDC's lack of funding thereof. Tellingly, AANDC's position is that it is not required to cost-share services that are not included in the *1965 Agreement*.

[393] Overall, AANDC's method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon, including a denial of adequate child and family services, by the application of AANDC's FNCFS Program, funding formulas and other related provincial/territorial agreements. These findings are consistent with those of the *NPR,* Wen:De reports, Auditor General of Canada reports and Standing Committee on Public Accounts reports. Again, the Panel accepts the findings in those

reports and has relied on them to make its own findings. Those findings are also corroborated by the other testimonial and documentary evidence outlined above, including the internal documents emanating from AANDC.

[394] As will be seen in the next section, the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.

C. Race and/or national or ethnic origin is a factor in the adverse impacts or denials

[395] As mentioned above, there is no dispute in this case that First Nations possess the characteristics of race and/or national or ethnic origin. Discrimination claims regarding Aboriginal peoples have been founded on both grounds (see for example *The Queen v. Drybones*, [1970] SCR 282; *Bear v. Canada (Attorney General)*, 2003 FCA 40; *Bignell-Malcolm v. Ebb and Flow Indian Band*, 2008 CHRT 3; and *Commission des droits de la personne et des droits de la jeunesse c. Blais*, 2007 QCTDP 11).

[396] The provision of child and family services under the FNCFS Program and the other provincial agreements are specifically aimed at First Nations living on reserve. Under the *Yukon Agreement*, the services are aimed at all First Nations living in the territory. That is, the determination of the public to which the services are offered is based uniquely on the race and/or ethnic origin of the service recipients. Pursuant to the application of the FNCFS Program, corresponding funding formulas and the other provincial/territorial agreements, First Nations people living on reserve and in the Yukon are *prima facie* adversely differentiated and/or denied services because of their race and/or national or ethnic origin in the provision of child and family services.

[397] AANDC argues there is no evidence that any changes to the FNCFS Program and corresponding funding formulas or the other related provincial/territorial agreements would lead to better outcomes for First Nations children and families. Therefore, it argues the Complainants have failed to establish a *prima facie* case of discrimination. In any event,

the question of whether federal funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under section 5 of the *CHRA*.

[398] The *prima facie* discrimination analysis is not concerned with proposed outcomes. It is concerned with adverse impacts and whether a prohibited ground is a factor in any adverse impacts. Proposed outcomes only come into play if the complaint is substantiated and an order from the Tribunal is required to rectify the discrimination under section 53(2) of the *CHRA*. The Panel also disagrees that the question of whether funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under the *CHRA*. That question and evidence related thereto informs the ultimate determination to be made in this case: whether First Nations children and families residing on-reserve have an opportunity equal with other individuals in accessing child and family services. That is, it addresses the issue of substantive equality.

i. Substantive equality

[399] The purpose of the *CHRA* is to give effect to the principle of equality. That "all individuals should have **an opportunity equal with other individuals** to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (*CHRA* at s. 2, **emphasis added**). The equality jurisprudence under section 15 of the *Charter* informs the content of the *CHRA*'s equality statement (see *Caring Society FCA* at para. 19). In this regard, the Supreme Court has consistently held that equality is not necessarily about treating everyone the same. As mentioned above, "identical treatment may frequently produce serious inequality" (*Andrews* at p. 164).

[400] As articulated in *Vriend v. Alberta*, [1998] 1 SCR 493 at para. 69, "[i]t is easy to say that everyone who is just like "us" is entitled to equality […] it is more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy". In other words, true equality and the accommodation of differences, what is termed 'substantive equality', will frequently require the making of distinctions (see *Andrews* at pp. 168-169). That is, in some cases "discrimination can accrue from a failure

to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public" (see *Eldridge* at para. 78).

[401] In *Eldridge*, the issue was whether the failure to provide sign language interpreters for hearing impaired persons as part of a publicly funded scheme for the provision of medical care was in violation of section 15 of the *Charter*. The Supreme Court held that discrimination stemmed from the actions of subordinate authorities, such as hospitals, who acted as agents of the government in providing the medical services set out in legislation. However, the Legislature, in defining its objective as guaranteeing access to a range of medical services, could not evade its obligations under section 15 of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. The medical care system applied equally to the entire population of the province, but the lack of interpreters prevented hearing impaired persons from benefitting from the system to the same extent as hearing persons. The legislation was discriminatory because it had the effect of denying someone the equal protection or benefit of the law.

[402] In determining whether there has been discrimination in a substantive sense, the analysis must also be undertaken in a purposive manner "…taking into account the full social, political and legal context of the claim" (see *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 30). For Aboriginal peoples in Canada, this context includes a legacy of stereotyping and prejudice through colonialism, displacement and residential schools (see *R. v. Turpin*, [1989] 1 SCR 1296 at p. 1332; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para. 66; *Lovelace v. Ontario*, [2000] 1 SCR 950 at para. 69; *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 59; and, *R. v. Ipeelee*, [2012] 1 S.C.R. 433 at para. 60).

[403] In providing the benefit of the FNCFS Program and the other related provincial/territorial agreements, AANDC is obliged to ensure that its involvement in the provision of child and family services does not perpetuate the historical disadvantages endured by Aboriginal peoples. If AANDC's conduct widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory (see *A* at para. 332; and, *Eldridge* at para. 73).

[404] The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC's FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.

ii. Impact of the Residential Schools system

[405] **Please note** that the information below contains graphic facts about Residential Schools. If this information causes distress, especially for survivors and their families, a 24-hour Indian Residential Schools Crisis Line has been set up to provide support, including emotional and crisis referral services:

1-866-925-4419

a. History of Residential Schools

[406] Dr. John Milloy, a historian and author of *A National Crime, The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 2006) [*A National Crime*]), was qualified as an expert on the history of Residential Schools before the Tribunal. His evidence was uncontroverted and supported by official archives and other documents referenced in his book. As such, the Panel accepts Dr. Milloy's evidence as fact.

[407] During the Residential Schools era, Aboriginal children were removed from their homes, often forcibly, and brought to residential schools to be "civilized". Living conditions in many cases were appalling, giving place to disease, hunger, stress, and despair. Children were often cold, overworked, shamed and could not speak their native language for fear of severe punishment, including some students who had needles inserted into their tongues. Many children were verbally, sexually and/or physically abused. There were instances where students were forced to eat their own vomit. Some children were locked in closets, cages, and basements. Others managed to run away, but some of those who

did so during the winter months died in the cold weather. Many children committed suicide as a result of attending a Residential School.

[408] Overall, a large number of Aboriginal children under the supervision of the Residential Schools system died while "in-care" (see *A National Crime* at p. 51). Many of those who managed to survive the ordeal are psychologically scarred as a result. In addition to the impacts on individuals, Dr. Milloy also explained how the Residential Schools affected First Nations communities as a whole. In losing future generations to the Residential Schools, the culture, language and the very survival of many First Nations communities was put in jeopardy.

[409] Elder Robert Joseph, from the Kwakwaka'wakw community, gave a very moving and detailed account of his personal experience in the Residential Schools system. According to Elder Joseph, abuse, strip searches, withholding gifts and visits from family members, and public shaming were very commonplace. In his view, some of the strip searches were actually veiled instances of sexual assault. In one instance, as a form of punishment, he recounted being stripped naked in front of the boys' division of the school and told to bend over. He also spoke of children being locked in closets and cages and the prevalence of racist remarks.

[410] Elder Joseph's experience gave him a deep sense of loneliness and he turned to alcohol to cope with the despair. He has since turned his life around and is now an advocate for reconciliation and healing for Aboriginal people.

[411] The Government of Canada has recognized the impacts and consequences of the Residential Schools system. In a 2008 Statement of Apology to former students of Residential Schools (see Annex, ex. 52), former Prime Minister Stephen Harper stated:

> The treatment of children in Indian Residential Schools is a sad chapter in our history.
>
> For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities. In the 1870's, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools. Two primary objectives of the Residential

Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

[…]

The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.

The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.

[…]

To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey. The Government of Canada sincerely apologizes and asks

> the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.

[412] In the spirit of reconciliation, the Panel also acknowledges the suffering caused by Residential Schools. Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Resident Schools system is one of the darkest aspects of Canadian history. As will be explained in the following section, the effects of Residential Schools continue to impact First Nations children, families and communities to this day.

b. Transformation of Residential Schools into an aspect of the child welfare system

[413] Residential Schools operated as a "school system" from the 1880's until the 1960's, when it became a marked component of the child welfare system. In about 1969, the Church's involvement in the Residential Schools system ceased, and the federal government took over sole management of the institutions. At around the same time, new regulations came into effect outlining who could attend Residential Schools, placing an emphasis on orphans and "neglected" children. The primary role of many Residential Schools changed from a focus on "education" to a focus on "child welfare". Despite this, many children were not sent home, because their parents were assessed as not being able to assume the responsibility for the care of their children (see *A National Crime* at pp. 211-212; and, testimony of Dr. Milloy, *Transcript* Vol. 34 at pp. 19-20).

[414] Over a 50-year period, between the 1930's to the 1980's, the number of schools declined steadily from 78 schools in 1930 down to 12 schools in 1980. The last school closed in 1986. The FNCFS Program is then implemented in 1990.

c. Intergenerational trauma of Residential Schools

[415] Dr. Amy Bombay, Ph.D. in neuroscience and M.Sc. in psychology, was qualified as an expert on the psychological effects and transmission of stress and trauma on wellbeing. She spoke about the intergenerational transmission of trauma among the offspring of Residential School survivors. The Panel finds Dr. Bombay's evidence reliable and helpful

in understanding the impacts of the individual and collective trauma experienced by Aboriginal peoples and finds her evidence highly relevant to the case at hand.

[416] Dr. Bombay explained how Residential Schools fits into the larger traumatic history that Aboriginal peoples have been exposed to:

> …for indigenous groups in Canada and worldwide, colonialism has comprised multiple collective traumas […] these include things like military conquest, epidemic diseases and forced relocation.
>
> So Indian residential schools is really just one example of one collective trauma which is part of a larger traumatic history that aboriginal peoples have already been exposed to.
>
> (*Transcript* Vol. 40 at p. 94)

[417] According to Dr. Bombay, these collective traumas have had a cumulative effect over time, namely on individual and community health (see *Transcript* Vol. 40 at p. 83). In her words: "these collective effects are greater than the sum of the individual effects" (*Transcript* Vol. 40 at p. 82). Similar effects have been shown in other populations and in other groups who have undergone similar collective traumas, such as Holocaust survivors, Japanese Americans subjected to internment during World War II, and survivors of the Turkish genocide of Armenians (see *Transcript* Vol. 40 at pp. 111-112). To measure and describe the fact that some groups have undergone this chronic exposure to collective traumas, Dr. Maria Yellow Horse Brave Heart of the University of New Mexico coined the term "historical trauma", which is defined as "…the cumulative emotional and psychological wounding over the lifespan across generations emanating from massive group trauma" (see testimony of Dr. Bombay, *Transcript* Vol. 40 at pp. 94-95).

[418] For Residential School survivors, Dr. Bombay indicated that they are more likely to suffer from various physical and mental health problems compared to Aboriginal adults who did not attend. For example, Residential School survivors report higher levels of psychological distress compared to those who did not attend, and they are also more likely to be diagnosed with a chronic physical health condition (see *Transcript* Vol. 40 at pp. 109-110).

[419] With respect to social outcomes, Dr. Bombay explained some of the intergenerational impacts of Residential Schools as follows:

> …numerous qualitative research studies have shown that the lack of traditional parental role models in residential schools impeded the transmission of traditional positive childrearing practices that they otherwise would have learned from their parents, and that seeing -- being exposed to the neglect and abuse and the poor treatment that a lot of the caregivers in residential schools -- how they treated the children, actually instilled negative -- a lot of negative parenting practices, as this was the only models of parenting that they were exposed to.
>
> (*Transcript* Vol. 40 at p. 110)

[420] Generationally, the above noted impacts could descend from the Residential School survivor, to their children and then to their grandchildren. In this regard, Dr. Bombay indicated, relying on the 2002-2003 Regional Health Survey, that 43% of First Nations adults on-reserve perceived that their parents' attendance at Residential School negatively affected the parenting that they received while growing up; 73.4% believed that their grandparents' attendance at Residential School negatively affected the parenting that their parents received; 37.2% of First Nations adults whose parents attended Residential School had contemplated suicide in their life versus 25.7% whose parents did not; and, the grandchildren of survivors were also at an increased risk for suicide as 28.4% had attempted suicide versus only 13.1% of those whose grandparents did not attend Residential School (see *Transcript* at Vol. 40 pp. 110-11, 114-115).

[421] In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also *Transcript* Vol. 40 at pp. 69, 71).

[422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding

funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[423] AANDC submits that in determining what services to provide and how to deliver them, the FNCFS Agencies decide what is "culturally appropriate" for their community. The definition of what is culturally appropriate depends on the specific culture of each First Nation community. According to AANDC, this is best left to the discretion of the FNCFS Agencies or First Nations leadership.

[424] However, in the *2008 Report of the Auditor General of Canada*, the Auditor General indicated that "[t]o deliver this program as the policy requires, we expected that the Department would, at a minimum know what "culturally appropriate services" means" (at s. 4.18, p. 12). That is, AANDC had no assurances that the FNCFS Program funds child welfare services that are culturally appropriate. In response, AANDC developed a guiding principle for what it understands culturally appropriate services to be:

> the Government of Canada provides funding, as a matter of social policy, to **support the delivery of culturally appropriate services** among First Nation communities that **acknowledge and respect values, beliefs and unique circumstances** being served. As such, culturally appropriate services encourage activities such as kinship care options where a child is placed with an extended family member so that cultural identity and traditions may be maintained.
>
> (see *AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts*, **emphasis added**)

[425] Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless. A glaring example of this is the denial of funding for Band Representatives under the *1965 Agreement* in Ontario. Another is the assumptions built into Directive 20-1 and the EPFA. If funding does not correspond to the

actual child welfare needs of a specific First Nation community, then how is it expected to provide services that are culturally appropriate? With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity.

[426] Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma.

[427] In this regard, it should be noted again that the federal government is in a fiduciary relationship with Aboriginal peoples and has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, more has to be done to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children. This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples.

iii. Canada's international commitments to children and Indigenous peoples

[428] As stated earlier, Amnesty International was granted "Interested Party" status to assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the Complaint. Amnesty International argues that the interpretation and application of the *CHRA*, and in particular of section 5, must respect Canada's

international obligations as enunciated in various international United Nations instruments, such as the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on Elimination of all Forms of Discrimination*, the *Universal Declaration on Human Rights* and the *Declaration on the Rights of Indigenous Peoples.*

[429] Amnesty International also refers to the views of treaty bodies, such as the United Nations Human Rights Committee (UNHRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child (CRC) in support of its argument that when a treatment discriminates both on the basis of First Nations identity and because of residency, it constitutes multiple violations of the prohibition of discrimination, which is a peremptory norm of international law. Specifically, Amnesty International points to these bodies' recommendations that special attention must be given to the prohibition of discrimination against children.

[430] In AANDC's view, the international law concepts and arguments advanced by Amnesty International do not assist the Tribunal in interpreting and applying the *CHRA* to the facts of this Complaint. Rather, they see Amnesty International's arguments as a claim that the Government of Canada is in violation of its international obligations, which is beyond the purview of the Complaint.

[431] In order to form part of Canadian law, international treaties need national legislative implementation, unless they codify norms of customary international law that are already found in Canadian domestic law. However, when a country becomes party to a treaty or a covenant, it clearly indicates its adherence to the contents of such a treaty or covenant and therefore makes a commitment to implement its principles in its national legislation. This public engagement is solemn and binding in international law. It is a declaration from the country that its national legislation will reflect its international commitments. Therefore, international law remains relevant in interpreting the scope and content of human rights in Canadian law, as was underlined by the Supreme Court on numerous occasions since Chief Justice Dickson's dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313.

[432] The basic principle, which is not limited to *Charter* interpretation, is that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (*Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at p. 1056). That is so because Parliament and the provincial legislatures are presumed to respect the principles of international law (see *Baker* at para. 81).

[433] This approach often leads the Supreme Court to look at decisions and recommendations of human right bodies to interpret the scope and content of domestic law provisions in the light of international law (see for example *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892 at p. 920; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at pp. 149-150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 26-27; and, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 154-160).

[434] In recent years, the Supreme Court has been willing to expand the relevance of international law and to give effect to Canada's role and actions in the development of norms of international law, particularly in the area of human rights (see *United States v. Burns*, 2001 SCC 7 at para. 81 [*Burns*]; and, *Canada (Justice) v. Khadr*, 2008 SCC 28 at paras. 2-3). In *Burns*, the Supreme Court found that Canada's advocacy for the abolition of the death penalty, and efforts to bring about change in extradition arrangements when a fugitive faces the death penalty, prevented it from extraditing someone to the United States facing the same sentence without obtaining assurance that it would not be carried out. The same reasoning applies to the case at hand as Canada has expressed its views internationally on the importance of human rights on numerous occasions.

[435] Indeed, since the foundation of the United Nations (the UN), Canada has been actively involved in the promotion of human rights on the international scene. This began with the participation of the Canadian Director of the UN Secretariat's Division for Human Rights, Mr. John Humphrey, in writing the preliminary draft of the *Universal Declaration of Human Rights* (the *Universal Declaration*), in 1947. Today, Canada still voices itself as a strong supporter of human rights at the international level.

[436] Canada's international human rights obligations with respect to equality and non-discrimination stem from various legal instruments. Similarities can be seen in the wording of both domestic and international human rights instruments and in the scope and content of their provisions. The close relationship between Canadian and international human rights law can also be seen both in the periodic reports submitted by Canada to various international treaty monitoring bodies on the steps taken domestically to give effect to the obligations flowing from the treaties and in the monitoring bodies' recommendations to Canada.

[437] Developments in human rights at the national level followed the *Universal Declaration* at the international level. Adopted by the United Nations General Assembly by resolution 217A at its 3rd session in Paris on 10 December 1948, article 2 of the *Universal Declaration* sets out the principle of equality and non-discrimination in the enjoyment of human rights. Article 7 proclaims equality before the law and equal protection of the law. As indicated above, these equality principles are now ingrained in section 15 of the *Charter* and in the purpose of the *CHRA*.

[438] Initially, the *Universal Declaration* was intended as a guide for governments in their efforts to guarantee human rights domestically. It was also meant to enunciate human rights principles that would be further developed into a legally binding convention. This eventually led to the adoption of two covenants and two optional protocols that, along with the *Universal Declaration*, are considered to form the International Bill of Rights.

[439] The first of those two covenants was the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (the *ICCPR*), entered into force by Canada on August 19, 1976. At the same time, Canada recognized the jurisdiction of the UNHRC to hear individual complaints by ratifying the *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 302. Articles 2 and 26 of the *ICCPR* guarantee equality and prohibit discrimination in terms that are similar to those of the *Universal Declaration*.

[440] In General Comment 18, thirty-seventh session, 10 November 1989 at paragraph 7, the UNHRC stated that the term “discrimination” as used in the *ICCPR* should be understood to imply:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The UNHRC went on to state that the aim of the protection is substantive equality, and to achieve this aim States may be required to take specific measures (see at paras. 5, 8, and 12-13).

[441] The second of the two covenants that stem directly from the *Universal Declaration* is the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (the *ICESCR*), which Canada entered into force on August 19, 1976. Article 2(2) guarantees the exercise of the rights protected without discrimination. Article 10 provides that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.

[442] The *ICESCR* is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the ICESR (see paras. 5 and 7). The CESCR also affirmed that the aim of the *ICESCR* is to achieve substantive equality by “…paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations” (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person’s place of residence (see at para. 34).

[443] In a report to the CESCR outlining key measures it adopted for the period of January 2005 to December 2009 to enhance its implementation of the *ICESCR*, Canada reported on the FNCFS Program and declared that “[t]he anticipated result is a more secure and stable family environment and improved outcomes for Indian children ordinarily

resident on reserve" (see *Canada's Sixth Report on the United Nations' International Covenant on Economic, Social and Cultural Rights* (Minister of Public Works and Government Services, 2013) at para. 103). Canada also reported that it had begun transitioning the FNCFS Program to a more prevention based model, the EPFA, "…on a jurisdiction-by-jurisdiction basis with ready and willing First Nations and provincial/territorial partners […] with the goal to have all jurisdictions on board by 2013" (at paras. 105-106). While the Government of Canada made this undertaking, the evidence is clear that this goal was not met.

[444] In addition to the covenants that protect human rights in general, Canada is a party to legal instruments that focus on specific issues or aim to protect specific groups of persons. Canada is a party to the *International Convention for the Elimination of all Forms of Racial Discrimination*, 660 U.N.T.S. 195 (the *ICERD*), ratified in 1970. The *ICERD* clarifies the prohibition of discrimination found in the *Universal Declaration*, to which it refers to in its preamble. Articles 1 and 2 define racial discrimination and direct States to take all necessary measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. The purpose is to guarantee them the full and equal enjoyment of human rights and fundamental freedoms, including special measures whenever warranted. Article 5 further highlights rights whose enjoyment must be free of discrimination, including the right to social services, which includes public health, medical care and social security.

[445] The monitoring body of the *ICERD*, the CERD, has discussed the meaning and scope of special measures in the *ICERD*. It has expressed a similar understanding of substantive equality as Canadian courts (see CERD, General Recommendation No. 32, September 24, 2009 (CERD/C/GC/32) at para. 8). In addition, it recognized that "special measures" that may be called for in order to achieve effective equality "…include the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus…" (at para. 13).

[446] In 2011, Canada reported to the CERD on the measures taken domestically to implement the *ICERD*. The CERD made several recommendations, including: "[d]iscontinuing the removal of Aboriginal children from their families and providing family

and child care services on reserves with sufficient funding" [see *Consideration of reports submitted by States parties under article 9 of the convention, Concluding observations of the CERD*, 9 March 2012 (CERD/C/CAN/CO/19-20) at para. 19(f)].

[447] Although AANDC argues that the federal government is merely funding child welfare services on-reserve as a matter of social policy, budgetary measures in and of themselves are an important component of the steps to be taken in order to achieve substantive equality for First Nations children. The recommendation of the CERD, read with the views it expressed in General Recommendation No. 32, indicate that the CERD sees insufficient funding of child care services on reserve as inhibiting substantive equality for First Nations in the provision of child and family services.

[448] Another important international instrument aiming at the protection of a specific group of persons that is relevant to the present case is the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the *CRC*), entered into force by Canada on January 12, 1992. Children have the same human rights as adults. However, they are more vulnerable and in need of protection that addresses their special needs. Consequently, the *CRC* focuses on giving them the special care, assistance and legal protection that they need (see in particular articles 2, 3, 5, 7.1, 8.1, 9, 9.1, 18.1, 20, 25 and 30). Furthermore, when it ratified the *CRC*, Canada made a Statement of Understanding expressing its view that, in assessing what measures are appropriate to implementing the rights recognized in the *CRC*, the rights of Aboriginal children to enjoy their own culture, to profess and practice their own religion and to use their own language must not be denied (Convention on the Rights of the Child, Declarations and Reservations, Canada, online: United Nations <http://www.treaties.un.org>).

[449] The *CRC*'s monitoring body, the CRC Committee, stressed the importance of culturally appropriate social services for indigenous children (see General Comment No. 11, February 12, 2009 (CRC/C/GC/11) at para. 25). With respect to childcare and support services, Canada reported that "[t]he Government of Canada plays a supporting role by providing a range of child and family benefits and transferring funds to other governments in Canada based on shared goals and objectives" (*Canada's Third and Fourth Reports on the Convention on the Rights of the Child*, 20 November 2009 at para. 49). Canada also

reported, as it did to the CESCR, that it is incrementally shifting its child welfare programs for Aboriginal children to a prevention-focused approach and that it expected that all agencies would be using the prevention-focused approach by 2013 (see at para. 98).

[450] In response to Canada, the CRC Committee expressed deep concern "…at the high number of children in alternative care and at the frequent removal of children from their families as a first resort in cases of neglect or financial hardship or disability" (*Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, 6 December 2012 (CRC/C/CAN/CO/3-4) at para. 55). Among other things, the CRC Committee recommended that Canada intensify cooperation with communities and community leaders to find suitable alternative care solutions for children in these communities [see at para. 56(f)]. It further recommended that Canada "[e]nsure that funding and other support, including welfare services, provided to Aboriginal, African-Canadian, and other minority children, including welfare services, is comparable in quality and accessibility to services provided to other children in the State party and is adequate to meet their needs" [see at para. 68(c)].

[451] Again, the recommendations of the CRC Committee reinforce the need for adequate funding, linked to the needs of First Nations children and families, in order to achieve substantive equality in the provision of child and family services on-reserve.

[452] Finally, the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) (the *UNDRIP*), which was adopted by the United Nations General Assembly on September 13, 2007, was endorsed by Canada on November 12, 2010. Article 2 provides that Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular rights based on their indigenous origin or identity. Although this international instrument is, at the time being, a declaration and not a treaty or a covenant, and is not legally binding except to the extent that some of its provisions reflect customary international law, when Canada endorsed it, it reaffirmed its commitment to "…improve the well-being of Aboriginal Canadians"(*Canada's Statement of Support on the United Nations*

Declaration on the Rights of Indigenous Peoples, November 12, 2010, online: Indigenous and Northern Affairs Canada <http://www.aadnc-aandc.gc.ca>).

[453] The international instruments and treaty monitoring bodies referred to above view equality to be substantive and not merely formal. Consequently, they consider that specific measures, including of a budgetary nature, are often required in order to achieve substantive equality. These international legal instruments also reinforce the need for due attention to be paid to the unique situation and needs of children and First Nations people, especially the combination of those two vulnerable groups: First Nations children.

[454] The concerns expressed by international monitoring bodies mirror many of the issues raised in this Complaint. The declarations made by Canada in its periodic reports to the various monitoring bodies clearly show that the federal government is aware of the steps to be taken domestically to address these issues. Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric.

[455] Substantive equality and Canada's international obligations require that First Nations children on-reserve be provided child and family services of comparable quality and accessibility as those provided to all Canadians off-reserve, including that they be sufficiently funded to meet the real needs of First Nations children and families and do not perpetuate historical disadvantage.

VI. Complaint substantiated

[456] In light of the above, the Panel finds the Complainants have presented sufficient evidence to establish a *prima facie* case of discrimination under section 5 of the *CHRA*. Specifically, they *prima facie* established that First Nations children and families living on reserve and in the Yukon are denied [s. 5(a)] equal child and family services and/or differentiated adversely [s. 5(b)] in the provision of child and family services.

[457] Through the FNCFS Program and other related provincial/territorial agreements, AANDC provides a service intended to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations on reserve. With specific regard to the

FNCFS Program, the objective is to ensure culturally appropriate child and family services to First Nations children and families on reserve and in the Yukon that are intended to be in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances. However, the evidence in this case demonstrates that AANDC does more than just ensure the provision of child and family services to First Nations, it controls the provision of those services through its funding mechanisms to the point where it negatively impacts children and families on reserve.

[458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:

- The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost.

- The current structure and implementation of the EPFA funding formula, which perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities.

- The failure to adjust Directive 20-1 funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living;

- The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act*.

- The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.

- The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.

[459] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system.

[460] AANDC's evidence and arguments challenging the Complainants' allegations of discrimination have been addressed throughout this decision. Overall, the Panel finds AANDC's position unreasonable, unconvincing and not supported by the preponderance of evidence in this case. Otherwise, as mentioned earlier, AANDC did not raise a statutory exception under sections 15 or 16 of the *CHRA*.

[461] Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve.

[462] This concept of reasonable comparability is one of the issues at the heart of the problem. AANDC has difficulty defining what it means and putting it into practice, mainly because its funding authorities and interpretation thereof are not in line with

provincial/territorial legislation and standards. Despite not being experts in the area of child welfare and knowing that funding according to its authorities is often insufficient to meet provincial/territorial legislation and standards, AANDC insists that FNCFS Agencies somehow abide by those standards and provide reasonably comparable child and family services. Instead of assessing the needs of First Nations children and families and using provincial legislation and standards as a reference to design an adequate program to address those needs, AANDC adopts an *ad hoc* approach to addressing needed changes to its program.

[463] This is exemplified by the implementation of the EPFA. AANDC makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost-model it knows is flawed. AANDC tries to obtain comparable variables from the provinces to fit them into this cost-model, however, they are unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula. By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a REFORM of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve.

[464] Not being experts in child welfare, AANDC's authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.

[465] AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In

this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.

[466] As a result, and having weighed all the evidence and argument in this case on a balance of probabilities, the Panel finds the Complaint substantiated.

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

VII. Order

[468] As the Complaint has been substantiated, the Panel may make an order against AANDC pursuant to section 53(2) of the *CHRA*. The aim in making an order under section 53(2) is not to punish AANDC, but to eliminate discrimination (see *Robichaud* at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the

particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

[469] It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the Act. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the Act are obtained. Applying a purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134; and, *Doucet-Boudreau* at paras. 25 and 55).

[470] The Complainants, Commission and Interested Parties request a variety of remedies to address the findings in this Complaint, including declaratory orders; orders to cease the discriminatory practice and take measures to redress or prevent it from reoccurring; and, compensation under sections 53(2)(e) and 53(3) of the *CHRA*.

[471] Furthermore, unrelated to the remedies requested under section 53(2), the Panel is also seized of a previous motion from the Complainants for costs related to the allegation that AANDC abused the Tribunal's process through its late disclosure of documents.

A. Findings of discrimination

[472] The Caring Society requests several declarations be made by the Tribunal in order to clarify which aspects of the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements are discriminatory. According to the Caring Society, this Tribunal routinely provides declaratory relief in the form of findings of discrimination.

[473] Indeed, throughout this decision, and generally at paragraph 458 above, the Panel has outlined the main adverse impacts it has found in relation to the FNCFS Program and other related provincial/territorial agreements. As race and/or national or ethnic origin is a factor in those adverse impacts, the Panel concluded First Nations children and families living on reserve and in the Yukon are discriminated against in the provision of child and

family services by AANDC. The Panel believes these findings address the Caring Society's request for declaratory relief.

B. Cease the discriminatory practice and take measures to redress and prevent it

[474] Section 53(2)(a) of the *CHRA* allows the Tribunal to order that the person found to be engaging in the discriminatory practice "cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future". Furthermore, section 53(2)(b) allows the Tribunal to order that the person "…make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice".

[475] Pursuant to these sections of the *CHRA*, the Complainants and Commission request immediate relief for First Nations children. In their view, this can be accomplished by ordering AANDC to remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program and child and family services in Ontario under the *1965 Agreement*; and, requiring AANDC to properly implement Jordan's Principle. Moving forward in the long term, the Complainants and Commission request other orders that AANDC reform the FNCFS Program and the *1965 Agreement* to ensure equitable levels of service, including funding thereof, for First Nations child and family services on-reserve.

[476] The Caring Society has provided a detailed methodology of how this reform can be achieved. It proposes a three-step process to redesign the FNCFS Program: (1) reconvene the National Advisory Committee to identify discriminatory elements in the provision of funding to FNCFS Agencies and make recommendations thereon; (2) fund tri-partite regional tables to negotiate the implementation of equitable and culturally based funding mechanisms and policies for each region; and, (3) develop an independent expert structure with the authority and mandate to ensure AANDC maintains non-discriminatory and culturally appropriate First Nations child and family services.

[477] Relatedly, the Caring Society also requests the public posting of information regarding the FNCFS Program, Jordan's Principle and children in care to educate FNCFS Agencies and the public about AANDC's child welfare policies, practices and directives and to help prevent future discrimination. Furthermore, it asks that AANDC staff be trained on First Nations culture, historic disadvantage, human rights and social work.

[478] The AFN requests similar reform, including commissioning a study to determine the most effective means of providing care for First Nations children and families and greater performance measurements and evaluations of AANDC employees related to the provision of First Nations child and family services. Similarly, in Ontario, the COO requests that an independent study of funding and service levels for First Nations child welfare in Ontario based on the *1965 Agreement* be conducted.

[479] Consistent with Canada's international obligations, Amnesty International stresses the need for a timely and effective remedy to achieve substantive equality for First Nations children and families on reserve, including increased funding, systemic structural changes to the way AANDC provides funding and a comprehensive and systematic monitoring mechanism for assuring non-repetition of breaches of the rights of First Nations children.

[480] AANDC submits that, while the Tribunal may order amendments to policy and provide guidance on the shape of amendments, it cannot prescribe the specific policy that must be adopted. According to AANDC, this is particularly appropriate in this case where the policy at issue is a complex scheme that takes into account competing priorities and must fit within broader governmental policy approaches. Such decisions are entitled to some considerable degree of deference and margin of reasonableness. Furthermore, AANDC argues the proposed remedy would intrude into the executive branch of government's role to establish public policy and direct the spending of public funds in accordance with fiscal priorities. AANDC is also concerned that some of the proposed reform measures are over-broad and beyond the scope of the Complaint. As such, it views aspects of the methodology proposed by the Complainants to be beyond the power of the Tribunal or any other court to order.

[481] The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.

[482] More than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice. In the best interest of the child, all First Nations children and families living on-reserve should have an opportunity "…equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (*CHRA* at s. 2).

[483] That said, given the complexity and far-reaching effects of the relief sought, the Panel wants to ensure that any additional orders it makes are appropriate and fair, both in the short and long-term. Throughout these proceedings, the Panel reserved the right to ask clarification questions of the parties while it reviewed the evidence. While a discriminatory practice has occurred and is ongoing, the Panel is left with outstanding questions about how best to remedy that discrimination. The Panel requires further clarification from the parties on the actual relief sought, including how the requested immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis.

[484] Within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered on an expeditious basis.

C. Compensation

[485] Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the

discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in wilfully or recklessly. Awards of compensation under each of those sections cannot exceed $20,000.

[486] The Caring Society asks the Panel to award compensation under section 53(3) for AANDC's wilful and reckless discriminatory conduct with respect to each First Nations child taken into care since February 2006 to the date of the award. In the Caring Society's view, as early as the 2000 findings of the *NPR*, AANDC voluntarily and egregiously omitted to rectify discrimination against First Nations children. It also notes that the federal government benefited for many years from the money it failed to devote to the provision of equal child and family services for First Nations children. As a result, it believes the maximum amount of $20,000 should be awarded per child. The Caring Society requests the compensation be placed in an independent trust to fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services.

[487] The AFN also requests compensation. It asks for an order that it, AANDC, the Caring Society and the Commission form an expert panel to establish appropriate individual compensation for children, parents and siblings impacted by the child welfare practices on reserve between 2006 and the date of the Tribunal's order.

[488] Amnesty International submits any compensation should address both physical and psychological damages, including the emotional harm and inherent indignity suffered as a result of the breach.

[489] AANDC submits there is insufficient evidence before the Tribunal to award the requested compensation. It argues the Caring Society's request is fundamentally flawed as it depends on the unproven premise that all these children were removed from their homes because of AANDC's funding practices. According to AANDC, the Caring Society's assertions overlook the complex nature of factors that lead to a child being removed from his or her home and, given the absence of individual evidence thereon, it is impossible for the Tribunal to assess compensation on an individual basis. Furthermore, AANDC submits

the Complainants' authority to receive and distribute funds on behalf of "victims" has not been established.

[490] Similar to its comments above, the Panel has outstanding questions regarding the Complainants' request for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. Again, within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered.

D. Costs for obstruction of process

[491] As part of a motion for disclosure decided in ruling 2013 CHRT 16, the Complainants requested costs from AANDC with respect to its alleged obstruction of the Tribunal's process. At that time, the Panel took the costs request under reserve and indicated the issue would be the subject of a subsequent ruling. The Complainants have reiterated their request for costs as part of their closing submissions on this Complaint. In response, AANDC reaffirmed its assertion that the Tribunal does not have the authority to award such costs.

[492] The Panel continues to reserve its ruling on the Complainants' request for costs in relation to the motion for disclosure decided in ruling 2013 CHRT 16. A ruling on the issue will be provided in due course.

E. Retention of jurisdiction

[493] The Complainants, Commission and Interested Parties request the Panel retain jurisdiction over this matter until any orders are fully implemented.

[494] As indicated above, the Panel has outstanding questions on the remedies being sought by the Complainants and Commission. A determination on those remedies is still to be made. As such, the Panel will maintain jurisdiction over this matter pending the determination of those outstanding remedies. Any further retention of jurisdiction will be re-evaluated when those determinations are made.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 26, 2016

VIII. Annex: exhibit references

1. **Exhibit HR-6, Tab 74**: *Glossary of Social Work Terms*, prepared for the Canadian Human Rights Commission by Michelle Sturtridge (February 2013)
2. **Exhibit HR-1, Tab 3**: Dr. Rose-Alma J. MacDonald & Dr. Peter Ladd et al., *First Nations Child and Family Services Joint National Policy ReviewFinal Report* (Ottawa: Assembly of First Nations and Department of Indian Affairs and Northern Development, 2000)
3. **Exhibit HR-3, Tab 29**: Department of Indian and Northern Affairs Canada, *First Nations Child and Family Services National Program Manual* (Ottawa: Social Policy and Programs Branch, 2004)
4. **Exhibit HR-13, Tab 272**: Indian and Northern Affairs Canada, *National Social Programs Manual* (January 31, 2012)
5. **Exhibit HR-11, Tab 214**: *Memorandum of Agreement Respecting Welfare Programs for Indians*, between the Government of Canada and the Government of the Province of Ontario (19 May, 1966)
6. **Exhibit HR-13, Tab 270**: *Arrangement for the Funding and Administration of Social Services*, between Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of Alberta (23 January, 1992)
7. **Exhibit HR-13, Tab 275**: *Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve*, between the Province of British Columbia and Her Majesty the Queen in right of Canada (March 30, 2012)
8. **Exhibit HR-13, Tab 274**: *Memorandum of Understanding for the Funding of Child Protection Services for Indian Children*, between Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of the province of British Columbia (28 March, 1996)
9. **Exhibit HR-13, Tab 305**: *Funding Agreement*, between Her Majesty the Queen in Right of Canada and the Government of Yukon (March 23, 2012)
10. **Exhibit HR-4, Tab 38**: *Fact Sheet – First Nations Child and Family Services* (October 2006), previously online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/info/fnsocec/fncfs_e.html>
11. **Exhibit HR-13, Tab 285**: Indian and Northern Affairs Canada, *First Nations Child and Family Services British Columbia Transition Plan (Decision by Assistant Deputy Minister – ESDPP)* by Megan Reiter, Barbara D'Amico & Steven Singer (March 16, 2011)

12. **Exhibit HR-15, Tab 404**: Indian and Northern Affairs Canada, *Reform of the FNCFS Program in Quebec (Information for the Deputy Minister)* by Rosalee LaPlante & Catherine Hudon (July 7, 2008)

13. **Exhibit HR-1, Tab 4**: John Loxley, Fred Wien and Cindy Blackstock, *Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report, a summary of research needed to explore three funding models for First Nations child welfare agencies* (Vancouver: First Nations Child and Family Caring Society of Canada, 2004)

14. **Exhibit HR-4, Tab 32**: Indian and Northern Affairs Canada, *Evaluation of the First Nations Child and Family Services Program* (Departmental Audit and Evaluation Branch, March 2007)

15. **Exhibit HR-1, Tab 5**: Dr. Cindy Blackstock et al., *Wen:De We Are Coming to the Light of Day* (Ottawa: First Nations Child and Family Caring Society, 2005)

16. **Exhibit HR-1, Tab 6**: John Loxley et al., *Wen:De The Journey Continues* (Ottawa: First Nations Child and Family Caring Society, 2005)

17. **Exhibit HR-3, Tab 11**: Auditor General of Canada, *May 2008 Report of the Auditor General of Canada to the House of Commons, Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2008)

18. **Exhibit HR-3, Tab 15**: House of Commons Report of the Standing Committee on Public Accounts, *Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (Ottawa: Communication Canada-Publishing, March 2009, 40th Parliament, 2nd session)

19. **Exhibit HR-3, Tab 16**: *Government of Canada Response to the Report of the Standing Committee on Public Accounts on Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (Presented to the House of Commons on August 19, 2009) online: Parliament of Canada <http://www.parl.gc.ca/CommitteeBusiness/ReportsResponses.aspx>

20. **Exhibit HR-5, Tab 53**: Auditor General of Canada, *2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, Programs for First Nations on Reserves* (Ottawa: Minister of Public Works and Government Services Canada, 2011)

21. **Exhibit HR-4, Tab 45**: House of Commons Report of the Standing Committee on Public Accounts, *Chapter 4, Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada* (Ottawa: Public Works and Government Services Canada, February 2012, 41st Parliament, 1st session)

22. **Exhibit HR-5, Tab 54**: *Government Response to the Report of the Standing Committee on Public Accounts on Chapter 4, Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada* (Presented to the House of Commons on June 5, 2012) online: Parliament of Canada <http://www.parl.gc.ca/CommitteeBusiness/ReportsResponses.aspx>

23. **Exhibit HR-11, Tab 239**: Indian and Northern Affairs Canada, Strategic Direction and Policy Directorate, Ontario Region, Discussion Paper: *1965 Agreement Overview* (November 2007)

24. **Exhibit HR-11, Tab 21**: Commission to Promote Sustainable Child Welfare, Discussion Paper: *Aboriginal Child Welfare in Ontario* (July 2011)

25. **Exhibit HR-14, Tab 362**: Letter from Mary Anne Chambers, Minster of Children and Youth Services, to John Duncan, Minister of Indian and Norther Affairs Canada (February 23, 2007)

26. **Exhibit HR-11, Tab 222**: Letter from Laurel Broten, Minster of Children and Youth, and Grand Chief Phillips, Chiefs of Ontario, to John Duncan, Minister of Indian and Norther Affairs Canada (March 25, 2011)

27. **Exhibit HR-11, Tab 223**: Letter from John Duncan, Minister of Indian and Norther Affairs Canada, to Laurel Broten, Minster of Children and Youth, and Grand Chief Phillips, Chiefs of Ontario (n.d. July 7, 2011?)

28. **Exhibit HR-11, Tab 224**: Department of Indian Affairs and Northern Development Canada, *Abinoojii Mental Health Services Mandate*, Information for Regional Director General and Assistant Reginal Directors General prepared by Nicole Anthony (April 1, 2011)

29. **Exhibit HR-11, Tab 209**: Ontario Association of Children's Aid Societies, *Child Welfare Report* (2012)

30. **Exhibit HR-13, Tab 281**: Letter from Glen Foulger, Revenue Manager, and Robert Parenteau, Director of Operations for Aboriginal Regional Support Services, Ministry of Children and Family Development, British Columbia, to Linda Stiller, Manager of Inter-Governmental Affairs, Indian and Northern Affairs Canada (June 22, 2007)

31. **Exhibit HR-14, Tab 353**: Indian and Northern Affairs Canada, *First Nations Child and Family Services (FNCFS)*, presentation to Policy Committee (April 12, 2005)

32. **Exhibit HR-6, Tab 64**: Indian and Northern Affairs Canada, *First Nations Child and Family Services (FNCFS) Q's and A's* (n.d.)

33. **Exhibit HR-13, Tab 330**: Indian and Northern Affairs Canada, *Explanations on Expenditures of Social Development Programs* (n.d.)

34. **Exhibit HR-14, Tab 354**: Indian and Northern Affairs Canada, *Social Programs*, presentation (February 7, 2006)

35. **Exhibit HR-6, Tab 81**: Indian and Northern Affairs Canada, *First Nation Child and Family Services: Putting Children and Families First in Alberta*, presentation [n.d.]

36. **Exhibit HR-3, Tab 17**: Letter from Micheal Wernick, Deputy Minister, Indian and Northern Affairs Canada, to Bruce Stanton, Chair of the Standing Committee on Aboriginal Affairs and Northern Development (11 September 2009)

37. **Exhibit HR-5, Tab 48**: Indian and Northern Affairs Canada, *Final Report: Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program* (Evaluation, Performance Measurement and Review Branch, September 2010)

38. **Exhibit HR-12, Tab 247**: Aboriginal Affairs and Northern Development Canada, *Final Report: Implementation Evaluation of the Enhanced Focused Approach in Saskatchewan and Nova Scotia for the First Nations Child and Family Services Program* (Evaluation, Performance Measurement and Review Branch, November 23, 2012)

39. **Exhibit HR-9, Tab 146**: Aboriginal Affairs and Northern Development Canada, *Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia*, presentation (April 27, 2012)

40. **Exhibit HR-12, Tab 248**: Aboriginal Affairs and Northern Development Canada, *First Nations Child and Family Services Program (FNCFS) The Way Forward*, presentation by Odette Johnson, Director of the Children and Family Services Directorate of AANDC to Françoise Ducros, Assistant Deputy Minister, ESDPPS (August 29, 2012)

41. **Exhibit HR-13, Tab 288**: Aboriginal Affairs and Northern Development Canada, *Renewal of the First Nations Child and Family Services Program*, presentation by Sheilagh Murphy, Director General, Social Policy and Programs Branch, to DGPRC (October 31, 2012)

42. **Exhibit HR-13, Tab 289**: Aboriginal Affairs and Northern Development Canada, *Renewal of the First Nations Child and Family Services Program*, presentation by Sheilagh Murphy, Director General, Social Policy and Programs Branch, to DGPRC (November 2, 2012)

43. **Exhibit R-14, Tab 85**: Aboriginal Affairs and Northern Development Canada, *British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework*, working draft (December 19, 2013)

44. **Exhibit HR-14, Tab 351**: Indian and Northern Affairs Canada, *Comparability of Provincial and INAC Social Programs Funding*, attachment to an email sent by Serge Menard, Policy Analyst, Social Policy and Programs Branch (October 16, 2008)

45. **Exhibit HR-3, Tab 20**: *Private Members' Business*, 39th Parliament, 2nd Session, *Hansard*, 012 (October 31, 2007); and, *Vote No. 27*, 39th Parliament, 2nd Session, Sitting No. 36 (December 12, 2007)

46. **Exhibit R-14, Tab 41**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Indian and Northern Affairs Canada and Health Canada (June 24, 2009)

47. **Exhibit HR-11, Tab 235**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Aboriginal Affairs and Northern Development Canada and Health Canada (January 2013)

48. **Exhibit R-14, Tab 39**: Health Canada, *Update on Jordan's Principle: The Federal Government Response*, presentation (June 2011)

49. **Exhibit HR-15, Tab 420**: *Jordan's Principle Case Conferencing to Case Resolution Federal/Provincial Intake Form* (November 21, 2012)

50. **Exhibit R-14, Tab 54**: *Federal Focal Points Tracking Tool Reference Chart – Manitoba Region* (January 2013)

51. **Exhibit HR-6, Tab 78**: Indian and Northern Affairs Canada, *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, attachment to an email sent by Bill Zaharoff, Director of Intergovernmental Affairs, British Columbia Region (June 3, 2009)

52. **Exhibit HR-3, Tab 10**: Government of Canada, *Statement of Apology - to former students of Indian Residential Schools* (June 11, 2008)

53. **Exhibit HR-14, Tab 340**: Amy Bombay, Kim Matheson and Hymie Anisman, "The Impact of Stressors on Second Generation Indian Residential Schools Survivors" (2011), 48(4) Transcultural Psychiatry 367

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: 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)

Decision of the Tribunal Dated: January 26, 2016

Dates and Place of Hearing: February 25, 26, 27 and 28, 2013;
March 1, 2013;
April 2, 3, 4, 8 and 9, 2013;
May 13, 14, 21 and 22, 2013;
July 15, 16, 17, 19, 22 and 24, 2013;
August 7, 12, 28, 29 and 30, 2013;
September 3, 4, 5, 6, 11, 12, 23, 24, 25 and 26, 2013;
October 28, 29 and 30, 2013;
November 6, 2013;
December 5, 9 and 10, 2013;
January 9, 10, 13, 14 and 15, 2014;
February 10, 11, 12 and 13, 2014;
March 17, 18, 19 and 20, 2014;
April 2, 3, 4 and 30, 2014;
May 1, 7, 8, 14, 15, 28, 29 and 30, 2014;
October 20, 21, 22, 23 and 24, 2014

Ottawa, Ontario

Appearances:

Sébastien Grammond, Robert Grant, David Taylor, Anne Levesque, Sarah Clarke, Michael Sabet, Paul Champ and Yavar Hameed, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Philippe Dufresne, Sarah Pentney and Samar Musallam, counsel for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan, Patricia MacPhee, Nicole Arsenault, Ainslie Harvey, Michelle Casavant and Terry McCormick, counsel for the Respondent

Michael Sherry, counsel for the Chiefs of Ontario, Interested Party

Justin Safayeni, counsel for Amnesty International, Interested Party

Federal Court  Cour fédérale

Date: 20211126

Docket: T-402-19
T-141-20

Citation: 2021 FC 1225

Ottawa, Ontario, November 26, 2021

PRESENT: The Honourable Madam Justice Aylen

CLASS PROCEEDING

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, JONAVON JOSEPH MEAWASIGE) AND JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

BETWEEN:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON (by his litigation guardian, CAROLYN BUFFALO), CAROLYN BUFFALO AND DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

UPON MOTION by the Plaintiffs, on consent and determined in writing pursuant to Rule 369 of the *Federal Courts Rules*, for an order:

(a) Granting the Plaintiffs an extension of time to make this certification motion past the deadline in Rule 334.15(2)(b);

(b) Certifying this proceeding as a class proceeding and defining the class;

(C) Stating the nature of the claims made on behalf of the class and the relief sought by the class;

(d) Stipulating the common issues for trial;

(e) Appointing the Plaintiffs specified below as representative plaintiffs;

(f) Approving the litigation plan; and

(g) Other relief;

CONSIDERING the motion materials filed by the Plaintiffs;

CONSIDERING that the Defendant has advised that the Defendant consents in whole to the motion as filed;

CONSIDERING that the Court is satisfied, in the circumstances of this proceeding, that an extension of time should be granted to bring this certification motion past the deadline prescribed in Rule 334.15(2)(b);

CONSIDERING that while the Defendant's consent reduces the necessity for a rigorous approach to the issue of whether this proceeding should be certified as a class action, it does not relieve the Court of the duty to ensure that the requirements of Rule 334.16 for certification are met [see *Varley v Canada (Attorney General)*, 2021 FC 589];

CONSIDERING that Rule 334.16(1) of the *Federal Courts Rules* provides:

Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(a) the pleadings disclose a reasonable cause of action;	a) les actes de procédure révèlent une cause d'action valable;
(b) there is an identifiable class of two or more persons;	b) il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(e) there is a representative plaintiff or applicant who	e) il existe un représentant demandeur qui :
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

CONSIDERING that, pursuant to Rule 334.16(2), all relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether: (a) the questions of law or fact common to the class members predominate over any questions affecting only individual members; (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings; (c) the class proceeding would involve claims that are or have been the subject of any other proceeding; (d) other means of resolving the claims are less practical or less efficient; and (e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means;

CONSIDERING that:

(a) The conduct of the Crown at issue in this proposed class action proceeding, as set out in the Consolidated Statement of Claim, concerns two alleged forms of

discrimination against First Nations children: (i) the Crown's funding of child and family services for First Nations children and the incentive it has created to remove children from their homes; and (ii) the Crown's failure to comply with Jordan's Principles, a legal requirement that aims to prevent First Nations children from suffering gaps, delays, disruptions or denials in receiving necessary services and products contrary to their *Charter*-protected equality rights.

(b) As summarized by the Plaintiffs in their written representations, at its core, the Consolidated Statement of Claim alleges that:

(i) The Crown has knowingly underfunded child and family services for First Nations children living on Reserve and in the Yukon, and thereby prevented child welfare service agencies from providing adequate Prevention Services to First Nations children and families.

(ii) The Crown has underfunded Prevention Services to First Nations children and families living on Reserve and in the Yukon, while fully funding the costs of care for First Nations children who are removed from their homes and placed into out-of-home care, thereby creating a perverse incentive for First Nations child welfare service agencies to remove First Nations children living on Reserve and in the Yukon from their homes and place them in out-of-home care.

(iii) The removal of children from their homes caused severe and enduring trauma to those children and their families.

(iv) Not only does Jordan's Principle embody the Class Members' equality rights, the Crown has also admitted that Jordan's Principle is a "legal requirement" and thus an actionable wrong. However, the Crown has disregarded its obligations under Jordan's Principle and thereby denied crucial services and products to tens of thousands of First Nations children, causing compensable harm.

(v) The Crown's conduct is discriminatory, directed at Class Members because they were First Nations, and breached section 15(1) of the *Charter*, the Crown's fiduciary duties to First Nations and the standard of care at common and civil law.

(c) With respect to the first element of the certification analysis (namely, whether the pleading discloses a reasonable cause of action), the threshold is a low one. The question for the Court is whether it is plain and obvious that the causes of action are doomed to fail [see *Brake v Canada (Attorney General)*, 2019 FCA 274 at para 54]. Even without the Crown's consent, I am satisfied that the Plaintiffs have pleaded the necessary elements for each cause of action sufficient for purposes of this motion, such that the Consolidated Statement of Claim discloses a reasonable cause of action.

(d) With respect to the second element of the certification analysis (namely, whether there is an identifiable class of two or more persons), the test to be applied is whether the Plaintiffs have defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits

of the action [see *Hollick v Toronto (City of)*, 2001 SCC 68 at para 17]. I am satisfied that the proposed class definitions for the Removed Child Class, Jordan's Class and Family Class (as set out below) contain objective criteria and that inclusion in each class can be determined without reference to the merits of the action.

(e) With respect to the third element of the certification analysis (namely, whether the claims of the class members raise common questions of law or fact), as noted by the Federal Court of Appeal in *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 72, the task under this part of the certification determination is not to determine the common issues, but rather to assess whether the resolution of the issues is necessary to the resolution of each class member's claim. Specifically, the test is as follows:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. (*Western Canadian Shopping Centres*, above at para 39; see also *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3 at paras 41 and 44-46.)

Having reviewed the common issues (as set out below), I am satisfied that the issues share a material and substantial common ingredient to the resolution of each class

member's claim. Moreover, I agree with the Plaintiff that the commonality of these issues is analogous to the commonality of similar issues in institutional abuse claims which have been certified as class actions (such as the Indian Residential Schools and the Sixties Scoop class action litigation). Accordingly, I find that the common issue element is satisfied.

(f) With respect to the fourth element of the certification analysis (namely, whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of fact and law), the preferability requirement has two concepts at its core: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members. A determination of the preferability requirement requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole, and may be satisfied even where there are substantial individual issues [see *Brake*, *supra* at para 85; *Wenham*, *supra* at para 77 and *Hollick*, *supra* at paras 27-31]. The Court's consideration of this requirement must be conducted through the lens of the three principle goals of class actions, namely judicial economy, behaviour modification and access to justice [see *Brake*, *supra* at para 86, citing *AIC Limited v Fischer*, 2013 SCC 69 at para 22].

(g) Having considered the above-referenced principles and the factors set out in Rule 334.16(2), I am satisfied a class proceeding is the preferable procedure for the just

and efficient resolution of the common questions of fact and law. Given the systemic nature of the claims, the potential for significant barriers to access to justice for individual claimants and the Plaintiffs' stated concerns regarding the other means available for resolving the claims of class members, I am satisfied that the proposed class action would be a fair, efficient and manageable method of advancing the claims of the class members.

(h) With respect to the fifth element of the certification analysis (namely, whether there are appropriate proposed representatives), I am satisfied, having reviewed the affidavit evidence filed on the motion together with the detailed litigation plan, that the proposed representative plaintiffs (as set out below) meet the requirements of Rule 334.16(1)(e);

CONSIDERING that the Court is satisfied that all of the requirements for certification are met and that the requested relief should be granted;

THIS COURT ORDERS that:

1. The Plaintiffs are granted an extension of time, *nunc pro tunc*, to bring this certification motion past the deadline in Rule 334.15(2)(b) of the *Federal Courts Rules*.

2. For the purpose of this Order and in addition to definitions elsewhere in this Order, the following definitions apply and other terms in this Order have the same meaning as in the Consolidated Statement of Claim as filed on July 21, 2021:

   (a) **"Class"** means the Removed Child Class, Jordan's Class and Family Class, collectively.

(b) **"Class Counsel"** means Fasken Martineau Dumoulin LLP, Kugler Kandestin LLP, Miller Titerle + Co., Nahwegahbow Corbiere and Sotos LLP.

(c) **"Class Members"** mean all persons who are members of the Class.

(d) **"Class Period"** means:

(i) For the Removed Child Class members and their corresponding Family Class members, the period of time beginning on April 1, 1991 and ending on the date of this Order; and

(ii) For the Jordan's Class members and their corresponding Family Class members, the period of time beginning on December 12, 2007 and ending on the date of this Order.

(e) **"Family Class"** means all persons who are brother, sister, mother, father, grandmother or grandfather of a member of the Removed Child Class and/or Jordan's Class.

(f) **"First Nation"** and **"First Nations"** means Indigenous peoples in Canada, including the Yukon and the Northwest Territories, who are neither Inuit nor Métis, and includes:

(i) Individuals who have Indian status pursuant to the *Indian Act*, R.S.C., 1985, c.I-5 [*Indian Act*];

(ii) Individuals who are entitled to be registered under section 6 of the *Indian Act* at the time of certification;

(iii) Individuals who met band membership requirements under sections 10-12 of the *Indian Act* and, in the case of the Removed Child Class members, have done so by the time of certification, such as where their respective First Nation community assumed control of its own membership by establishing membership rules and the individuals were found to meet the requirements under those membership rules and were included on the Band List; and

(iv) In the case of Jordan's Class members, individuals, other than those listed in sub-paragraphs (i)-(iii) above, recognized as citizens or members of their respective First Nations whether under agreement, treaties or First Nations' customs, traditions and laws.

(g) **"Jordan's Class"** means all First Nations individuals who were under the applicable provincial/territorial age of majority and who during the Class Period were denied a service or product, or whose receipt of a service or product was delayed or disrupted, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department.

(h) **"Removed Child Class"** means all First Nations individuals who:

(i) Were under the applicable provincial/territorial age of majority at any time during the Class Period; and

(ii) Were taken into out-of-home care during the Class Period while they, or at least one of their parents, were ordinarily resident on a Reserve.

(i) **"Reserve"** means a tract of land, as defined under the *Indian Act*, the legal title to which is vested in the Crown and has been set apart for the use and benefit of an Indian band.

3. This proceeding is hereby certified as a class proceeding against the Defendant pursuant to Rule 334.16(1) of the *Federal Courts Rules*.

4. The Class shall consist of the Removed Child Class, Jordan's Class and Family Class, all as defined herein.

5. The nature of the claims asserted on behalf of the Class against the Defendant is constitutional, negligence and breach of fiduciary duty owed by the Crown to the Class.

6. The relief claimed by the Class includes damages, *Charter* damages, disgorgement, punitive damages and exemplary damages.

7. The following persons are appointed as representative plaintiffs:

(a) For the Removed Child Class: Xavier Moushoom, Ashley Dawn Louise Bach and Karen Osachoff;

(b) For the Jordan's Class: Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Measwasige) and Noah Buffalo-Jackson (by his litigation guardian, Carolyn Buffalo); and

(c) For the Family Class: Xavier Moushoom, Jonavon Joseph Meawasige, Melissa Walterson, Carolyn Buffalo and Dick Eugene Jackson (also known as Richard Jackson),

all of whom are deemed to constitute adequate representative plaintiffs of the Class.

8. Class Counsel are hereby appointed as counsel for the Class.

9. The proceeding is certified on the basis of the following common issues:

(a) Did the Crown's conduct as alleged in the Consolidated Statement of Claim [Impugned Conduct] infringe the equality right of the Plaintiffs and Class Members under section 15(1) of the *Canadian Charter of Rights and Freedoms*? More specifically:

(i) Did the Impugned Conduct create a distinction based on the Class Members' race, or national or ethnic origin?

(ii) Was the distinction discriminatory?

(iii) Did the Impugned Conduct reinforce and exacerbate the Class Members' historical disadvantages?

(iv) If so, was the violation of section 15(1) of the *Charter* justified under section 1 of the *Charter*?

(v) Are *Charter* damages an appropriate remedy?

(b) Did the Crown owe the Plaintiffs and Class Members a common law duty of care?

(i) If so, did the Crown breach that duty of care?

(c) Did the Crown breach its obligations under the *Civil Code of Québec*? More specifically:

(i) Did the Crown commit fault or engage its civil liability?

(ii) Did the Impugned Conduct result in losses to the Plaintiffs and Class Members and if so, do such losses constitute injury to each of the Class Members?

(iii) Are Class Members entitled to claim damages for the moral and material damages arising from the foregoing?

(d) Did the Crown owe the Plaintiffs and Class Members a fiduciary duty?

(i) If so, did the Crown breach that duty?

(e) Can the amount of damages payable by the Crown be determined partially under Rule 334.28(1) of the *Federal Courts Rules* on an aggregate basis?

(i) If so, in what amount?

(f) Did the Crown obtain quantifiable monetary benefits from the Impugned Conduct during the Class Period?

(i) If so, should the Crown be required to disgorge those benefits?

(ii) If so, in what amount?

(g) Should punitive and/or aggravated damages be awarded against the Crown?

(i) If so, in what amount?

10. The Plaintiffs' Fresh as Amended Litigation Plan, as filed November 2, 2021 and attached hereto as Schedule "A", is hereby approved, subject to any modifications necessary as a result of this Order and subject to any further orders of this Court.

11. The form of notice of certification, the manner of giving notice and all other related matters shall be determined by separate order(s) of the Court.

12. The opt-out period shall be six months from the date on which notice of certification is published in the manner to be specified by further order of this Court.

13. The timetable for this proceeding through to trial shall also be determined by separate order(s) of the Court.

14. Pursuant to Rule 334.39(1) of the *Federal Courts Rules*, there shall be no costs payable by any party for this motion.

"Mandy Aylen"
Judge

ANNEX A

Court File Nos. T-402-19 / T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON,
NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

FRESH AS AMENDED LITIGATION PLAN

November 2, 2021

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Table of Contents

I. DEFINITIONS

1. The definitions below will be used throughout this Litigation Plan. Any term defined in the Consolidated Statement of Claim that is also used in this Litigation Plan has the same meaning as that included in the Consolidated Statement of Claim or as otherwise defined by the Court.

Aggregate Damages Distribution Process means the system directed by the Court for the **Class Action Administrator** to distribute aggregate damages to **Approved Class Members**;

Approved Class Member(s) means **Approved Removed Child Class Member(s)** and/or **Approved Jordan's Class Member(s)** and/or **Approved Family Class Members**;

Approved Family Class Member(s) means a Family Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Family Class Member, including the brother, sister, mother, father, grandmother or grandfather of an Approved Removed Child Class Member (regardless of whether the Approved Removed Child Class Member is alive) and whose approval as a Family Class Member has not been successfully challenged;

Approved Jordan's Class Member(s) means a Jordan's Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Jordan's Class Member and whose approval as a Jordan's Class Member has not been successfully challenged;

Approved Removed Child Class Member(s) means a Removed Child Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Removed Child Class Member and whose approval as a Removed Child Class Member has not been successfully challenged;

Certification Notice means the information set out in Schedule A to this Litigation Plan, as may be subsequently amended and as approved by the Court;

CHRT Decision means the decision of the **CHRT** in the **CHRT Proceeding** dated January 26, 2016, bearing citation 2016 CHRT 2;

CHRT means the Canadian Human Rights Tribunal;

CHRT Proceeding means the proceeding before the **CHRT** under file number T1340/7008;

Claim Form means the form set out in Schedule C to this Litigation Plan used by the Removed Child Class Members and/or the Jordan's Class Members and/or the Family Class Members to submit a claim, as may be subsequently amended and as approved by the Court;

Class Action Administrator means any settlement administrator or other appropriate firm appointed by the Court to assist in the administration of the class proceeding;

Class Counsel means the consortium of law firms acting as co-counsel in this class proceeding, with the firms of Sotos LLP, Kugler Kandestin LLP, Miller Titerle + Company, Nahwegahbow, Corbiere and Faskens LLP as Solicitors of Record;

Class Member(s) means an individual who falls within the definition of the Removed Child Class and/or the Jordan's Class and/or the Family Class, as pleaded in the Consolidated Statement of Claim and as approved by the Court;

Common Issues means the issues listed in the Notice of Motion for Certification, or as found by the Court, as may be subsequently amended and as approved by the Court;

Common Issues Notice means the information set out in the notice regarding the **Common Issues** to be certified by the Court at Certification, as may be subsequently amended and as approved by the Court;

Crown Class Member Information means information to be provided by the Crown, at the request of the plaintiffs and/or as ordered by the Court, to the **Class Action Administrator** and/or **Class Counsel** regarding the names and last known contact information of all individuals who meet the criteria of Class Members as set out in the Consolidated Statement of Claim or as otherwise defined by the Court, including: (a) a list of all known Class Members' names and last known addresses using the information in the Crown's possession or under its control[1] as well as all individuals who received a product or service pursuant to Jordan's Principle following the CHRT Decision (estimated by the Crown in its representations to the CHRT to be individuals having received over 165,000 services under Jordan's Principle as of October 2018).

Individual Damage Assessment Form means the form set out in Schedule D to this Litigation Plan, as may be subsequently amended and as approved by the Court, to be used by **Approved Class Member(s)** to elect an individual assessment of their damages and commence an individual damage assessment under the **Individual Damage Assessment Process**;

Individual Damage Assessment Process means the procedure and system to be approved by the Court following the **Common Issues** trial to be used to assess and distribute damages to **Approved Class Member(s)** who have requested an individual damage assessment by submitting an **Individual Damage Assessment Form**;

Notice Program means the process, set out in the Litigation Plan, for communicating the **Certification Notice** and/or the **Common Issues Notice** to **Class Members**, as may be subsequently amended and as approved by the Court;

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[1] Where Class Members are known to be represented by counsel, only their name should be provided along with their counsel's name and address.

Opt Out Form means the form set out in Schedule B to this Litigation Plan used by Class Members to opt out of the class proceeding, as may be subsequently amended and as approved by the Court;

Opt Out Period means the deadline, proposed by the plaintiffs as six months from the date on which notice of certification to the Class is published in the manner to be specified by the Court or as otherwise determined by the Court, to opt out of the class proceeding;

Opt Out Procedures means the procedures, set out in the Litigation Plan, for Class Members to opt out of this class proceeding, as may be subsequently amended and as approved by the Court; and

Special Opt Out Procedures means the procedures, set out in the Litigation Plan, for Class Members who have already commenced a civil proceeding in Canada or who are known by the Crown to have already retained legal counsel to opt out of this class proceeding, as may be subsequently amended and as approved by the Court.

II. OVERVIEW

2. The plaintiffs have commenced this action on behalf of First Nations individuals who allege that the Crown has engaged in the discriminatory underfunding of child and family services and breached the equality obligations underlying Jordan's Principle. The class action advances the rights of tens of thousands of First Nations children, former children and family members.

3. This Litigation Plan is advanced as a workable method of advancing the proceeding on behalf of the Class and of notifying Class Members as to how the class proceeding is progressing, pursuant to rule 334.16(1)(e)(ii) of the *Federal Court Rules*. The Litigation Plan is modelled on the class action relating to the Indian Residential Schools.[2]

4. This Litigation Plan sets out a detailed plan for the common stages of this litigation, and sets out, on a without prejudice basis, an early plan for how the individual stage of the action may progress. Given the early stage of the litigation, the plan is necessarily subject to substantial revisions as the case progresses.

5. The plaintiffs are mindful that the CHRT has awarded statutory compensation to a subset of the Class Members pursuant to the CHRA (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39). If CHRT compensation is paid to any Class Members, the plaintiffs will seek a determination from the Court as to whether the Crown is entitled to a set-off or deduction of damages in this action for such amounts.

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[2] See *Baxter v Canada (Attorney General)*, 2006 CanLII 41673 (Ont Sup Ct), and subsequent orders of the Court. See also information available on the website of the Indian Residential Schools Adjudication Secretariat, online <http://www.iap-pei.ca/home-eng.php>.

III. PRE-CERTIFICATION PROCESS

A. The Parties

i. The Plaintiffs

6. The plaintiffs have proposed three classes:

   (a) the Removed Child Class, represented by Xavier Moushoom, Ashley Dawn Louise Bach, and Karen Osachoff;

   (b) the Family Class, represented by Xavier Moushoom, Jonavon Joseph Meawasige, Melissa Walterson, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson; and

   (c) the Jordan's Class, represented by Jeremy Meawasige, by his litigation guardian, Jonavon Joseph Meawasige; and Noah Buffalo-Jackson, by his litigation guardian, Carolyn Buffalo.

ii. The Defendant

7. The defendant is the Crown.

B. The Pleadings

i. Consolidated Statement of Claim

8. The plaintiffs have delivered a Consolidated Statement of Claim issued with leave of the Honourable Justice St-Louis dated July 7, 2021.

ii. Statement of Defence

9. The Crown has not delivered a Statement of Defence.

iii. Third Party Claim

10. The Crown has not issued any Third Party Claim.

C. Pre-Certification Communication Strategy

i. Responding to Inquiries from Putative Class Members

11. Both before and since the commencement of this class proceeding, Class Counsel have received many communications from Class Members affected by this class proceeding.

12. With respect to each inquiry, the individual's name, address, email and telephone number is added to a confidential database. Class Members are asked to register on the websites of Class Counsel. Once registered, they receive regular updates on the progress of the class proceeding in French and English. Any individual Class Members who contact Class Counsel are responded to in their preferred language.

ii. Pre-Certification Status Reports

13. In addition to responding to individual inquiries, Class Counsel have created a webpage concerning the class proceeding in English and French (see: https://sotosclassactions.com/cases/current-cases/first-nations-youth/). The most current information on the status of the class proceeding is posted and is updated regularly in English and French.

14. Copies of the publicly filed court documents and court decisions are accessible from the webpage. In addition, phone numbers for Class Counsel in Quebec and Ontario as well as email contact information are provided.

15. Class Counsel send update reports to Class Members who have provided their contact information and have indicated an interest in being notified of further developments in the class proceeding.

iii. Pre-certification outreach

16. Class Counsel have presented the proposed class action to a council of First Nations social services delivery personnel for the Province of Québec and the region of Labrador, as well as the First Nations youth directors forum in British Columbia. Class Counsel are in the process of arranging similar presentations to affected communities in Québec and elsewhere in Canada.

D. Settlement Conference

i. Pre-Certification Settlement Conference

17. The plaintiffs have participated in a pre-Certification mediation to determine whether any or all of the issues arising in the class proceeding can be resolved. Mediation is ongoing and may require that some of the targeted timelines in this Litigation Plan be amended on agreement of the parties or as otherwise ordered by the Court to allow negotiations to advance.

E. Timetable

IV. POST-CERTIFICATION PROCESS

A. Timetable

i. Plaintiffs' Timetable for the Post-Certification Process

18. The plaintiffs intend to proceed to trial on an expedited basis or a hybrid summary judgment/*viva voce* trial. It is anticipated that all of the documentary evidence produced by the Crown in the CHRT Proceeding will be relevant and producible in this class proceeding. Because of the extensive documentary production in the CHRT Proceeding, the plaintiffs expect few, if any, disputes as to documentary productions in this case relating to the time period covered by the CHRT Proceeding (*i.e.*, 2006-present). Furthermore, in light of the extensive testimony given at the CHRT Proceeding, it is anticipated that oral discovery can proceed quickly after certification and can be completed in a limited period of time. The plaintiffs have less clarity at this time regarding productions pertaining to the 1991-2006 period.

19. The plaintiffs propose that the following post-Certification process timetable, as explained in detail below:

Certification Notice to Class Members commences	at a date to be determined by the Court after certification
Exchange Affidavits of Documents within	90 days after Certification Notice to Class Members

Motions for Production of Documents, Multiple Examinations of Crown representatives or for Examinations of Non-Parties to be conducted within	120 days after Certification Notice to Class Members
Examinations for Discovery to be conducted within	150 days after Certification Notice to Class Members
Certification Notice to Class Members completed within	60 days from a date to be determined by the Court
Trial Management Conference re: Expert Evidence	180 days after Certification Notice to Class Members
Motions arising from Examinations for Discovery within	180 days after Certification Notice to Class Members
Undertakings answered within	200 days after Certification Notice to Class Members
Further Examinations, if necessary, within	240 days after Certification Notice to Class Members
Common Issues Pre-Trial to be conducted	290 days after Certification Notice to Class Members
Opt Out Period deadline	Six months after Notice of Certification to Class Members
Common Issues Trial or Hybrid Trial to be conducted within	330 days after Certification Notice to Class Members

B. Certification Notice, Notice Program and Opt Out Procedures

i. Certification Notice

20. The Certification Notice and all other notices to Class Members provided by the plaintiffs will, once finalized and approved by the Court, be translated into French. The plaintiffs will explore whether it will be necessary to translate the Certification Notice and/or other notices into some First Nations languages, subject to Court approval.

21. The Certification Notice will, subject to further amendments, be in the form set out in Schedule A hereto.

ii. Notice Program

22. The plaintiffs propose to communicate the Certification Notice to Class Members through the following Notice Program.

23. The plaintiffs will provide Certification Notice to Class Members by arranging to have the Certification Notice (and its translated versions whenever possible) communicated/published in the following media starting on a date to be determined by the Court, as frequently as may be reasonable or as directed by the Court under rule 334.32 of the *Federal Courts Rules*. In particular, the plaintiffs propose the following means of providing Certification Notice:

(a) A press release on the start date of notice of certification to the Class to be determined by order of the Court;

(b) Direct communication with Class Members:

(i) by email or regular mail to the last known contact information of Class Members provided by the Crown (*i.e.*, Crown Class Member Information);

(ii) by email or regular mail to all Class Members who have provided their contact information to Class Counsel, including through the Class Proceeding's webpage;

(iii) by regular mail to the last known addresses of all Status Card holders in Canada born on or after April 1, 1991;

(c) Distribution by the Assembly of First Nations to its membership of First Nations bands across Canada;

(d) Email to First Nations children's aid societies across Canada;

(e) Circulation through the following media:

(i) Aboriginal newspapers/publications such as First Nations Drum, The Windspeaker, Mi'kmaq Maliseet Nations News, APTN National News;

(ii) radio outlets, such as Aboriginal radio CFWE, CBC national and CBC regional;

(iii) television outlets, such as on The Aboriginal Peoples Television Network; and / or

(iv) social media outlets, such as Facebook and Instagram.

iii. Opt Out Procedures

24. The plaintiffs propose Opt Out Procedures for Class Members who do not wish to participate in the class proceeding.

25. The Certification Notice will include information about how to Opt Out of the class proceeding and will provide information about how to obtain and submit the appropriate Opt Out Forms to the Class Action Administrator and/or Class Counsel.

26. There will be one standard Opt Out Form for all Class Members.

27. Class Members will be required to file the Opt Out Form with the Class Action Administrator and/or Class Counsel within the Opt Out Period.

28. The Class Action Administrator or Class Counsel shall, within 30 days after the expiration of the Opt Out Period, deliver to the Court and the Parties an affidavit listing the names of all persons who have opted out of the Class Action.

iv. Special Opt Out Procedures

29. The plaintiffs propose Special Opt Out Procedures for Class Members who are either named party plaintiffs in a civil proceeding in Canada or who are known by the Crown to have retained legal counsel in respect of the subject matter of this action with the express purpose of starting a separate action against the Crown.

30. Ongoing civil actions by Class Members who do not opt out of the Class Action should be dealt with in a manner to be determined by this Court or by the Court in which such proceedings are brought.

C. Identifying and Communicating with Class Members

i. Identifying Class Members

31. As stated above, the plaintiffs intend to request the Crown Class Member Information.

ii. Database of Class Members

32. Class Counsel will maintain a confidential database of all Class Members who contact Class Counsel. The database will include each individual's name, address, telephone number, and/or email address where available.

iii. Responding to Inquiries from Class Members

33. Class Counsel and their staff respond to each inquiry by Class Members.

34. Class Counsel have a system in place to allow for responses to inquiries by Class Members in their language of choice whenever possible.

iv. Post Certification Status Reports

35. In addition to responding to individual inquiries, Class Counsel will continually update the webpage dedicated to this class action with information concerning the status of the class proceeding.

36. Class Counsel will send update reports to Class Members who have provided their contact information. These update reports will be sent as necessary or as directed by the Court.

D. Documentary Production

i. Affidavit/List of Documents

37. The plaintiffs will be required to deliver an Affidavit of Documents within 90 days after after notice of certification is given to Class Members. The Crown will similarly be required to deliver a List of Documents within 90 days after notice of certification is given to Class Members.

38. The Parties are expected to serve Supplementary Affidavits (or Lists) of Documents as additional relevant documents are located.

ii. Production of Documents

39. All Parties are expected to provide, at their own expense, electronic copies of all Schedule "A" productions at the time of delivering their Affidavit of Documents. All productions are to be made in electronic format.

40. Documentary productions are to include, but not be limited to, all documents produced and exhibits tendered in the CHRT Proceedings.

iii. Motions for Documentary Production

41. Any motions for documentary production shall be made within 120 days after certification notice is given to Class Members.

iv. Document Management

42. The Parties will each manage their productions with a compatible document management system, or as directed by the Court. All documents are to be produced in OCR format.

43. All productions should be numbered and scanned electronically to enable quick access and efficient organization of documents.

E. Examinations for Discovery

44. Examinations for Discovery will take place within 150 days after certification notice is given to Class Members.

45. The plaintiffs expect to request the Crown's consent to examine more than one Crown representative. In the event that a dispute arises in this regard, the plaintiffs propose to bring a motion within 120 days after certification notice is given to Class Members.

46. The plaintiffs anticipate that the Examination for Discovery of a properly selected and informed officer of the Crown will take approximately 10 days, subject to refusals and undertakings.

47. The plaintiffs anticipate that the Examination for Discovery of the representative plaintiffs will take approximately one day, subject to refusals and undertakings.

F. Interlocutory Matters

i. Motions for Refusals and Undertakings

48. Specific dates for motions for undertakings and refusals that arise from the Examinations for Discovery will be requested upon Certification. Motions for refusals and undertakings will be heard within 180 days after certification notice is given to Class Members.

ii. Undertakings

49. Undertakings are to be answered within 200 days after certification notice is given to Class Members.

iii. Re-attendances and Further Examinations for Discovery

50. Any re-attendances or further Examinations for Discovery required as a result of answers to undertakings or as a result of the outcome of the motions for refusals and undertakings should be completed within 240 days after certification notice is given to Class Members.

G. Expert Evidence

i. Identifying Experts and Issues

51. A Trial Management Conference will take place following Examinations for Discovery at which guidelines for identifying experts and their proposed evidence at trial will be determined.

H. Determination of the Common Issues

i. Pre-Trial of the Common Issues

52. Upon Certification, the Court will be asked to assign a date for a Pre-Trial relating to the Common Issues trial.

53. The plaintiffs expect that a full day will be required for a Pre-Trial and will request that the Pre-Trial be held within 290 days after certification notice is given to Class Members and, in any event, at least 90 days before the date of the Common Issues trial.

ii. Trial of the Common Issues

54. Upon Certification, the Court will be asked to assign a date for the Common Issues trial.

55. The plaintiffs propose that the trial of the Common Issues be held 330 days after certification notice is given to Class Members.

56. The length of time required for the Common Issues trial will depend on many factors and will be determined at the Trial Management Conference.

V. POST COMMON ISSUES DECISION PROCESS

A. Timetable

i. Plaintiffs' Timetable for the Post-Common Issues Decision Process

57. The plaintiffs propose that the following timetable be imposed by the Court following the Court's judgment on the Common Issues:

Common Issues Notice provided	Within 90 days of Common Issues decision
Individual Issue Hearings, if any, begin	120 days after decision
Individual Damage Assessments, if any, begin	240 days after decision
Deadline to Submit Claim Forms (as of right)	Within 1 year of decision
Deadline to Submit Claim Forms (as of right in prescribed circumstances or with leave of the Court)	1 year after decision

B. Common Issues Notice

i. Notifying Class Members

58. The Common Issues Notice will, subject to further amendments, be substantially in the form approved by the Court at the Common Issues trial. The Common Issues Notice may contain, amongst others, information on any aggregate damages awarded and any issues requiring individual determination, as approved by the Court.

59. The plaintiffs propose to circulate the Common Issues Notice within 90 days after the Common Issues judgment.

60. The Common Issues Notice will be circulated in the same manner as set out above dealing with the Certification Notice or as directed by the Court.

C. Claim Forms

i. Use of Claim Forms

61. The Court will be asked to approve under rule 334.37 the use of standardized Claim Forms by Class Members who may be entitled to a portion of the aggregate damage award or who may be entitled to have an individual assessment.

ii. Obtaining and Filing Claim Forms

62. The procedure for obtaining and filing Claim Forms will be set out in the Common Issues Notice.

63. The plaintiffs propose to use a single standard Claim Form, substantially in the form attached as Schedule C, for all three classes, subject to further amendments and as approved by the Court.

64. The plaintiffs propose that counselling be made available to Class Members in need of support and assistance when completing the Claim Forms. Where necessary, a process for appointing a guardian or trustee to assist the Class Members will be developed.

65. Before completing a Claim Form, Class Members will be able to review information about them in the possession of Canada relevant to their claim (the Crown Class Member Information). That information may include:

(a) any records relating to the Class Member's voluntary or involuntary placement in out-of-home care during the Class Period;

(b) any records relating to a need by the Class Member for a service or product;

(c) any records relating to a request made by the Class Member for a service or product;

(d) any records relating to the denial of a service or product to the Class Member;

(e) any records relating to any service(s) or product(s) provided by the Crown to the Class Member; and/or

(f) any records relating to the family status or family relationship between a Family Class Member and a Removed Child Class Member or a Jordan's Class Member.

66. Class Members will be required to file the appropriate Claim Form with the Class Action Administrator and/or Class Counsel within the deadlines set out below or as directed by the Court.

67. The Class Action Administrator will be responsible for receiving all Claim Forms.

iii. Deadline for Filing Claim Forms

68. Class Members will be advised of the deadline for filing Claim Forms in the Common Issues Notice.

69. The plaintiffs propose that Class Members be given one year, or such period as set out by the Court, after the Common Issues judgment to file Claim Forms as of right.

70. The plaintiffs propose that Class Members be entitled to file Claim Forms more than one year after the Court's judgment on the Common Issues in certain circumstances prescribed by the Court (*i.e.*, lack of awareness of entitlement, etc.) or with leave of the Court (*i.e.*, based on mental or physical health issues, etc.).

D. Determining and Categorizing Class Membership

i. Approving Removed Child Class Members

71. The Class Action Administrator will determine whether an individual submitting a Claim Form as a Removed Child Class Member properly qualifies as a Class Member.

72. In addition, the Class Action Administrator will determine and categorize the duration of the Removed Child Class Member's presence in out-of-home care. The Class Action Administrator will also determine the number of out-of-home care locations that the Removed

Child Class Member was placed in, as well as whether such locations were on or off Reserve and whether such locations were within the community of the Class Member.

73. The Class Action Administrator will make these determinations by referring to the information set out in the Claim Form as well as the Crown Class Member Information.

74. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual filing the Removed Child Class Claim Form or the Crown to make these determinations.

ii. Approving Jordan's Class Members

75. The Class Action Administrator will determine whether an individual submitting a Claim Form as a Jordan's Class Member properly qualifies as a Class Member.

76. The Class Action Administrator will make these determinations following guidelines determined by the Court at the Common Issues trial in part by referring to the information set out in the Claim Form. Such guidelines may include: (a) whether the Class Member needed a service or product at any point during the Class Period; (b) whether the Class Member was denied that service or product; (c) whether the Class Member's receipt of a service or product was delayed or disrupted; (d) whether such denial, delay or disruption was based on lack of funding, lack of jurisdiction or a jurisdictional dispute between governments or government departments; and/or (e) whether such denial, disruption or delay happened while the Class Member was under the applicable provincial/territorial age of majority.

77. The Class Action Administrator will also make these determinations in part by referring to the Crown Class Member Information regarding the number of Class Members who have received a service or product under Jordan's Principle since the CHRT Decision.

78. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual submitting the Jordan's Class Claim Form or the Crown to make these determinations.

iii. Approving Family Class Members

79. The Class Action Administrator will determine whether an individual submitting a Family Class Claim Form properly qualifies as a Family Class Member.

80. These determinations will be made by the Class Action Administrator by referring to Crown Class Member Information and the information set out in the Claim Form with respect to the relationship of the proposed Family Class Member with an Approved Removed Child Class Member.

81. The Class Action Administrator will, where appropriate and necessary, request in writing further information from the individual filing the Claim Form to make these determinations.

iv. Deceased Class Members

82. The estate of a deceased Class Member may submit a Claim Form if the deceased Class Member died on or after April 1, 1991.

83. If the deceased Class Member would otherwise have qualified as an Approved Class Member, the estate will be entitled to be compensated in accordance with the Aggregate Damages Distribution Process. The estate will not have the option to proceed under the Individual Damage Assessment Process except with leave of the Court.

v. Notifying Class Members, Challenging and Recording Decisions

84. Within 30 days of receipt of a Claim Form, the Class Action Administrator will notify the individual of its decision on whether the individual is an Approved Class Member. Individuals

who are not approved as Class Members will be provided with information on the procedures to follow to challenge the decision of the Class Action Administrator. The plaintiffs propose that these procedures include an opportunity to resubmit an amended Claim Form with supporting documentation capable of verifying that the individual is a Class Member.

85. All interested parties will be provided with the ability to appeal a decision by the Class Action Administrator to the Court or in a manner to be prescribed. Class Counsel may challenge the decision on behalf of affected individuals.

86. The Class Action Administrator will keep records of all Approved Class Members and their respective Claim Forms and will provide this information to Class Counsel, the Crown and other interested parties on a monthly basis. Class Counsel and/or other interested parties will have 30 days after receiving this information to challenge the Class Action Administrator's decision by advising the Class Action Administrator and the other affected parties in writing of the basis for their challenge. The responding party will be given 30 days thereafter to respond in writing to the challenge at which time the Class Action Administrator will reconsider its decision and advise all parties.

E. Aggregate Damages Distribution Process

i. Distribution of Aggregate Damages

87. The Class Action Administrator will distribute the aggregate damages to all Approved Class Members in the manner directed by the Court.

88. The plaintiffs will propose that Approved Class Members be entitled to a proportion of the aggregate damages as determined by the Class Action Administrator based on factors to be approved by the Court, including but not limited to: (a) the duration of the Class Member's

presence in out-of-home care; (b) the number of out-of-home care locations where the Class Member was placed as a child; (c) the duration of deprivation from a service or product as a result of a delay, denial or disruption contrary to Jordan's Principle; and (d) the family relationship of the Family Class Member to a given Removed Child Class Member.

89. The Class Action Administrator, upon advising Approved Class Members of its decision on their membership as set out above, will within a reasonable period of time to be determined by the Court, advise the Approved Class Members of the proportion of aggregate damages owing to each Approved Class Member under the Aggregate Damages Distribution Process to be approved by the Court.

90. In addition, if applicable, the Class Action Administrator will provide Approved Class Members with a package of materials including: information on how to collect their aggregate damage awards, information on Class Members' ability to proceed through the Individual Damage Assessment Process, copies of the Individual Damage Assessment Form along with a guide on how to complete the form, and contact information for obtaining independent legal advice and counselling. Such information is to be provided in a culturally responsive and appropriate style, making full use of interactive media, including video tutorials.

ii. Seeking an Individual Damage Assessment

91. Approved Class Members, when notified of their entitlement to aggregate damages, may be given information on their right to have their compensation individually assessed under the Individual Damage Assessment Process set out below.

F. Individual Damage Assessment Process

i. Individual Damage Assessment Forms

92. When Approved Class Members are notified of their aggregate damage entitlement and information on their right to proceed under the Individual Damage Assessment Process, they will be provided with an Individual Damage Assessment Form as set out in Schedule D.

93. If applicable, the plaintiffs propose that a request for individual damages be made by sending an Individual Damage Assessment Form to the Class Action Administrator, and that only those individuals who wish to proceed through the Individual Damage Assessment Process be required to submit Individual Damage Assessment Forms.

ii. Individual Damage Assessments

94. The Court may be asked to approve the use of an Individual Damage Assessment Process after a judgment on the Common Issues or otherwise as directed by the Court.

95. The Individual Damage Assessment Process would be available to all Approved Class Members except those who are found by the Court not to be entitled to individual damages following the Common Issues trial.

iii. Individual Issue Hearings

96. The Court will be asked to provide directions, or to appoint persons to conduct references under rule 334.26 of the *Federal Courts Rules* or appoint a judge to conduct test cases involving selected Approved Class Members who are proceeding under the Individual Damage Assessment Process to assist with the matters that may or may not remain in issue after the determination of the Common Issues, such as:

(a) Hearing rules for individual assessments;

(b) A compensation matrix for individual damages;

(c) Assistance in resolving disputes relating to the definitions of key terms such as "cultural and language loss", "pain and suffering", "physical abuse", and "sexual abuse"; and

(d) Other matters raised by the Court or the parties during the Common Issues litigation.

G. Class Proceeding Funding and Fees

i. Plaintiffs' Legal Fees

97. The plaintiffs' fees are to be paid on a contingency basis, subject to the Court's approval under rule 334.4 of the *Federal Courts Rules*.

98. The agreement between the representative plaintiffs and Class Counsel states that legal fees and disbursements to be paid to Class Counsel shall be on the following basis:

(a) Aggregate damages recovery: 20% of the first two hundred million dollars ($200,000,000) in recovery by settlement or judgment, plus 10% of any amounts recovered by settlement or judgment beyond the first two hundred million dollars; and

(b) Individual damages recovery: 25% of settlement or judgment.

ii. Funding of Disbursements

99. Funding of legal disbursements for the representative plaintiffs has been, and will continue to be, available through Class Counsel, unless the plaintiffs and Class Counsel subsequently deem it to be in the best interests of the Class to obtain third-party funding. Class Counsel will advise the Court of such third-party funding and seek approval thereof.

H. Settlement Issues

i. Settlement Offers and Negotiations

100. The plaintiffs have been conducting settlement negotiations with the Crown with a view to achieving a fair and timely resolution.

ii. Mediation and Other Non Binding Dispute Resolution Mechanisms

101. The plaintiffs have been participating in mediation and negotiations in an effort to try to resolve the dispute or narrow the issues in dispute between the Parties.

I. Review of the Litigation Plan

i. Flexibility of the Litigation Plan

102. This Litigation Plan will be reconsidered on an ongoing basis and may be revised under the continued case management authority of the Court before or after the determination of the Common Issues or as the Court sees fit.

October 29, 2021

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SCHEDULE "A"

FIRST NATIONS YOUTH CARE (THE MILLENNIUM SCOOP) CLASS ACTION

PROPOSED NOTICE OF CERTIFICATION

THIS NOTICE MAY AFFECT YOUR RIGHTS. PLEASE READ CAREFULLY.

The Nature of the Lawsuit

In March 2019, Sotos LLP, Kugler Kandestin LLP and Miller Titerle + Co. (collectively "Class Counsel") commenced an action on behalf of First Nations plaintiffs in the Federal Court of Canada in Montreal, against the Attorney General of Canada (the "Crown").

The lawsuit claims that starting in 1991 the Crown instituted discriminatory funding policies across Canada that led to First Nations children being removed from their homes and communities and placed in out-of-home care. The lawsuit also claims that the Crown delayed, disrupted or denied the delivery of needed public services and products to First Nations youth contrary to Jordan's Principle.

The action was brought on behalf of a Class of:

(a) all First Nations youths who were taken into out-of-home care since April 1, 1991, while they or at least one of their parents were ordinarily resident on a Reserve;

(b) all First Nations youths who were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, on the grounds of lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department (contrary to Jordan's Principle);

(c) family members of the Class Members cited in (a) above.

By order dated [**INSERT DATE**], The Honourable Justice St-Louis certified the action as a class proceeding, appointing Xavier Moushoom and Jeremy Meawasige (by his litigation guardian, Maurina Beadle) as representative plaintiffs for the class.

The Court found that the following issues affecting the Class will be tried at a Common Issues trial:

- [**INSERT CERTIFIED COMMON ISSUE**]
- …

Participation in the Class Action

If you fall within the class definition, you are automatically included as a member of the Class, unless you choose to opt out of the Class Action, as explained below. All members of the Class will be bound by the judgment of the Court, or any settlement reached by the parties and approved by the Court.

At this juncture, the Court has not taken a position as to the likelihood of recovery for the representative plaintiffs or the Class, or with respect to the merits of the claims or defences asserted by the Crown.

Fees and Disbursements

You do not need to pay any legal fees out of your own pocket. A retainer agreement has been entered into between the representative plaintiffs and Class Counsel with respect to legal fees. The agreement provides that the law firms have been retained on a contingency fee basis, which means they will only be paid their fees in the event of a successful result in the litigation or a Court-approved settlement.

You will not be responsible for Defendant's legal costs if the class action is unsuccessful. Any fee paid to lawyers for the Class is subject to the Court's approval.

Opt Out

If you are a class member and wish to exclude yourself from this class proceeding ("opt out"), you must complete and return the "Class Member Opt Out" form by no later than [**INSERT DATE**]. The Opt Out form may be downloaded at: [**INSERT WEBSITE ADDRESS**].

Class members who choose to opt out within the above noted deadline will not recover any monies if the representative plaintiffs are successful in this action. If class members do not choose to opt out by the deadline, they will be bound by any judgment ultimately obtained in this class action, whether favourable or not, or any settlement if approved by the Court.

Contact Information

If you have any questions or concerns about the matters in this Notice or the status of the class action, you may contact Class Counsel in a number of ways.

By phone: [**INSERT PHONE NUMBER**]

By email: [**INSERT EMAIL**]

Toll-Free Hotline: [**INSERT TELEPHONE**]

By mail: [**INSERT ADDRESS**]

SCHEDULE “B”

OPT OUT FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I do not want to participate in the class action styled as ***Xavier Moushoom et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children. I understand that by opting out, I will not be eligible for the payment of any amounts awarded or paid in the class action, and if I want an opportunity to be compensated, I will have to make an individual claim and decide whether to engage a lawyer at my own expense.

Dated: _____

_____
Signature

_____
Full Name

_____
Address

_____
City, Province, Postal Code

_____
Telephone

_____
Email

This Notice must be delivered by regular mail, email or fax on or before_____, 201_ to be effective.

SCHEDULE "C"

CLAIM FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I, _____ (insert full name(s), including maiden name if applicable), have received Notice of the National Class Action styled as ***Xavier Moushoom et al v. The Attorney General of Canada*** regarding the claims of discrimination against First Nations children. My date of birth is _____ (insert day, month, year of birth).

I believe that I am a Class Member and I wish to submit a claim as a member of the following Class or Classes (mark the applicable item(s) with an X):

[_] Removed Child Class

[_] Jordan's Class

[_] Family Class

If you selected the Removed Child Class, please summarize below your placement(s) in out-of-home care since April 1, 1991:

Number of foster home(s)	**Number of years of placement in foster home(s)**	**Was foster home(s) on-reserve or off-reserve?**	**Was foster home(s) within your own First Nations community?**

If you selected the Jordan's Class, please summarize below the public services or products that you needed since April 1, 1991, and that were denied, delayed or disrupted:

Product(s) or service(s) needed	**Was a request made for the**	**Was the service(s) or product(s) denied, delayed or disrupted?**	**The date(s) of need, request, and/or denial,**

	service(s) or product(s)?		delay or disruption

If you selected the Family Class, please summarize below your relationship to the member(s) of the Removed Child Class:

Full name(s) and claim number of the Approved Removed Child Class Member in your family	Your relationship to the Class Member (only the brother, sister, mother, father, grandmother or grandfather of an Approved Removed Child Class Member)

My mailing address is:

_____
Street name, Apartment #

_____
City, Province

_____
Postal Code

_____
Telephone Number(s)

_____
Email address

Signed: _____ Date: _____

SCHEDULE “D”

INDIVIDUAL DAMAGE ASSESSMENT FORM

TO:
[CLASS ACTION ADMINISTRATOR TO BE APPOINTED]
[Address]
[Email]
[Fax]
[Phone number]

ATTN: [CLASS ACTION ADMINISTRATOR TO BE APPOINTED]

I, _____ [insert full name(s), including maiden name if applicable], have been notified that I am an Approved Removed Child Class Member or Approved Jordan's Class Member. My claim number is _____ [insert assigned claim number].

I have been provided with a package of information outlining and explaining my option to request an individual damage assessment in accordance with the Individual Damage Assessment Process.

I am also aware that I can obtain independent legal advice with respect to this request and can obtain assistance to complete this form at no charge to me by contacting [insert assigned contact #].

Below is information relating to my experience in out-of-home care and the impacts and harms that resulted from my experience:

[The Individual Damage Assessment Form will be designed after a Court decision on the Common Issues. The goal of the Individual Damage Assessment Form though will be to obtain, amongst others, the following information from Approved Class Members:

- *Information relating to the Class Member's age at apprehension, the foster households where the Class Member was placed, duration of out-of-home care;*
- *Information relating to any abuse on the Class Member, including each incident of a compensable harm/wrong, such as the dates, places, times of the incidents and information about the alleged perpetrator for each incident;*
- *Information relating to compensable impacts, including cultural and language impacts;*
- *A narrative relating to the experience of the individual while in care;*
- *The reason(s) for apprehension;*
- *Whether expert evidence will be provided to support a claim for certain consequential harms such as past and future income loss;*

- *Information on the treatment records including records of customary or traditional counsellors or healers they will be submitting to assist in proving either the abuse or the harm suffered or both;*

- *Authorizations for the Crown to obtain documents; and*

- *Such further and other information that is deemed necessary and appropriate.]*

Below is information relating to my experience with the denial/delay/disruption of the receipt of a public service or product and the impacts and harms that resulted from my experience:

[The Individual Damage Assessment Form will be designed after a Court decision on the Common Issues. The goal of the Individual Damage Assessment Form though will be to obtain, amongst others, the following information from Approved Class Members:

- *Any conditions or circumstances that required a public service or product;*

- *Reasons for denial of a public service or product;*

- *Department(s) of contact;*

- *Authorizations for the Crown to obtain documents; and*

- *Such further and other information that is deemed necessary and appropriate.]*

Signed: _____ Date: _____

Federal Court of Appeal | Cour d'appel fédérale

Date: 20220421

Docket: A-325-21

Citation: 2022 FCA 67

Present: **STRATAS J.A.**

BETWEEN:

RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA, BLAISE ALLEYNE and MATTHEW BATTISTA

Appellants

and

CANADA (MINISTER OF EMPLOYMENT, WORKFORCE, AND LABOUR)

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 21, 2022.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20220421

Docket: A-325-21

Citation: 2022 FCA 67

Present: **STRATAS J.A.**

BETWEEN:

RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA, BLAISE ALLEYNE and MATTHEW BATTISTA

Appellants

and

CANADA (MINISTER OF EMPLOYMENT, WORKFORCE, AND LABOUR)

Respondent

REASONS FOR ORDER

STRATAS J.A.

[1] Three parties move for leave to intervene in this appeal: the Association for Reformed Political Action (ARPA) Canada, Action Canada for Sexual Health and Rights, and the Evangelical Fellowship of Canada. For the reasons that follow, the motions will be dismissed.

A. The issue in this appeal

[2] In 2018, the Minister of Employment, Workforce, and Labour required that applicants for funding under the Canada Summer Jobs Program attest to several statements. One of these statements is that the applicant respects individual human rights, Charter rights, and reproductive rights. The appellant, the Right to Life Association of Toronto and Area did not so attest. Thus, the Minister did not consider its application for funding.

[3] In the Federal Court, the appellants brought an application for judicial review seeking quash the refusal on the grounds of improper purpose, irrelevant considerations, lack of authorization under the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, bad faith, and the existence of a closed mind. The appellants also alleged that the Minister failed to appropriately balance freedom of religion, freedom of expression, and government objectives in accordance with *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395. The constitutional challenge was framed and asserted under the rubric of *Doré* and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, with reasonableness as the standard of review. The challenge was not framed and asserted on the basis that the order itself was state action that violated the Charter, with correctness as the standard of review: see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 and *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416.

[4] The Federal Court (*per* Kane J.) dismissed the application for judicial review: 2021 FC 1125.

B. The test for intervention

[5] The most recent authority from a full panel of this Court on interventions is *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3. But, as we shall see, *Sport Maska* requires us to look to other authorities on intervention.

[6] The respondent submits that *Sport Maska* adopted the test in the older case of *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.) and so *Rothmans* remains the governing authority. Inexplicably and quite disappointingly, the respondent ignores the other jurisprudence of this Court, much of which ignores or downplays *Rothmans*.

[7] *Sport Maska* itself tells us that articulations and refinements of the test in other cases are also usable, indeed in some respects preferable. In particular, *Sport Maska* approved the discussion in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253 on what makes an intervention in "the interests of justice", a discussion adopted in many other cases. It is not right to suggest, as the respondent does, that *Rothmans* remains the governing authority.

[8] Indeed, *Sport Maska* did not address certain critical issues and so we are driven to look at other authorities:

- *Rule 109*. Rule 109 is paramount. This is the governing legislation. Legislation prevails over all court decisions: *Canada (Attorney General) v. Utah*, 2020 FCA 224, 455 D.L.R. (4th) 714 at para. 28; *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131, 424 D.L.R. (4th) 366 at para. 54; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 82. As other cases cited below suggest, the assessment whether an intervener should be allowed into the proceedings must start with the requirements of Rule 109.

- *Criticisms of Rothmans*. *Rothmans* makes no sense in certain respects: *Pictou Landing* at paras. 6-9. For example, it injects a "direct interest" standard—one sufficient for standing as a party—into the test for intervention. But party status and intervener status are two entirely different things.

- *The "interests of justice" criterion for intervention*. *Sport Maska* left this undefined. Thus, it left it in the eyes of the beholder, *i.e.*, the undefined, unstated, impossible-to-articulate impressions of individual judges. This is unacceptable, as we are governed by objective law and legal doctrine, not subjective inclinations and feelings: see *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para. 11; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, 481 C.R.R. (2d) 234 at paras. 8-9.

[9] Since *Pictou Landing*, this Court has refined the test for intervention by working in and elaborating on the criterion of usefulness that is central to Rule 109: *Canada (Attorney General)*

v. Kattenburg, 2020 FCA 164 and *Canadian Council for Refugees*. The most recent case, *Canadian Council for Refugees*, collects all the various strands in our jurisprudence—including those adopted by and left unaddressed in *Sport Maska*—and offers a compendious test. Quite appropriately, the three moving parties adopt *Canadian Council for Refugees* at paras. 6 and 9 as the test we should apply here.

[10] The test is as follows:

I. Will the proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues? To determine usefulness, four questions need to be asked:

- What issues have the parties raised?
- What does the proposed intervener intend to submit concerning those issues?
- Are the proposed intervener's submissions doomed to fail?
- Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills, and resources and will dedicate them to the matter before the Court?

III. Is it in the interests of justice that intervention be permitted? The list of considerations is not closed but includes the following questions:

- Is the intervention consistent with the imperatives in Rule 3? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?

- Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?

- Has the first-instance court in this matter admitted the party as an intervener?

- Will the addition of multiple interveners create the reality or an appearance of an “inequality of arms” or imbalance on one side?

[11] Often applications to intervene run afoul of the first part of this test—the usefulness of the intervener's submissions. In some cases, the issues, viewed in light of the standard of review, are such that an intervener will have little room to be useful; in others, such as those involving broad and uncertain issues of law for which the standard of review is correctness, an intervener may have more room to be useful. The best applications to intervene concentrate on usefulness. They "hone into the true nature of the case, locating the particular itch in the case that needs to be scratched, and telling us specifically how they will go about scratching it" and "investigate the evidentiary record and the specific issues in the case, enabling them to offer much detail and particularity on how they will assist the Court": *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686 at para. 10.

[12] As well, an intervener's submissions must contribute to what we actually do as a court of law. As a court of law, we ascertain, interpret, and apply legal doctrine to the facts as found by a first-instance court. In interpreting legislation, we regard legislative purpose as "the authentic aim of the legislation passed by the legislators, not what international authorities, judges, parties and interveners think is 'best for Canadians' or what they consider to be 'just', 'right' or 'fair'": *Kattenburg* at para. 26; *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174; *Atlas Tube Canada ULC v. Canada (National Revenue)*, 2019 FCA 120, 2019 D.T.C. 5062 at paras. 5-9. We draw on international law only where it properly arises before us and we reject those who cite it as if it is "a series of tasty plates on a buffet table from which we can take whatever we like and eat whatever we please": *Kattenburg* at para. 26; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020

FCA 100 at paras. 76-92. We do not draw upon policies at large, especially those untethered to proven facts and settled doctrine. Still less do we enshrine grand policies into law as if we are legislators or constitutional framers. Nor are we a running an open-line radio show or a roving commission of inquiry. We are running a court of law. See *Ishaq* at paras. 9 and 26-27 and *Kattenburg* at paras. 41 and 44.

[13] We deplore interveners who try to slip fresh evidence into the record through crafty, unprofessional means, such as smuggling into their books of authorities materials that contain facts and social science opinions not in evidence or sliding fresh evidence into their oral submissions: *Public School Boards' Association of Alberta v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845, 180 D.L.R. (4th) 670; *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108, 174 C.P.R. (4th) 85; *Zaric* at para. 14; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 at para. 19. Here, experience is our teacher. We have seen falsehoods advanced by interveners seep uncritically into reasons for judgment, with damaging, real-life consequences: see the examples provided in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130, [2021] 1 F.C.R. 53 at paras. 156-159, citing *Teksavvy Solutions* at para. 22, both referring to *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 and *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467. If at any time interveners or their lawyers have tried these sorts of things in this or in any other Court or if we sense from their submissions that they might, we will keep them out.

[14] As well, sometimes those applying to intervene seem to think that the superiority, rightness, and importance of their causes allows them to insert their issues—new issues—into a

case that existing parties have prosecuted and defended often at great stress and expense for years. Some go so far as to transform the parties' case, to turn it into something more than it is, or into something it is not. This we forbid. In our Court, interveners are nothing more than secondary participants in cases that already have parties. Thus, interveners must take the parties' issues as they find them. This Court once put it this way:

> [I]nterveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.
>
> To allow them to do more is to alter the proceedings that those directly affected—the applicants and the respondents—have cast and litigated under for months, with every potential for procedural and substantive unfairness.

(*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 at paras. 55-56.) If interveners want to do more, if they want to advance their own issues, they must bring their own cases as parties with all that that entails, including legal expense and potential costs liability.

[15] Finally, for us, the fairness of our proceedings and our impartiality, both actual and apparent, is paramount, especially in the controversial cases that often attract many applications to intervene. But fairness and impartiality are damaged, sometimes severely, when the Court admits too many interveners on only one side of the debate, all pushing for the same outcome. If the Court ultimately adopts that outcome, fair-minded lay observers might well believe that the imbalance of voices on one side of the courtroom and their amplification through frequent repetition—all set up by the Court's decisions on intervention—may have carried the day.

[16] Thus, in considering applications to intervene, we are careful to avoid the appearance of a court-sanctioned stacking in favour of one side or a court-sanctioned gang-up against the other side. The outcomes we reach must be seen to be the product of fair and impartial judicial thinking, nothing else. See *Canadian Council for Refugees* at para. 15; *Teksavvy* at para. 11; *Gitxaala Nation v. Canada*, 2015 FCA 73 at para. 23.

[17] In offering the foregoing comments about interventions, the Court draws comfort from recent changes the Supreme Court has made to its policies on intervention: "November 2021 – Interventions" (15 November 2021), online: *Supreme Court of Canada* <www.scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx>. Although not binding on this Court, the Supreme Court's *Notice* underscores the importance and appropriateness of three fundamental policies of this Court evident from the above discussion: (1) intervention in another's case is a privilege, not a right; (2) the focus is on what the intervener can usefully do to help the Court determine the issues already before it, not other issues; and (3) the proceeding must be scrupulously fair, both in reality and appearance.

C. Application of these principles

[18] The three moving parties do not meet the test for intervention. They have not met the all-important, first branch of the test set out at paragraph 10, above.

[19] The Court is not persuaded that the arguments the moving parties intend to advance are different from the arguments that the appellants will put before the Court. In many respects, the

arguments are identical or have a modestly different, inconsequential spin from those already before the Court. They echo the arguments of the appellants. But this does not meet the necessary threshold of usefulness: *Li v. Canada (Citizenship and Immigration)*, 2004 FCA 267, 327 N.R. 253 at para. 9; *Canada (Attorney General) v. Shakov*, 2016 FCA 208 at para. 9; *Zaric* at para. 17.

[20] For example, the Association for Reformed Political Action (ARPA) Canada proposes to argue that "a private organization is incapable of disrespecting *Charter* rights or values" and that the expression rights at issue are "at the core of section 2(b)'s guarantee of freedom of expression". The appellants already argues that its activities are lawful and that the attestation requirement "strikes at the core of *Charter* s. 2(a) and (b) protection". The Association's proposed submissions provide little more than an inconsequential spin on what is already before the Court.

[21] The Evangelical Fellowship of Canada proposes two new issues that are not currently in play in this appeal: section 27 of the Charter and the requirement under section 1 of the Charter that the limit be "prescribed by law". Section 27 of the Charter may have interpretive significance and can be considered by the existing parties or by the Court itself; assistance is neither necessary nor useful. The section 1 requirement that the limit be "prescribed by law" is a feature relevant to the test under *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, a test that applies where state action, such as legislation or an administrative decision, are alleged to violate a Charter right or freedom. As mentioned at paragraph 3 above, the appellants do not

make that allegation here. The appellants have instead chosen to argue under the line of jurisprudence exemplified by *Doré* and *Loyola*.

[22] The rest of the arguments advanced by the Evangelical Fellowship of Canada are ultimately unhelpful to the Court's task. For example, it argues that the Minister's attestation requirement "*undermine*[*s*] rather than advance[s] the statutory objectives of an inclusive labour market and of improving social well-being and quality of life for all" and that "the government should not concern itself with preventing youth from working for law-abiding organizations with pro-life views". These sorts of freestanding policy opinions are unrelated to the *Doré*/*Loyola* legal test before us and should be rejected: *Zaric* at para. 12.

[23] Action Canada for Sexual Health and Rights intends to argue that the activities of anti-abortion organizations are inconsistent with Charter values and international human rights obligations. Action Canada for Sexual Health and Rights proposes to discuss the current state of abortion laws. These issues have nothing to do with the legal issues before this Court in this particular appeal. They concern wider policy issues surrounding abortion. This resembles what some of the moving parties for intervention in *Kattenburg* tried to do: to transform a legal case on the reasonableness of an administrative decision on the acceptability of a particular wine label into a policy discussion about Canadian foreign policy, human rights in the Middle East, and the status of the West Bank.

[24] All three moving parties are interested in the development of the law in this case because they, like hundreds of other organizations, might be affected by this Court's decision. But this

sort of purely jurisprudential interest, without more, is insufficient: *Canadian Doctors for Refugee Care* at para. 30; *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, 2000 FCA 233, [2010] 1 F.C.R. 226 at paras. 10-11.

[25] The Evangelical Fellowship of Canada is the only moving party that discusses how the Minister's actions tangibly affect it. It is concerned that the impugned attestation requirement will prevent it from applying for the federal government's Summer Jobs Program. But notwithstanding the impugned attestation requirement, the Evangelical Fellowship of Canada has applied for and has received funding in years after the rejection of funding in this case. On this basis, the Federal Court rejected the Evangelical Fellowship of Canada's motion to intervene. This Court substantially agrees with this rejection, for the reasons the Federal Court gave.

[26] The Association for Reformed Political Action (ARPA) Canada and the Evangelical Fellowship of Canada submit that they can offer important religious perspectives. But this Court does not lack religious perspectives in this case: see the presence in the record of an affidavit from a professor of moral theology, arguments placed before the Federal Court, and the Federal Court's reasons (at paras. 29-30, 118-119, 121, 144-146, 159 and 161). As well, these moving parties have not persuaded this Court that the religious perspectives offered by these moving parties are different from those already before it. And even if the perspectives are different, they are likely factual in nature. But they do not appear in the factual record before this Court.

D. Disposition

[27] Therefore, for the foregoing reasons, I will dismiss the motions.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-325-21
STYLE OF CAUSE:	RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA, BLAISE ALLEYNE AND MATTHEW BATTISTA v. CANADA (MINISTER OF EMPLOYMENT, WORKFORCE, AND LABOUR)

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	APRIL 21, 2022

WRITTEN REPRESENTATIONS BY:

Amanda Montague-Reinholdt	FOR THE MOVING PARTY, ACTION CANADA FOR SEXUAL HEALTH AND RIGHTS
Tabitha Ewert	FOR THE MOVING PARTY, ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA
John Sikkema	FOR THE MOVING PARTY, THE EVANGELICAL FELLOWSHIP OF CANADA
Kerry Boyd Jennifer Lee Keelan Sinnott	FOR THE RESPONDENT, CANADA (MINISTER OF EMPLOYMENT, WORKFORCE, AND LABOUR)

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck, LLP Ottawa, Ontario	FOR THE MOVING PARTY, ACTION CANADA FOR SEXUAL HEALTH AND RIGHTS
Tabitha Ewert Ottawa, Ontario	FOR THE MOVING PARTY, ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA
The Acacia Group Ottawa, Ontario	FOR THE MOVING PARTY, THE EVANGELICAL FELLOWSHIP OF CANADA
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT, CANADA (MINISTER OF EMPLOYMENT, WORKFORCE, AND LABOUR)

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160209

Docket: A-402-14

Citation: 2016 FCA 44

CORAM: **NADON J.A.**
PELLETIER J.A.
GAUTHIER J.A.

BETWEEN:

SPORT MASKA INC. dba REEBOK-CCM HOCKEY

Appellant

and

BAUER HOCKEY CORP.

Respondent

and

EASTON SPORTS CANADA INC.

Respondent

Heard at Montreal, on September 15, 2015.

Judgment delivered at Ottawa, Ontario, on February 9, 2016.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160209

Docket: A-402-14

Citation: 2016 FCA 44

CORAM: **NADON J.A.**
PELLETIER J.A.
GAUTHIER J.A.

BETWEEN:

SPORT MASKA INC. dba REEBOK-CCM HOCKEY

Appellant

and

BAUER HOCKEY CORP.

Respondent

and

EASTON SPORTS CANADA INC.

Respondent

REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

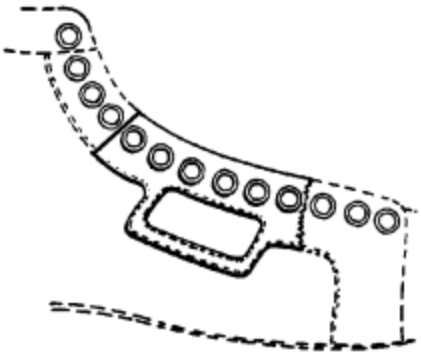
[1] In this appeal, Sports Maska Inc. dba Reebok-CCM Hockey ("CCM") challenges the judgment (2014 FC 853) of Harrington J. (the "Judge") of the Federal Court dated September 8, 2014 pursuant to which he dismissed CCM's motion which sought to overturn the June 20, 2014

order (2014 FC 594) of Prothonotary Morneau (the "Prothonotary") denying CCM's motion for leave to intervene in proceedings commenced by the respondent Bauer Hockey Corp. ("Bauer") in Federal Court File T-1036-13.

[2] For the reasons that follow, I would dismiss the appeal.

II. Facts

[3] CCM, Bauer and Easton Sports Canada Inc. ("Easton") are competitors in the hockey equipment industry. Bauer is the current owner of the trade-mark referred to as the "SKATES EYESTAY Design" registered under number TMA361,722 (the " '722 registration", the "trade-mark" or the "mark").



[4] On January 11, 2010, pursuant to a request made by Easton, the Registrar of Trade-marks (the "Registrar") issued a notice under section 45 of the *Trade-marks Act*, R.S.C. 1985 c. T-13 (the "Act") requiring Bauer to furnish evidence of use of the SKATES EYESTAY Design during the three year period preceding the date of the notice.

[5] On January 12, 2011, Bauer brought an action against Easton, *inter alia*, for infringement of the '722 registration (in Federal Court File: T-51-11). On December 21, 2012, Bauer launched a similar action against CCM (in Federal Court File: T-311-12).

[6] On April 5, 2013, the Registrar ordered that the '722 registration be expunged from the Register because of her finding that the mark had not been used, as registered, in the relevant time frame. On June 11, 2013, Bauer filed, pursuant to section 56 of the Act, a notice of application appealing the Registrar's decision in which Easton was named as a respondent (in Federal Court File: T-1036-13) ("Bauer's application").

[7] On February 13, 2014, Bauer and Easton reached an agreement pursuant to which Bauer agreed to discontinue its infringement action against Easton and the latter agreed to abandon its contestation of Bauer's application of the Registrar's decision.

[8] On April 7, 2014, CCM filed a motion in the Federal Court seeking leave to intervene in Bauer's application.

[9] On April 9, 2014, CCM filed its statement of defence and counterclaim in Federal Court File: T-311-12.

[10] On April 30, 2014, Bauer filed its reply and defence to CCM's counterclaim arguing, *inter alia*, that CCM was barred from attacking its trade-mark by reason of an agreement concluded on February 21, 1989 between CCM and Bauer's predecessors in title. More

particularly, CCM and Canstar Sports Group and Canstar Sports Inc. ("Canstar"), predecessors in title to Bauer, reached an agreement pursuant to which CCM undertook to withdraw its opposition to trade-mark application 548,351, filed on September 9, 1985 by Warrington Inc. (to whom Canstar succeeded in title), which led to the '722 registration on November 3, 1989. In a letter dated February 24, 1989, counsel for CCM wrote to the Registrar to advise that its client, the opponent, would not object to the use and registration of the trade-mark in association with the wares identified in the trade-mark application.

III. Decisions Below

A. *The Prothonotary's Decision*

[11] In his decision of June 20, 2014, the Prothonotary, who was the case management judge assigned to Bauer's application and the related actions brought by Bauer against Easton and CCM for infringement of the trade-mark, dismissed CCM's motion, brought under Rule 109 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), for leave to intervene in Bauer's application.

[12] The Prothonotary began his analysis by pointing out that the effect of granting leave to CCM would be to substitute CCM as a respondent for the absent Easton. This was not, according to the Prothonotary, how Rule 109 should be used. In so saying, the Prothonotary referred to this Court's decision in *Canada (Attorney General) v. Siemens Enterprises Communications Inc.*, 2011 FCA 250, 423 N.R. 248 ("*Siemens*") where, in his view, this Court held that Rule 109 was not meant to be used so as to allow an intervener to substitute itself as a respondent.

[13] The Prothonotary then addressed CCM's argument that the interests of justice militated in favour of granting it leave to intervene so as to provide the Court with a different view of the case. The Prothonotary dealt with CCM's argument by referring, with approval, to Madam Prothonotary Tabib's decision in *Genencor International Inc. v. Canada (Commissioner of Patents)*, 2007 FC 376, 55 C.P.R. (4th) 395 (*"Genencor"*) where she made the point that even if it was useful for the Court to have an opponent in a patent proceeding, the Court could nevertheless carry out its duties without an opposing side.

[14] The Prothonotary then turned to Bauer's argument that its agreement with Easton should be respected, and that it not be jeopardized by allowing CCM to substitute itself as a respondent in lieu of Easton. The Prothonotary indicated that he fully agreed with that argument.

[15] The Prothonotary then addressed CCM's argument that there was a public interest component in section 45 proceedings. He rejected this argument and again referred to Prothonotary Tabib's decision in *Genencor* where the learned Prothonotary, albeit on a question of registration of intellectual property and not section 45 proceedings, held that there was no public interest involved in allowing an intervention so as to ensure that untenable or invalid intellectual property registrations not be maintained.

[16] Finally, the Prothonotary turned to Bauer's submission that because CCM in its counterclaim to the infringement action in Federal Court File T-311-12 had raised the invalidity of the '722 registration on the same grounds as those relied on by the Registrar in expunging the mark at issue, it had raised in its defence to CCM's counterclaim the fact that CCM was barred,

by reason of its 1989 agreement with Bauer, from attacking the '722 registration. This led the Prothonotary to make the comment that "[i]t would appear that said argument by Bauer would not be possible to make against CCM in the Appeal should the latter be granted intervener status" (paragraph 13 of the Prothonotary's decision).

[17] The Prothonotary then referred to my colleague Stratas J.A.'s reasons in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253 ("*Pictou Landing*") where, at paragraph 11, he sets forth those factors which he considers relevant in determining whether intervention should be granted to a proposed intervener. In light of the factors set out in *Pictou Landing*, the Prothonotary concluded that by reason of what he referred to as the "full debate already ongoing in File T-311-12", the first two factors were met but that factors III, IV and V were not met.

[18] This led the Prothonotary to opine that, on balance, CCM should not be allowed to intervene in the section 45 proceedings which were "well under way" (paragraph 16 of the Prothonotary's reasons). Consequently, he dismissed CCM's motion to intervene with costs.

B. *The Federal Court's Decision*

[19] The Judge began by addressing the standard of review which should be applied in reviewing the Prothonotary's decision. In his view, because the questions on a motion to intervene were not vital to the final issue of the case, the Prothonotary's decision should be reviewed in accordance with the principles set out by this Court in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, 2 F.C.R. 459, at paragraph 19. Thus, it was his task to determine whether the

Prothonotary had exercised his discretion based upon a wrong principle or upon a misapprehension of the facts.

[20] The Judge then briefly reviewed the facts and turned to the factors which were to guide him in determining whether leave should be granted. In that regard, he referred to this Court's decision in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, [1989] F.C.J. No. 707 ("*Rothmans, Benson & Hedges"*) where the Court, in allowing the appeals before it, affirmed the correctness of the factors, i.e. six factors relevant to the determination of a leave to intervene application, enunciated by the trial judge, Rouleau J. of the Federal Court ([1990] 1 F.C. 74, 29 F.T.R. 267, at paragraph 12).

[21] After setting out Rouleau J.'s six factors, the Judge turned to Stratas J.A.'s reasons in *Pictou Landing* and cited paragraph 11 thereof where my colleague sets forth the factors which, in his view, are relevant to present day litigation. The Judge then remarked that the relevant factors, as set out in *Rothmans, Benson & Hedges* and in *Pictou Landing*, were not to be taken, in his words, *au pied de la lettre*. He also indicated that this Court's decision in *Siemens* was not to be taken as an absolute bar to a motion to intervene, adding that he did not feel that it was necessary to carry out a detailed analysis based on the factors of *Rothmans, Benson & Hedges* and *Pictou Landing*. He then pointed out that Stratas J.A.'s reasons in *Pictou Landing* were those of a single motions judge and thus not binding on this Court, adding that this Court was reluctant to reverse itself, citing for that proposition our decision in *Miller v. Canada (Attorney General)*, 2002 FCA 370, [2002] F.C.J. No. 1375 ("*Miller*"), at paragraph 8.

[22] The Judge then turned to the merits of the motion before him. In his view, there could be no doubt that CCM had an interest in Bauer's application for judicial review of the Registrar's decision and that CCM's intervention would be useful to the Court in that no one was opposing Bauer in the proceedings. He then stated that the Prothonotary was clearly wrong in considering the settlement agreement between Bauer and Easton.

[23] He then turned his attention to the question of whether the Prothonotary had downplayed the public interest aspect of the Register. He pointed to a number of decisions, both of this Court and of the Federal Court, to make the point that there was a public interest aspect in proceedings arising under section 45 of the Act. However, in his view, the public interest aspect of these proceedings did not rank as high as the public interest aspect of cases, for example, where constitutional issues were raised. On this point, the Judge concluded that the Court "might well benefit from CCM's intervention as it would give a different perspective, in the sense that Easton is giving no perspective at all" (paragraph 29 of the Judge's reasons).

[24] All of this led the Judge to conclude that although the Prothonotary had been wrong to consider the agreement between Bauer and Easton, that error was not fatal as he was satisfied that the Prothonotary would, in any event, have come to the same conclusion. The Judge then made the point that the better forum in which CCM could advance its arguments was in the action for infringement between it and Bauer. Thus, in the Judge's view, the Prothonotary had not wrongly exercised his discretion upon a wrong principle or upon a misapprehension of facts. Hence, he dismissed CCM's appeal.

IV. Issues and Standard of Review

[25] In my opinion, there are two issues raised in this appeal:

(1) What are the applicable criteria to decide whether to grant intervener status to CCM?

(2) Was the Judge wrong in not interfering with the Prothonotary's decision?

[26] There is no dispute between the parties that a prothonotary's decision ought to be disturbed by a judge only where it is clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts. Consequently, in the present matter, we should not interfere with the Judge's decision unless there were grounds justifying his intervention, or if he arrived at his decision on a wrong basis or was plainly wrong (*Z.I. Pompey Industrie v. Ecu-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, at paragraph 18).

V. Parties Submissions

A. *CCM's Submissions*

[27] CCM argues that the Prothonotary's decision was based upon wrong principles and a misapprehension of the facts thus constituting grounds for the Judge to set his order aside. CCM finds numerous errors in the Prothonotary's decision that can be divided into the following three categories:

(1) Misapplying this Court's decision in *Siemens*

[28] In applying the *Pictou Landing* criteria, the Prothonotary concluded that criteria III, IV and V had not been met. Criteria III relates to the different and valuable perspective that an

intervener should advance. The Prothonotary held that CCM would only be replacing Easton as a respondent and for that finding, relied on this Court's decision in *Siemens*. CCM argues, however, that the rule put forward in *Siemens* was only "directed to the particular mischief of duplication" (CCM's memorandum of fact and law, paragraph 32). In CCM's view, there would be no duplication in this case given that Easton undertook not to participate in the judicial review.

(2) Finding no public interest in section 45 proceedings / Failing to appreciate that it is in the interests of justice that the Court hear both sides of the issue / Finding intervention inconsistent with Rule 3

[29] The *Pictou Landing* criteria IV and V purport to ensure that the intervention is in the interests of justice and that it would advance the imperatives set forth in Rule 3 which provides that the Rules are to be interpreted and applied so as to secure "the just, most expeditious and least expensive determination of every proceeding on its merits". CCM argues that there is a public interest in ensuring the accuracy of the Register as a public record of trade-marks: "[t]he fact that an applicant under s. 45 is not even required to have an interest in the matter (…) speaks eloquently to the public nature of the concerns the section is designed to protect" (CCM's memorandum of fact and law, paragraph 39, quoting *Meredith & Finlayson v. Canada (Registrar of Trade-marks)*, [1991] F.C.J. No. 1318, 40 C.P.R. (3d) 409 (F.C.A.) (*"Meredith*")).

[30] CCM asserts that it was an error on the part of the Prothonotary to refuse to grant it leave to intervene on the basis that there was a "full debate already ongoing" between itself and Bauer because of the different questions at issue in the section 45 proceedings and in the infringement

action. Moreover, the existence of another efficient means to submit a question to the Court was held to be irrelevant in *Pictou Landing*.

(3) Giving credence to Bauer's settlement with Easton

[31] This private agreement plays no role in considering whether CCM should be given the right to intervene. The Judge agreed with CCM on this point and found that the Prothonotary was clearly wrong in taking the settlement into account.

[32] CCM submits that the Judge identified a number of "errors" in the Prothonotary's decision: the settlement should not have been taken into account, there is a public aspect to the Trade-marks Register, *Siemens* is not an absolute bar to intervention and the Court would be better served if someone were present to defend the expungement decision (CCM's memorandum of fact and law, paragraph 21). In addition, CCM says that the Judge "erred in implying that the decision in Pictou Landing reverses the Federal Court of Appeal decision in Rothmans" (CCM's memorandum of fact and law, paragraph 71). CCM says that *Pictou Landing* simply updates and evolves the *Rothmans, Benson & Hedges* factors. Accordingly, the Judge's decision was plainly wrong.

B. *Respondent's Submissions*

[33] Bauer argues that the Judge's decision not to intervene is not fundamentally wrong given that the Prothonotary turned his mind to the applicable factors and did not misapprehend the facts. The sole error found by the Judge was the effect to be given to the settlement between it and Easton, and he was not satisfied that "without referring to that settlement, [the Prothonotary]

would have come to a different conclusion" (Bauer's memorandum of fact and law, paragraph 48, quoting the Judge's decision at paragraph 30).

[34] Contrary to what is suggested by CCM, the Judge's decision was not based upon a finding that the infringement action would be a forum more appropriate for CCM's case, but rather on a rightful application of the standard of review. Bauer further argues that even greater deference should be given to the Prothonotary's decision for he was the Case Management Judge and was "intimately familiar" with the history and details of the matter. In Bauer's view, "CCM must demonstrate that the Judge 'erred in a fundamental way' in refusing to disturb the Prothonotary's decision, in that the latter was the 'clearest case of misuse of judicial discretion'" (Bauer's memorandum of fact and law, paragraph 42).

[35] Bauer further says that the list of factors to consider in a motion for intervention were "originally developed in Rothmans some 25 years ago and has since then been reiterated on several occasions" (Bauer's memorandum of fact and law, paragraph 53). Bauer argues that the new test set out in *Pictou Landing* must not be applied to this case because it was created by a judge alone and is therefore not binding. Bauer points out that the "traditional" *Rothmans, Benson & Hedges* factors were applied by the Federal Court in a trade-mark expungement case posterior to *Pictou Landing* (*Coors Brewing Co. v. Anheuser-Busch, LLC*, 2014 FC 318, 123 C.P.R. (4th) 340).

[36] Bauer also stresses that the motion to intervene is late (CCM only launched it after it learned that Bauer and Easton had reached an agreement), that there is no public interest in a

section 45 proceeding, that unopposed cases of this kind are commonplace in the Federal Court, and that CCM is already attacking the validity of the '722 registration in the infringement action. Finally, Bauer argues that CCM undertook, in an agreement signed in 1989, not to object to the use or registration of the '722 registration. It is thus arguably breaching this agreement.

VI. Analysis

A. *What are the applicable criteria to decide whether to grant CCM leave to intervene?*

[37] I begin by noting that there appears to be a certain amount of confusion as to the governing jurisprudence on the question of motions for leave to intervene since the decision of my colleague Stratas J.A. in *Pictou Landing*. It is my view, which I do not believe is contentious, that the decision of a panel of this Court has precedence over that of a single judge of the Court sitting as a motions judge. My colleague recognized as much in his reasons: see *Pictou Landing* at paragraph 8. This means that the governing case is *Rothmans, Benson & Hedges*.

[38] That said, I wish to make it clear that this panel, or for that matter any other panel of the Court, cannot prevent a single motions judge from expressing his view of the law if he is so inclined. In my view, parties may use a single motions judge's reasoning, if they wish, and make it part of their argument in order to convince the Court that it should change or modify its case law. But all should be aware that a single judge's opinion does not change the law until it is adopted by a panel of the Court.

[39] A comparison of *Rothmans, Benson & Hedges* factors and *Pictou Landing* shows that the main differences between the two are the removal of the "lack of any other reasonable means"

factor (*Rothmans, Benson & Hedges* third factor) and of the "ability of the Court to hear the case without the intervener" factor (*Rothmans, Benson & Hedges* sixth factor), as well as the addition of the "compliance with procedural requirements" factor (*Pictou Landing* first factor), and the "consistency with Rule 3" factor (*Pictou Landing* fifth factor). These differences are not, in my respectful view, of any substance. In effect, "compliance with procedural requirements" will generally always be a relevant consideration and the "consistency with Rule 3" factor can always be considered under the "interests of justice" factor (*Rothmans, Benson & Hedges* fifth factor).

[40] I do not disagree with Stratas J.A.'s comments in *Pictou Landing* that the existence of another appropriate forum is not necessarily a reason to refuse a proposed intervention that can be helpful to the Court. It obviously depends on the relevant circumstances. It is also undeniable that the Court, in most cases, is able to hear and decide a case without an intervener and that the "more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter" (*Pictou Landing*, paragraph 9, last bullet). This requirement is, in essence, what Rule 109(2)(*b*) requires. In any event, as Stratas J.A. recognized at paragraph 7 of his reasons, he could have reached the same result by applying the *Rothmans, Benson & Hedges* factors and ascribing little weight to the factors which he did not find relevant.

[41] In my opinion, the minor differences between the *Rothmans, Benson & Hedges* factors and those of *Pictou Landing* do not warrant that we change or modify the factors held to be relevant in *Rothmans, Benson & Hedges*. As the *Rothmans, Benson & Hedges* factors are not

meant to be exhaustive, they allow the Court, in any given case, to ascribe the weight that the Court wishes to give to any individual factor.

[42] The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. "[a]re the interests of justice better served by the intervention of the proposed third party?" is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought. In my view, the *Pictou Landing* factors are simply an example of the flexibility which the *Rothmans, Benson & Hedges* factors give to a judge in determining whether or not, in a given case, a proposed intervention should be allowed.

[43] To conclude on this point, I would say that the concept of the "interests of justice" is a broad concept which not only allows the Court to consider the interests of the Court but also those of the parties involved in the litigation.

B. *Was the Judge wrong in not interfering with the Prothonotary's decision?*

[44] In determining the second question before us, it must be kept in mind that our task is not to decide whether we believe that CCM meets the relevant factors for intervention and thus that

leave should have been granted, but whether the Judge was wrong in refusing to interfere with the Prothonotary's decision. To that task I now turn.

[45] So the question is: should the Judge have interfered with the Prothonotary's order? CCM says that the Prothonotary made a number of errors which should have justified his intervention. First, it says that the Prothonotary misapplied *Siemens*.

[46] I begin by saying that CCM's motion is not, in reality, a motion for leave to intervene. It is, in effect, a motion which seeks to allow CCM to become the respondent, in lieu of Easton, in Bauer's application. In that respect, CCM's motion is similar to that made by West Atlantic Systems ("WAS") in *Siemens* where WAS sought to intervene in an application for judicial review filed by the Attorney General following a decision of the Canadian International Trade Tribunal (the "CITT") which was unfavourable to the Department of Public Works and Government Services. More particularly, the CITT determined that the procurements at issue were deficient and failed to comply with Article 1007(1) of the *North American Free Trade Agreement*.

[47] Siemens Enterprises Communications Inc. ("Siemens"), which had filed a number of complaints with the CITT and which had fully participated in the proceedings before that tribunal, chose not to participate in the Attorney General's judicial review application. WAS, which had unsuccessfully attempted to participate in the proceedings before the CITT, sought to obtain leave from this Court to intervene in the judicial review proceedings. In denying WAS'

motion, Mainville J.A., writing for the Court, made the following comments at paragraph 4 of his reasons.

> By its motion, WAS is attempting to substitute itself for Siemens as the respondent in this judicial review application. WAS seeks to challenge the application under a proposed order of the Court which would, for all intents and purposes, grant it a status equivalent to that of a respondent in these proceedings. The rules permitting interventions are intended to provide a means by which persons who are not parties to the proceedings may nevertheless assist the Court in the determination of a factual or legal issue related to the proceedings (Rule 109(2)*b*) of the *Federal Courts Rules*). These rules are not to be used in order to replace a respondent by an intervener, nor are they a mechanism which allows a person to correct its failure to protect its own position in a timely basis.
>
> [emphasis added]

[48] CCM argues that the Prothonotary erred in relying on *Siemens* because our decision in that case "should be understood to be directed to the particular mischief of duplication" (paragraph 32 of CCM's memorandum of fact and law). In my respectful view, this argument is without merit as there was no question of duplication in *Siemens* since there was no respondent in the judicial review proceedings as Siemens had decided not to participate.

[49] Considering that our Court in *Siemens* held that Rule 109 should not be used to substitute a new respondent in the proceedings, it cannot be said, in my view, that the Prothonotary was wrong to consider, as a relevant factor, that the purpose of CCM's motion was to substitute itself as a respondent in lieu of Easton. However, I agree with the Judge that *Siemens* does not, *per se*, constitute an absolute bar to a motion to intervene.

[50] Second, CCM says that the Prothonotary was in error in holding that there was no public interest in section 45 proceedings sufficient to support its intervention in Bauer's application.

More particularly, it says that the Prothonotary was wrong to rely on Prothonotary Tabib's decision in *Genencor* which dealt with an entirely different matter, adding that "[t]here is a public interest in ensuring the accuracy of the Register as a public record of trade-marks" (CCM's memorandum of fact and law, paragraph 41).

[51] CCM also says that the Prothonotary erred in holding that Bauer's judicial review proceedings could be disposed of without its participation, adding that the Prothonotary again erred in relying on *Genencor*. CCM says that both the Rules and section 45 of the Act envisage the participation of the requesting party in section 45 proceedings and any appeal taken therefrom. In CCM's view, it can be said that there is an expectation that in any appeal from a section 45 decision, the Court will have the benefit of an appellant and a respondent. Thus, CCM says that the Judge ought to have intervened in that the Prothonotary was wrong to find that there was no public interest in section 45 proceedings and that the matter could be heard without its participation.

[52] Before determining whether the Prothonotary erred, as argued by CCM, it is important to have a brief look at section 45 and the proceedings which arise from it. Pursuant to section 45, the Registrar may at any time and at the written request of any person, give notice to the registered owner of a trade-mark requiring it to show, by way of an affidavit or a statutory declaration, that the mark was used in Canada during the three years preceding the notice.

[53] In making a determination as to whether or not the mark was used in the time frame provided by section 45, the only evidence admissible before the Registrar is the aforementioned

affidavit or statutory declaration. It is on the basis of that evidence and the parties' representations that the Registrar must decide whether or not there has been use of the mark as required by section 45.

[54] Following the Registrar's decision, an appeal may be taken before the Federal Court pursuant to section 56 of the Act and new evidence may be submitted to the Court in addition to the evidence already adduced before the Registrar. If the new evidence could have materially affected the Registrar's decision, then the Court must consider the matter *de novo* and reach its own conclusion on the issues to which the new evidence pertains.

[55] The purpose of section 45 proceedings is to remove registrations which have fallen into disuse. The burden of proof on the registered owner is not a heavy one. In *Locke v. Osler, Hoskin & Harcourt LLP*, 2011 FC 1390, 98 C.P.R. (4th) 357, O'Keefe J. stated at paragraph 23 that "[t]he threshold to establish use is relatively low and it is sufficient if the applicant establishes a prima facie case of use". It has also been said that the purpose of section 45 of the Act is to remove deadwood from the Register (see *Eclipse International Fashions Canada Inc. v. Shapiro Cohen*, 2005 FCA 64, 348 N.R. 86, at paragraph 6). In *Dart Industries Inc. v. Baker & Mckenzie LLP*, 2013 FC 97, 426 F.T.R. 98, at paragraph 13, O'Keefe J. commented that "[p]roceedings under section 45 of the Act are summary and administrative in nature". Finally, in *Meredith*, Huguessen J.A., writing for this Court, made these comments, at page 412, regarding section 45 proceedings:

> Section 45 provides a simple and expeditious method of removing from the register marks which have fallen into disuse. It is not intended to provide an alternative to the usual *inter partes* attack on a trade mark envisaged by s. 57. The fact that an applicant under s. 45 is not even required to have an interest in the

> matter (the respondent herein is a law firm) speaks eloquently to the *public* nature of the concerns the section is designed to protect.
>
> Subsection 45(2) is clear: the Registrar may only receive evidence tendered by or on behalf of the registered owner. Clearly it is not intended that there should be any trial of a contested issue of fact, but simply an opportunity for the registered owner to show, if he can, that his mark is in use or if not, why not.
>
> An appeal to the Court, under s. 56 does not have the effect of enlarging the scope of the inquiry or, consequentially, of the evidence relevant thereto. We cannot improve on the words of Thurlow C.J., speaking for this Court, in *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980), 53 C.P.R. (2d) 62 at p. 69, [1981], 1 F.C. 679, 34 N.R. 39, quoting with approval the words of Jackett P. in *Broderick & Bascom Rope Co. v. Registrar of Trade Marks*, (1970), 62 C.P.R. 268.:
>
> > In my view, evidence submitted by the party at whose instance the s-s. 44(1) [now 45(1)] notice was sent is not receivable on the appeal from the Registrar any more than it would have been receivable before the Registrar. On this point, I would adopt the view expressed by Jackett P. in *Broderick Bascom Rope Co. v. Registrar of Trade Marks, supra*, when he said at p. 279:…
>
> [emphasis added]

[56] In my view, the Prothonotary ought to have considered that there was a public interest component in section 45 proceedings. In concluding as he did, the Prothonotary relied on *Genencor* for support. However, I note from paragraphs 3 and 7 of *Genencor* that Prothonotary Tabib made a clear distinction between the nature of the proceedings before her and those which arise under section 45 of the Act. More particularly, in refusing to grant intervener status to the proposed intervener, she pointed out that the provisions at issue before her, namely sections 48.1 to 48.5 of the *Patent Act*, R.S.C., 1985, c. P-4 were not similar to those arising under section 45 in that they did not give third parties the right to challenge patents by way of a summary process in the way that section 45 allowed third parties to challenge trade-marks.

[57] Section 45 proceedings contemplate the participation of persons with no interest whatsoever in the existence of a given trade-mark. The provision allows anyone to initiate a section 45 notice, to submit representations to the Registrar and in the case of an appeal, to either launch the appeal or to participate as a respondent in that appeal. As this Court said at page 412 in *Meredith*, this "speaks eloquently to the public nature of the concerns the section is designed to protect", i.e. removing from the Registrar marks which have fallen into disuse. Thus, it necessarily follows, in my view, that the nature of the proceedings under section 45 is a relevant consideration in determining whether or not intervener status should be given to a third party, such as CCM in the present matter.

[58] In coming to that view, I am mindful of the arguments put forward by Bauer in response to CCM's arguments on this issue. In particular, I am mindful of Bauer's arguments that *Genencor* is relevant, that *Meredith* had to be understood in its proper context, i.e. that the public nature of section 45 had to do with the fact that any member of the public could initiate a section 45 notice, that, as in *Genencor*, there is no overriding public interest in ensuring that invalid trade-marks are not maintained on the public register, that proceedings arising under section 45 do not usually involve complicated legal questions but, to the contrary, usually pertain to simple well known legal principles resulting from an extensive body of jurisprudence and that proceedings under section 45 are commonplace in the Federal Court.

[59] However, the fact that there is a public aspect to section 45 proceedings does not elevate these proceedings to a level comparable to cases that, in the words of the Judge at paragraph 26 of his reasons, "affect large segments of the population or raise constitutional issues". Thus, the

public nature of section 45 proceedings must be balanced against other relevant considerations which, in my respectful view, must be considered in the present matter. As I will explain shortly, the existence of a public interest component in section 45 does not, in the present matter, outweigh other considerations which militate against granting intervention. In my view, when all of the relevant factors are considered, the public nature of section 45 proceedings does not tip the scale in CCM's favour. In other words, a proper balancing of all the relevant factors leads me to conclude that the Prothonotary did not err in refusing to allow CCM to intervene.

[60] I now turn to these other considerations.

[61] The first consideration is the agreement entered into between Bauer and CCM wherein CCM undertook and agreed not to object to Bauer's use or registration of the trade-mark at issue. On the basis of this agreement, Bauer asserts that CCM is contractually barred from attacking the validity of its trade-mark. It says that this argument can be put forward in its defence against CCM's counterclaim in Federal Court File T-311-12 and will constitute one of the issues to be determined by the Federal Court in that file. However, Bauer says that if intervener status is given to CCM, it will be unable to raise the issue in the context of section 45 proceedings in that the Federal Court "will merely be reviewing the decision of the Registrar to expunge Bauer's Trademark registration applying the appropriate standard of review" (Bauer's memorandum of fact and law, paragraph 113).

[62] I should point out that the aforesaid agreement between CCM and Bauer was considered by our Court in *Bauer Hockey Corp. v. Sports Maska*, 2014 FCA 158 where it held that the judge

below had erred in striking certain portions of Bauer's amended statement of claim. More particularly, our Court was of the view that Bauer's amended allegations, which relied in part on the aforesaid agreement, were such that it could not be said that its claim for punitive damages had no reasonable prospect of success. In other words, it was not plain and obvious, in the Court's view, that the amended statement of claim disclosed no reasonable cause of action with respect to punitive damages.

[63] The Prothonotary, at paragraph 13 of his reasons, considered this point concluding that "it would appear that said argument by Bauer would not be possible to make against CCM in the appeal should the latter be granted intervener status". It is clear, in my view, that this is one of the considerations which led the learned Prothonotary to conclude that intervention should not be granted to CCM. In considering Bauer's contractual arrangements with CCM as relevant in the determination of whether intervener status should be granted, the Prothonotary did not err. I would go further and say that it would have been an error on his part not to give consideration to this matter.

[64] The other consideration which, in my view, militates against granting intervener status to CCM is the existence of litigation between Bauer and CCM in Federal Court File T-311-12. In that file, Bauer has instituted proceedings against CCM claiming that CCM has infringed its trade-mark and CCM has counter-claimed seeking a declaration that the trade-mark is invalid. In seeking the invalidity of the trade-mark, CCM says at paragraph 25 of its Statement of Defence and Counterclaim:

> 25 […] Bauer does not use the [Trademark] as a trade-mark; rather, the [Trademark] is merely a decorative border or surround on the skate to highlight

> the BAUER word mark. To the extent that the [Trademark] or the Floating Skate's Eyestay Design have ever appeared on Bauer's skates, they have always been in combination with the BAUER word mark. […]

[65] The above assertion by CCM is similar to paragraph 13 of the Registrar's decision where she said:

> [13] I find that the addition of the word element "BAUER" IS A DOMINANT ELEMENT OF THE [Trademark] as used. As such, the [Trademark] as used is no longer simply a design mark but is clearly composed of two elements – an eyestay design and the word BAUER. As for the use of BAUER within the design mark, I am not convinced that the public would likely perceive it as a separate trade-mark from the [Trademark] at issue. Such additional matter would detract from the public's perception of the use of the trade-mark "SKATES'S EYESTAY DESIGN" *per se*

[66] Bauer says that its use of the trade-mark at the time that Easton requested that the Registrar send a section 45 notice is the same as that when it reached its agreement with CCM approximately 30 years ago. In its reply and defence to CCM's counterclaim, Bauer also says, as I have just indicated , that CCM is contractually barred from challenging its trade-mark.

[67] The Prothonotary was of the view that the litigation in Court File T-311-12 was a factor which had to be considered in determining whether intervener status should be given to CCM. At paragraph 15 of his reasons, the Prothonotary referred to those proceedings by saying that there was a "full debate already ongoing in File T-311-12 - a dynamic not present in Pictou Landing". The Judge shared the Prothonotary's view and said at paragraph 31 of his reasons that "[t]he validity of the trade-mark is in issue in the litigation between Bauer and CCM in docket T-311-12. That is the forum in which CCM should make its case".

[68] In my view, there was no error in so concluding on the part of the Prothonotary and the Judge. I agree with Bauer's assertion that allowing CCM to intervene would not, in any event, necessarily simplify and expedite the ongoing dispute over Bauer's trade-mark. However, I need not go into this in greater detail since both the Prothonotary and the Judge, exercising their respective discretions, were of the view that litigation in File T-311-12 was a relevant consideration in determining whether CCM should be allowed to intervene. I can see no basis on which I could conclude that it was wrong on their part to take the ongoing litigation between the parties as a relevant factor. Again, I am of the view that it would have been an error not to take such litigation into consideration.

[69] CCM further submits, as it did before the Judge, that the Prothonotary erred in considering Bauer's settlement with Easton. As I indicated earlier, the Judge agreed with CCM but was satisfied that the Prothonotary's error was inconsequential. I am also of that view. In any event, it is my opinion that Bauer's agreement with CCM and the existence of litigation in Federal Court File T-311-12 clearly outweigh all other considerations in this file.

[70] Although I believe that this is sufficient to dispose of the appeal, I will nonetheless briefly examine the specific factors enunciated in *Rothmans, Benson & Hedges* in the light of the evidence before us.

[71] First, is CCM directly affected by the outcome of the section 45 proceedings? The answer is that it is affected, in a certain way. More particularly, if the Registrar's decision is upheld, Bauer's trade-mark will be expunged and that conclusion will be helpful to CCM in Bauer's

infringement action. However, it is clear to me, in the circumstances of this case, that the purpose of CCM's attempt to intervene is to gain a tactical advantage. In so saying I do not intend to criticize CCM. I am simply making what I believe to be a realistic observation of what is going on in the file.

[72] As to the second factor, i.e. whether there exists a justiciable issue and a veritable public interest, I have already dealt with this in addressing CCM's arguments concerning the public nature of section 45 proceedings.

[73] As to the third factor, i.e. whether there is a lack of any other reasonable or efficient means to submit the question at issue before the Court, the answer is no. The question raised in the section 45 proceedings is, albeit in a different setting, also raised in the litigation conducted by the parties in Federal Court File: T-311-12. Preventing CCM from intervening in the section 45 proceedings will not cause it any prejudice other than the loss of a tactical advantage. In any event, CCM can and could have requested the Registrar to give Bauer a section 45 notice at any time. It chose not to do so for reasons which are of no concern to us. Whether it did not request the Registrar to give such a notice because of its agreement with Bauer not to object to Bauer's use or registration of the trade-mark is a question which I need not address.

[74] With regard to the fourth factor, i.e. whether the position of the proposed intervener can be adequately defended by one of the parties, the answer is no in that there is no party to the case other than Bauer. The position which CCM wishes to advance is that which Easton put forward,

with success, before the Registrar and which it would have defended in the appeal before the Federal Court.

[75] As to the sixth factor, i.e. can the Court hear and decide the case on its merits without the proposed intervener, the answer is yes. The fact that there would be no respondent does not prevent the Federal Court from performing its task in the circumstances. There can be no doubt that a respondent would be helpful to the Court but, in the circumstances, this factor does not tip the scale in favour of CCM. In any event, that was the conclusion arrived at by the Prothonotary and I can see no basis to disturb it.

[76] To repeat myself, I am satisfied that when all of the relevant considerations are taken in, the interests of justice are better served by not allowing CCM to intervene.

VII. Conclusion

[77] For these reasons, I conclude that the Judge made no error in refusing to interfere with the Prothonotary's decision. Consequently, I would dismiss the appeal but, in the circumstances, without costs.

"M Nadon"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-402-14

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE HARRINGTON DATED SEPTEMBER 8, 2014, DOCKET NUMBER T-1036-13)

STYLE OF CAUSE:	SPORT MASKA INC. dba REEBOK-CCM HOCKEY v. BAUER HOCKEY CORP. and EASTON SPORTS CANADA INC.
PLACE OF HEARING:	MONTREAL
DATE OF HEARING:	SEPTEMBER 15, 2015
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	PELLETIER J.A. GAUTHIER J.A.
DATED:	FEBRUARY 9, 2016

APPEARANCES:

Christopher Van Barr	FOR THE APPELLANT
François Guay Jean-Sébastien Dupont	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowling Lafleur Henderson LLP Ottawa, Ontario	FOR THE APPELLANT
Smart & Biggar Montreal, Québec	FOR THE RESPONDENT

Federal Court Cour fédérale

Date: 20210924

Docket: T-1542-12

Citation: 2021 FC 988

Vancouver, British Columbia, September 24, 2021

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND AND THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSEN

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

[1] To redress the tragic legacy of Residential Schools and to advance the process of reconciliation, the Truth and Reconciliation Commission *Calls to Action* called upon Canada to work "collaboratively with plaintiffs not included in the Indian Residential Schools Settlement Agreement". This is a Motion for approval of the partial settlement of a class action brought on behalf of the Day Scholars who attended Residential Schools across Canada.

[2] In 2010, Chief Gottfriedson and Chief Feschuck decided to take action in response to the failure of the Residential School settlements to recognize the harms suffered by Day Scholars. At the urging of these Chiefs, in August 2012, this class action was filed to seek justice for the Residential School Day Scholars and to ensure that "no-one was left behind".

[3] On June 3, 2015, Justice Harrington certified this as a class proceeding for the benefit of three classes: the Survivor Class, the Descendant Class, and the Band Class (*Gottfriedson v Canada*, 2015 FC 706).

[4] On this Motion, the Court is asked to approve the proposed settlement reached between Canada and the Survivor Class and the Descendant Class for the loss of culture and language suffered by those who attended Residential Schools as Day Scholars between 1920 and 1997. The Band Class claims have not been settled and that part of the class proceeding will continue.

[5] This Motion was heard in a hybrid manner with legal counsel and representative class members appearing in person in Vancouver with others appearing virtually via Zoom or by telephone.

[6] For the reasons outlined below, although the Court heard from class members who oppose the proposed settlement, overall, the Court is satisfied that the settlement is fair and reasonable and in the best interests of the Survivor and Descendant Class members and the settlement is therefore approved.

Background

[7] To put these claims in context, I will touch briefly on the background of the Residential School system in Canada and the compensation provided by other settlements.

[8] In 1920, the *Indian Act* made it compulsory for "every Indian child" between the ages of 7 and 15 to attend a Residential School or other federally established school. Residential Schools remained in operation for many decades in Canada with the last Residential School not closing until 1997.

[9] In keeping with that timeframe, the class period for this proceeding is 1920 to 1997.

[10] Many students who attended Residential Schools also resided there; however, there were thousands of Day Scholars who attended those same schools but returned home each day. For most Day Scholars, the Residential School was located within their community.

[11] In 2006, the Indian Residential Schools Settlement Agreement (IRSSA) was reached between Canada, Residential School Survivors, and various Church Entities (*Canada (Attorney General) v Fontaine*, 2017 SCC 47 at para 5). As part of the IRSSA, survivors who resided at Residential Schools were eligible for a Common Experience Payment (CEP), in the amount of $10,000 for one school year, and $3,000 for any subsequent school year. In addition, those who suffered sexual abuse and/or serious physical abuse – whether they resided at the Residential School or not – could apply for compensation through an Individual Assessment Process (IAP).

[12] In addition to Residential Schools, there were also Indian Day Schools that were operated separately from Residential Schools. Students in these schools did not reside there full-time, but returned home each day. The Indian Day School Survivors were excluded from the IRSSA and a class action was started on their behalf in 2009. The Court approval of the Day School Survivors class action settlement is reported at *McLean v Canada*, 2019 FC 1075 [*McLean*].

[13] The Day Scholars of Residential Schools, remained unrecognized by both the IRSSA and *McLean* Settlement. Although the Day Scholars could apply for the IAP portion of the IRSSA if they suffered sexual abuse or serious physical abuse, they were not eligible for the CEP.

[14] The background to this class proceeding is best explained in Plaintiffs' Counsel's written submissions as follows:

> 20. Tk'emlúps te Secwépemc ("Tk'emlúps", also known as "Kamloops Indian Band" or "Tk'emlúps te Secwépemc Indian Band") and shíshálh Nation ("shíshálh", also known as "Sechelt Indian Band" or "shíshálh Band") are two of the First Nations which had Residential Schools on their reserve lands, and consequently had a large number of community members who

> attended as Day Scholars. The exclusion of Day Scholars from the CEP portion of IRSSA, and the corresponding lack of recognition for the common experiences of Day Scholars at Residential Schools, caused significant anger and frustration in these First Nations. In late 2010, the then-Chiefs of those First Nations (Shane Gottfriedson and Garry Feshuk, respectively), decided that their Nations would come together to fight on behalf of Day Scholars, including by retaining a legal team of experienced class action and Aboriginal law lawyers to consider legal options.

[15] In 2012, this class proceeding was filed on behalf of the Day Scholars for relief described as follows in Plaintiffs' Counsel's written submissions:

> 22. With regard to the Survivor and Descendant Classes, the focus of this lawsuit is on remedying the gap that was left by IRSSA – specifically, seeking recognition and compensation on behalf of the Survivor and Descendant Classes for the loss of Indigenous language and culture which they endured as a result of the forced attendance of Survivor Class Members at Residential Schools. The core claims in the Plaintiffs' pleading are that the purpose, operation and management of the Residential Schools destroyed Survivor and Descendant Class Members' language and culture, and violated their cultural and linguistic rights.

[16] After the filing of this class proceeding, Canada aggressively defended the claim. Prior to certification, Canada brought a number of procedural motions, including a Motion to stay the action pursuant to s. 50.1 of the *Federal Courts Act*. Canada also Motioned to bring third party claims against a number of Church Entities for contribution and indemnity, and took the position that the Federal Court did not have jurisdiction over these third party claims. The Motion and an appeal from the Motion were unsuccessful. After the Plaintiffs amended their claim to only seek "several" liability against Canada and not any damages for which the Church Entities might be liable, Canada responded by filing third party claims against five religious organizations. These claims were struck by Justice Harrington.

[17] In 2015, the Certification Motion in this action was contested by Canada necessitating a 4-day hearing. During the hearing, Canada took the following positons: the claims disclosed no reasonable cause of action; the class definitions were overbroad; the proposed common issues were not capable of class-wide determination; the claims were time-barred; and the claims were released pursuant to the IRSSA general release and the release signed by Survivor Class members who accessed the IAP.

[18] In April 2019, Canada filed an Amended Statement of Defence, in which they raised a number of the same defences raised at the Certification Motion. Canada argued that there was no breach of any fiduciary, statutory, constitutional or common law duties owed to the members, and that Canada did not breach the Aboriginal Rights of the members. Canada also argued that there was no private law duty of care to protect members from intentional infliction of mental distress, or if there was, they did not breach it. Further, Canada argued that any damages suffered by the plaintiffs were not caused by Canada.

[19] In keeping with the *Calls to Action* outlined in the Truth and Reconciliation Report, Canada's litigation strategy evolved. In the spirit of reconciliation, the parties undertook intensive settlement negotiations in 2019. When those negotiations failed, the parties pressed forward with the litigation. The common issues trial was scheduled to begin on September 7, 2021 and continue for 74 days.

[20] On June 4, 2021, the parties negotiated the proposed settlement agreement of the Survivor Class and Descendant Class claims.

[21] By order of this Court, on June 10, 2021, the parties undertook a notice campaign to provide details of the proposed settlement to class members.

Motion for Approval

[22] On this Motion for approval of the settlement agreement, the parties have filed the following Affidavits:

- Affidavit of Charlotte Anne Victorine Gilbert, representative plaintiff for the Survivor Class, sworn on August 23, 2021;

- Affidavit of Diena Marie Jules, representative plaintiff for the Survivor Class, sworn on August 23, 2021;

- Affidavit of Daphne Paul, representative plaintiff for the Survivor Class, sworn on August 23, 2021;

- Affidavit of Darlene Matilda Bulpit, representative plaintiff for the Survivor Class, sworn on August 23, 2021;

- Affidavit of Rita Poulsen, representative plaintiff for the Descendant Class, sworn on August 23, 2021;

- Affidavit of Amanda Deanne Big Sorrel Horse, representative plaintiff for the Descendant Class, sworn on August 23, 2021;

- Affidavit of Peter Grant, co-class counsel, sworn on August 25, 2021 (attaching the Affidavit of Dr. John Milloy, Professor of History at Trent University, sworn on November 12, 2013);

- Affidavit of Martin Reiher, Assistant Deputy Minister of the Resolution and Partnerships Sector of the Department of Crown-Indigenous Relations and Northern Affairs Canada, sworn on August 12, 2021;

- Affidavit of Dr. Rita Aggarwala, an expert retained by class counsel for the purpose of providing an opinion to the Court on the estimated size of the Survivor Class, sworn on August 20, 2021;

- Affidavit of Joelle Gott, Partner in the Financial Advisory Services Group at Deloitte LLP, proposed Claims Administrator, sworn on August 25, 2021; and,

- Affidavit of Roanne Argyle of Argyle Communications, the court-appointed Notice Administrator, sworn on August 23, 2021.

[23] In addition to the above, the Court received a number of written submissions regarding the proposed settlement. During the settlement approval hearing, the Court heard oral submissions from 11 class members who openly expressed their views on the proposed settlement.

[24] Although the majority of those who expressed their views are in support of the proposed settlement, there are a number of class members who oppose the settlement. I will specifically address the objections to the settlement below.

Terms of the Settlement Agreement

[25] The full settlement agreement in both English and French as well as the applicable Schedules are included in the Motion Record.

[26] The objectives of the settlement are noted in the preamble at Clause E, as follows:

> The Parties intend there to be a fair and comprehensive settlement of the claims of the Survivor Class and Descendant Class, and further desire the promotion of truth, healing, education, commemoration, and reconciliation. They have negotiated this Agreement with these objectives in mind.

[27] The compensation for individual Day Scholar claimants is outlined at paragraph 25.01 as follows:

> Canada will pay the sum of ten thousand dollars ($10,000) as non-pecuniary general damages, with no reductions whatsoever, to each Claimant whose Claim is approved pursuant to the Claims Process.

[28] Those eligible to make a claim are Day Scholars who attended any of the Residential Schools listed in Schedule E for even part of a school year, so long as they have not already received compensation for that school year as part of the CEP or *McLean* Settlement.

[29] For Day Scholars who passed away after the May 30, 2005 cut-off date, but who would otherwise be eligible, one of their descendants will be eligible to make a claim for distribution to their estate. In total, the claim period will be open for 24 months. Canada will cover the costs of claims administration and the *de novo* reconsiderations for any denied claims. Class members will also be entitled to free legal services from class counsel for reconsideration claims. Canada does not have any right to seek reconsideration.

[30] There is no limit or cap on the number of payments that can be made, and no amounts for legal fees or administration costs can or will be deducted from the payments.

[31] The claims process is described at paragraph 35.01 as follows:

> The Claims Process is intended to be expeditious, cost-effective, user-friendly, culturally sensitive, and trauma-informed. The intent is to minimize the burden on the Claimants in pursuing their Claims and to mitigate any likelihood of re-traumatization through the Claims Process. The Claims Administrator and Independent Reviewer shall, in the absence of reasonable grounds to the contrary, assume that a Claimant is acting honestly and in good faith. In considering an Application, the Claims Administrator and Independent Reviewer shall draw all reasonable and favourable inferences that can be drawn in favour of the Claimant.

[32] The creation of the Day Scholars Revitalization Fund is outlined at paragraph 21.01 as follows:

> Canada agrees to provide the amount of fifty million dollars ($50,000,000.00) to the Day Scholars Revitalization Fund, to support healing, wellness, education, language, culture, heritage and commemoration activities for the Survivor Class Members and Descendant Class Members.

[33] The purpose and operation of the fund is described at paragraph 22.01 as:

> The Parties agree that the Day Scholars Revitalization Society will use the Fund to support healing, wellness, education, language, culture, and commemoration activities for the Survivor Class Members and the Descendant Class Members. The monies for the Fund shall be held by the Day Scholars Revitalization Society, which will be established as a "not for profit" entity under the British Columbia *Societies Act*, S.B.C. 2015, c. 18 or analogous federal legislation or legislation in any of the provinces or territories prior to the Implementation Date, and will be independent of the Government of Canada, although Canada shall have the right to appoint one representative to the Society Board of Directors.

[34] If the settlement agreement is approved by the Court, Canada will be released from liability relating to the Survivor Class and Descendant Class members claims regarding their attendance at Residential Schools. However, the terms of the settlement agreement are completely without prejudice to the ongoing litigation of the Band Class claims.

[35] The Parties request that Deloitte LLP be appointed as the Claims Administrator. Deloitte is also the court-appointed Claims Administrator in the *McLean* Settlement.

Analysis

[36] Rule 334.29 of the *Federal Court Rules*, SOR/98-106 provides that class proceedings may only be settled with the approval of a judge. The applicable test is "whether the settlement is fair and reasonable and in the best interests of the class as a whole" (*Merlo v Canada*, 2017 FC 533 at para 16 [*Merlo*]).

[37] The Court considers whether the settlement is reasonable, not whether it is perfect (*Châteauneuf v Canada*, 2006 FC 286 at para 7; *Merlo*, at para 18). Likewise, the Court only has the power to approve or to reject the settlement; it cannot modify or alter the settlement (*Merlo*, at para 17; *Manuge v Canada*, 2013 FC 341 at para 5).

[38] The factors to be considered in assessing the overall reasonableness of the proposed settlement are outlined in a number of cases (see: *Condon v Canada*, 2018 FC 522 at para 19; *Fakhri et al v Alfalfa's Canada, Inc cba Capera*, 2005 BCSC 1123 at para 8) and include the following:

a. Likelihood of recovery or likelihood of success;

b. The amount and nature of discovery, evidence or investigation;

c. Settlement terms and conditions;

d. Future expense and likely duration of litigation;

e. Recommendations of neutral parties;

f. Number of objectors and nature of objections;

g. Presence of good faith bargaining and the absence of collusion;

h. Communications with class members during litigation; and,

i. Recommendations and experience of counsel.

[39] In addition to the above considerations, as noted in *McLean* (para 68), the proposed settlement must be considered as a whole and it is not open to the Court to rewrite the

substantive terms of the settlement or assess the interests of individual class members in isolation from the whole class.

[40] I will now consider these factors in relation to the proposed settlement in this case.

a. *Likelihood of recovery or likelihood of success*

[41] This class proceeding raises novel and complex legal issues. It is one of the few actions in Canada advancing a claim for the loss of Indigenous language and culture. Advancing novel claims is a significant challenge, and success was far from certain. Recovery of damages on such claims was even more of a challenge. Layered onto this is the inherent challenge of litigating claims for historical wrongs.

[42] When this class proceeding was filed, the likelihood of the success was uncertain. The exclusion of these claimants from the IRSSA and *McLean* Settlement foretold Canada's position on the viability of these claims. Canada aggressively argued against certification, and after certification, Canada advanced a number of defences including limitation defences and claims that the IRSSA releases were a complete bar to these claims. Canada denied any breach of fiduciary, statutory, constitutional or common law duties to the class members, and denied any breach of Aboriginal Rights. Success for Canada on any of these defences would mean no recovery for class members.

[43] As well, the potential liability of the Church Entities who were involved in the Residential Schools posed significant liability and evidentiary challenges.

[44] The passage of time and the historic nature of these claims is also a factor for consideration. Historic documentary evidence is difficult to amass, and the first-hand evidence from Day Scholars themselves was being lost with each passing year. Since the filing of the action, two of the Representative Plaintiffs have passed away as have a number of Survivor Class members. The risk of losing more class members increases the longer this litigation continues.

[45] The settlement agreement provides certainty, recovery, and closure for the Survivor Class and the Descendant Class members. These results could not be guaranteed if the litigation were to proceed.

b. *The amount and nature of discovery, evidence or investigation*

[46] The settlement agreement was reached a few months before the September 2021 common issues trial was scheduled to begin. A great deal of work had been undertaken to prepare this matter for trial. Documentary disclosure was largely complete with Canada having disclosed some 120,000 documents throughout 2020. The parties had retained experts. Examinations of Representative Plaintiffs and examinations for discovery in writing and orally had taken place. Pre-trial examinations were scheduled for March and April 2021.

[47] As this proceeding was trial ready, class counsel had reviewed thousands of pages of documentary evidence and had the benefit of expert opinions. This allowed class counsel to approach settlement discussions with a clear understanding of the challenges they would face in proving the asserted claims.

c. *Settlement terms and conditions*

[48] The settlement agreement provides for a $10,000 Day Scholar Compensation Payment for eligible Survivor Class member or, where an eligible Survivor Class member has passed away, their Descendants. Schedule E to the Agreement lists the Residential Schools which had, or may have had, Day Scholars. Any Survivor who attended a school listed in Schedule E, even if for part of the year, will be eligible for a compensation payment, provided they have not already received compensation as part of the *McLean* Settlement or IRSSA. A lengthy claim period of 21 plus 3 months and the limited 45-day timeframe within which Canada must assess claims provides flexibility to claimants while ensuring speedy resolution of their claims.

[49] Importantly, within the claims process, there is a presumption in favour of compensation and the process has been designed to avoid re-traumatization. No evidence and no personal narrative is required to make a claim. There is also a low burden of proof to establish a claim. As well, there is a simplified process for persons with a disability. This process is distinct from that of the IAP, which has been criticized for the re-victimization of survivor claimants (*Fontaine v Canada (Attorney General),* 2018 ONSC 103 at para 202).

[50] The settlement also includes a $50,000,000 Day Scholars Revitalization Fund. This fund provides for Indigenous led initiatives to support healing, wellness, education, language, culture, heritage and commemoration activities for the Survivor Class members and Descendant Class members. This is a significant feature of the settlement agreement, and it is uncertain if the Court could provide such a remedy as part of the common issues trial or otherwise (*McLean* at para 103).

[51] The legal fees payable to class counsel, which is the subject of a separate Order of this Court, were negotiated after the proposed settlement agreement. The legal fees agreement is not conditional upon the settlement agreement being approved. This "de-linking" of the agreements is important as it ensured that the issue of legal fees did not inform or influence the terms of the settlement agreement. As well, legal fees are not payable from the settlement funds. Therefore, there is no risk of depleting the funds available to class members.

d. *Future expense and likely duration of litigation*

[52] As noted, the common issues trial was scheduled to start in September 2021 and continue for 74 days. If the settlement agreement is not approved, a lengthy trial will be necessary and appeals are likely. The Survivor Class members are elderly. Two of the Representative Plaintiffs, Violet Gottfriedson and Frederick Johnson, passed away since litigation commenced, as have a number of class members. Given the nearly decade-long history of this action, as well as the novelty of the claims, the future expense and duration of litigation should the settlement not be approved is likely to be substantial and lengthy.

e. *Recommendations of neutral parties*

[53] In support of this Motion, class counsel re-submitted the Affidavit of Dr. John Milloy, an expert historian who provided evidence at the Certification Motion. Dr. Milloy is the author of *A National Crime*, a report on the Residential School system. Dr. Milloy outlined the Schools' purpose as "the eradication of the children's' traditional ontology, their language, spirituality and their cultural practices", and highlighted the inadequate conditions and standards of care in the

Schools. Significantly, Dr. Milloy also opined on the impact of Residential Schools on Day Scholars, writing:

> The impacts of residential schools on children were detrimental. Many lost their languages, belief systems and thus their connections to their communities. As a result, many have lived lives of considerable dysfunction, have found their way to other state institutions – prisons, mental hospitals and welfare services. Many survivor families have had their children taken from them by social service agencies. There is no reason to believe that the schools discriminated in their treatment of students between day students and resident students; all would have experienced Canada's attempt to extinguish their identities.

[54] The Court also has an Affidavit from Dr. Rita Aggarwala attaching her report titled *Estimating the Number of Day Scholars who Attended Canada's Indian Residential Schools*. Although Dr. Aggarwala notes concerns about the quality of the data she had access to for the purposes of her statistical analysis, she did provide estimates which are of assistance in understanding the order of magnitude of this settlement. Dr. Aggarwala estimates the class size of Day Scholars who attended Residential Schools from 1920 to 1997 and were alive as of 2005 to be approximately 15,484. Based upon this number, Dr. Aggarwala estimates the total value of the settlement of the Survivor Class claim, based upon a funding formula of $10,000 per survivor, to be approximately $154,484,000.

f. *Number of objectors and nature of objections*

[55] In advance of the hearing, class counsel filed 45 statements from class members of which 24 were objections. At the settlement approval hearing, the Court also heard oral submissions from 6 members objecting to the settlement.

[56] Those speaking against the proposed settlement provided moving and emotionally raw statements about their experiences at Residential Schools. Many made reference to the recent discovery of the bodies of young children within the school grounds as reopening the painful wounds left by the tragic legacy of Residential Schools. Their pain is real and it is palpable. The Court heard members of the Survivor Class explain how their souls were destroyed at the Residential Schools. They mourn the loss of their language, their culture, their spirit, and their pride. Survivors spoke about how the school was the centre of the community – and as a result of the treatment they received they lost both their community and their core identity. Some spoke about the opportunities lost without a proper education.

[57] Members of the Descendant Class spoke about the intergenerational trauma, the pain and dysfunction suffered by their parents and grandparents, and the resulting loss of meaningful family relationships and loss of cultural identity.

[58] Unsurprisingly, the common theme running through the objections is that a payment of $10,000 is simply not enough to compensate for the harms endured and the losses suffered. However, as acknowledged by almost all who spoke, putting a dollar value on the losses suffered is an impossible task. Some of those objecting to the $10,000 payment argued that any settlement should offer at least the same compensation levels as those offered through the IRSSA and the *McLean* Settlement.

[59] While it is understandable that class members compare the compensation offered by this settlement with that offered in the IRSSA and the *McLean* Settlement such a comparison fails to

recognize the key difference in the actions. The claims advanced in this class action are for loss of language and culture. The IRSSA and the *McLean* Settlement addressed claims for sexual and physical abuse.

[60] In any event, the $10,000 payment to Day Scholars in this settlement agreement is comparable with the IRSSA and *McLean* compensation models. In the IRSSA, class members were eligible for a CEP of $10,000 for the first school year, and $3,000 for each additional school year. In *McLean* compensation was based on grid or levels of harm. The range of the grid was from $10,000 for Level 1 claims, to $200,000 for Level 5, with the higher levels of compensation for those who suffered repeated and persistent sexual abuse or serious physical abuse.

[61] The Class Representative Plaintiffs who have been involved in the litigation throughout, overwhelmingly support the settlement. Their support of the settlement is compelling. They have shouldered the burden of moving these claims forward and have had to relive their own trauma by recounting their Residential School experiences. They did this for the benefit of all class members who now, because of the terms of the settlement, will not be required to do so.

[62] Overall, when assessing the reasonableness of the proposed settlement, the Court must consider the interests of all class members, estimated to be over 15,000, as against the risks and benefits of having this class action proceed to trial.

[63] I have considered the objections voiced at the hearing as well as the written objections filed. The objections were primarily focused on the inadequacy of the settlement amount. All while acknowledging that no amount of money can right the wrongs or replace that which has been lost. However, what is certain is that continuing with this litigation will require class members to re-live the trauma for many years to come, against the risk and the uncertainty of litigation. Bringing closure to this painful past has real value which cannot be underestimated.

[64] I acknowledge that the settlement of a class proceeding will never be perfectly suited to the needs of each person within the class, however, considering the obstacles that were overcome to reach this settlement, I am satisfied that this settlement agreement is in the best interests of the Survivor Class and the Descendant Class.

[65] Finally, I commend the lawyers for designing a claims process that protects class members against having to re-live the trauma in order to establish a claim for compensation.

g. *Presence of good faith and absence of collusion*

[66] This action has been ongoing since 2012. It was not until 2017 that the parties first undertook serious settlement discussions. At that time, exploratory discussions were held between class counsel and the Minister's Special Representative (MSR). The Parties met on ten occasions. In March 2017, class counsel forwarded a settlement framework to Canada. Settlement negotiations continued into 2018, and the parties engaged in several rounds of judicial dispute resolution. Unfortunately, a settlement was not reached at that time and the parties prepared to proceed to trial.

[67] On March 4, 2021, the MSR delivered a new settlement offer to class counsel. This ultimately became the settlement agreement that was signed in June 2021 and which is now before the Court for approval.

[68] I am satisfied the parties engaged in good faith negotiations throughout and there is no collusion.

h. *Communications with class members during litigation*

[69] Following the public announcement of the proposed settlement on June 9, 2021, class members were contacted pursuant to a Court approved 2-month Notice Plan. The methods used to communicate the settlement agreement with potential class members included media advertisements, a website, community outreach kits, outreach to national and regional journalists, 6 information webinars, and a “Justice for Day Scholars” Facebook group.

[70] Settlement notices were provided in English, French, James Bay Cree, Plains Cree Ojibwe, Mi’kmaq, Inuktitut, and Dene. Class counsel advises that hundreds of class members made contact by phone, email and mail, and that class counsel responded to all inquiries.

[71] Notice of the settlement agreement was also provided to provincial and territorial public guardians and trustees by letter, and to provincial and territorial provincial health insurers by letter. Finally, notice of the settlement agreement was provided to the Assembly of First Nations (AFN), all AFN Regional Chiefs, and a number of other leaders of Indigenous governance organizations.

[72] I am satisfied that a robust, clear and accessible notice of the proposed settlement was provided to potential class members.

i. *Recommendations and experience of counsel*

[73] Class counsel are experienced in class actions litigation and in Aboriginal law. They have first hand experience with the IRSSA and were specifically sought out to act on this class proceeding. They wholly recommend this settlement agreement, which, in their opinion, addresses the Representative Plaintiffs' objectives.

Conclusion

[74] For the above reasons, I have concluded that the settlement agreement is fair, reasonable, and in the best interests of the Survivor Class and Descendant Class. I echo the comments of Justice Phelan in *McLean* where he states at para 3: "It is not possible to take the pain and suffering away and heal the bodies and spirits, certainly not in this proceeding. The best that can be done is to have a fair and reasonable settlement of the litigation."

[75] I therefore approve the settlement agreement.

[76] With the approval of the settlement agreement, the claims of the Survivor and Descendant Class members against Canada will be dismissed with prejudice and without costs.

[77] Deloitte LLP is appointed as the Claims Administrator, as defined in the settlement agreement, to carry out the duties assigned to that role.

[78] The Certification Order of Justice Harrington will be amended as requested and the Plaintiffs are granted leave to file an Amended Statement of Claim in the form attached to the Plaintiffs' Notice of Motion.

ORDER IN T-1542-12

THIS COURT ORDERS that:

1. The Settlement Agreement dated June 4, 2021 and attached as Schedule "A" is fair and reasonable and in the best interests of the Survivor and Descendant Classes, and is hereby approved pursuant to Rule 334.29(1) of the *Federal Courts Rules*, SOR/98-106, and shall be implemented in accordance with its terms;

2. The Settlement Agreement, is binding on all Canada and all Survivor Class Members and Descendant Class Members, including those persons who are minors or are mentally incapable, and any claims brought on behalf of the estates of Survivor and Descendant Class Members;

3. The Survivor Class and Descendant Class Claims set out in the First Re-Amended Statement of Claim, filed June 26, 2015, are dismissed and the following releases and related Orders are made and shall be interpreted as ensuring the conclusion of all Survivor and Descendant Class claims, in accordance with sections 42.01 and 43.01 of the Settlement Agreement as follows:

    a. each Survivor Class Member or, if deceased, their estate (hereinafter "Survivor Releasor"), has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, and demands of every nature or kind available, asserted for the Survivor Class in the First Re-Amended Statement of Claim filed June 26, 2015, in the Action or that could have been

asserted by any of the Survivor Releasors as individuals in any civil action, whether known or unknown, including for damages, contribution, indemnity, costs, expenses, and interest which any such Survivor Releasor ever had, now has, or may hereafter have due to their attendance as a Day Scholar at any Indian Residential School at any time;

b. each Descendant Class Member or, if deceased, their estate (hereinafter "Descendant Releasor"), has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, and demands of every nature or kind available, asserted for the Descendant Class in the First Re-Amended Statement of Claim filed June 26, 2015, in the Action or that could have been asserted by any of the Descendant Releasors as individuals in any civil action, whether known or unknown, including for damages, contribution, indemnity, costs, expenses, and interest which any such Descendant Releasor ever had, now has, or may hereafter have due to their respective parents' attendance as a Day Scholar at any Indian Residential School at any time;

c. all causes of actions/claims asserted by, and requests for pecuniary, declaratory or other relief with respect to the Survivor Class Members and Descendant Class Members in the First Re-Amended Statement of Claim filed June 26, 2015, are dismissed on consent of the Parties without determination on their merits, and will not be adjudicated as part of the determination of the Band Class claims;

d. Canada may rely on the above-noted releases as a defence to any lawsuit that purports to seek compensation from Canada for the claims of the Survivor Class and Descendant Class as set out in the First Re-Amended Statement of Claim;

e. for additional certainty, however, the above releases and this Approval Order will not be interpreted as if they release, bar or remove any causes of action or claims that Band Class Members may have in law as distinct legal entities or as entities with standing and authority to advance legal claims for the violation of collective rights of their respective Aboriginal peoples, including to the extent such causes of action, claims and/or breaches of rights or duties owed to the Band Class are alleged in the First Re-Amended Statement of Claim filed June 26, 2015, even if those causes of action, claims and/or breaches of rights or duties are based on alleged conduct towards Survivor Class Members or Descendant Class Members set out elsewhere in either of those documents;

f. each Survivor Releasor and Descendant Releasor is deemed to agree that, if they make any claim or demand or take any action or proceeding against another person, persons, or entity in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over, whether by statute, common law, or Quebec civil law, in relation to allegations and matters set out in the Action, including any claim against provinces or territories or other legal entities or groups, including but not limited to religious or other institutions that were in any way involved with Indian Residential Schools, the Survivor Releasor or Descendant Releasor will expressly limit their claim so as to exclude any portion of Canada's responsibility;

g. upon a final determination of a Claim made under and in accordance with the Claims Process, each Survivor Releasor and Descendant Releasor is also deemed to agree to release the Parties, Class Counsel, counsel for Canada, the Claims Administrator, the Independent Reviewer, and any other party involved in the Claims Process, with respect to any claims that arise or could arise out of the application of the Claims Process, including but not limited to the sufficiency of the compensation received; and

h. Canada's obligations and liabilities under the Settlement Agreement constitute the consideration for the releases and other matters referred to in the Settlement Agreement and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Survivor Releasors and Descendant Releasors are limited to the benefits provided and compensation payable pursuant to the Settlement Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims, and demands.

5. The Court reserves exclusive and continuing jurisdiction over the claims of the Survivor and Descendant Classes in this action, for the limited purpose of implementing the Settlement Agreement and enforcing the Settlement Agreement and this Approval Order.

6. Deloitte LLP is hereby appointed as Claims Administrator.

7. The fees, disbursements, and applicable taxes of the Claims Administrator shall be paid by Canada in their entirety, as set out in section 40.01 of the Settlement Agreement.

8. The Claims Administrator shall facilitate the claims administration process, and report to the Court and the Parties in accordance with the terms of the Settlement Agreement.

9 No person may bring any action or take any proceeding against the Claims Administrator or any of its employees, agents, partners, associates, representatives, successors or assigns for any matter in any way relating to the Settlement Agreement, the implementation of this Order or the administration of the Settlement Agreement and this Order, except with leave of this Court.

10. Prior to the Implementation Date, the Parties will move for approval of the form and content of the Claim Form and Estate Claim Form.

11. Prior to the Implementation Date, the Parties will identify and propose an Independent Reviewer or Independent Reviewers for Court appointment.

12. Class Counsel shall report to the Court on the administration of the Settlement Agreement. The first report will be due six (6) months after the Implementation Date and no less frequently than every six (6) months thereafter, subject to the Court requiring earlier reports, and subject to Class Counsel's overriding obligation to report as soon as reasonable on any matter which has materially impacted the implementation of the terms of the Settlement Agreement.

13. The Certification Order of Justice Harrington, dated June 18, 2015, will be amended as requested.

14. The Plaintiffs are granted leave to amend the First Re-Amended Statement of Claim in the form attached hereto.

15. There will be no costs of this motion.

"Ann Marie McDonald"
Judge

SCHEDULE "A"

Court File No. T-1542-12

FEDERAL COURT

CLASS PROCEEDING

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, on his own behalf and on behalf of all the members of the TK'EMLUPS TE SECWÉPEMC INDIAN BAND and the TK'EMLUPS TE SECWÉPEMC INDIAN BAND,

CHIEF GARRY FESCHUK, on his own behalf and on behalf of all the members of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND,

VIOLET CATHERINE GOTTFRIEDSON, CHARLOTTE ANNE VICTORINE GILBERT, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, DAPHNE PAUL and RITA POULSEN

PLAINTIFFS

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

DEFENDANT

DAY SCHOLARS SURVIVOR AND DESCENDANT CLASS SETTLEMENT AGREEMENT

WHEREAS:

A. Canada and certain religious organizations operated Indian Residential Schools for the education of Indigenous children, in which children suffered harms.

B. On May 8, 2006, Canada entered into the Indian Residential Schools Settlement Agreement, which provided for compensation and other benefits, including the Common Experience Payment, in relation to attendance at Indian Residential Schools.

C. On August 15, 2012, the Plaintiffs filed a putative class action in the Federal Court of Canada bearing Court File No. T-1542-12, *Gottfriedson et al. v. Her Majesty*

the Queen in Right of Canada (the "Action"). An Amended Statement of Claim was filed on June 11, 2013, and a First Re-Amended Statement of Claim was filed on June 26, 2015.

D. The Action was certified as a class proceeding by order of the Federal Court dated June 18, 2015, on behalf of three subclasses: the Survivor Class, the Descendant Class, and the Band Class.

E. The Parties intend there to be a fair and comprehensive settlement of the claims of the Survivor Class and Descendant Class, and further desire the promotion of truth, healing, education, commemoration, and reconciliation. They have negotiated this Agreement with these objectives in mind.

F. Subject to the Settlement Approval Order, the claims of the Survivor Class Members and Descendant Class Members shall be settled on the terms contained in this Agreement.

G. The Parties intend that the claims of the Band Class shall continue, notwithstanding the settlement of the claims of the Survivor Class and Descendant Class, and intend that this Agreement shall not prejudice the rights of the Parties in the continued litigation of the Band Class Members' claims in the Action.

NOW THEREFORE in consideration of the mutual agreements, covenants, and undertakings set out herein, the Parties agree as follows:

INTERPRETATION & EFFECTIVE DATE

1. Definitions

1.01 In this Agreement, the following definitions apply:

"Aboriginal" or "Aboriginal Person" means a person whose rights are recognized and affirmed by the *Constitution Act, 1982*, s. 35;

"Action" means the certified class proceeding bearing Court File No. T-1542-12, *Gottfriedson et al. v. Her Majesty the Queen in Right of Canada*;

"Agreement" means this settlement agreement, including the schedules attached hereto;

"Approval Date" means the date the **Court** issues its **Approval Order**;

"Approval Order" means the order or orders of the **Court** approving this **Agreement**;

"Band Class" means the Tk'emlúps te Secwépmec Indian Band and the Sechelt Indian Band and any other Indian Band(s) which:

a. has or had some members who are or were members of the **Survivor Class**, or in whose community an **Indian Residential School** is located; and

b. is specifically added to the **Action** with one or more **Indian Residential Schools**;

"Business Day" means a day other than a Saturday or a Sunday or a day observed as a holiday under the laws of the province or territory in which the person who needs to take action pursuant to this **Agreement** is situated or a holiday under the federal laws of Canada applicable in the said province or territory;

"Canada" means Her Majesty the Queen in Right of Canada, the Attorney General of Canada, and their legal representatives, employees, agents, servants, predecessors, successors, executors, administrators, heirs, and assigns;

"Certification Order" means the order of the **Court** dated June 18, 2015, certifying this **Action** under the *Federal Courts Rules*, attached as Schedule B;

"Claim" means an application/request for compensation made by a **Claimant** under this **Agreement** by submitting a **Claim Form**, including any related documentation, to the **Claims Administrator**;

"Claim Form" means the application for a **Day Scholar Compensation Payment** that must be submitted by a **Claimant** to the **Claims Administrator** by the **Claims Deadline,** the form and content of which will be approved by the **Court** prior to the **Implementation Date**;

"Claimant" means a **Day Scholar**, their **Personal Representative**, or, in the case of a Day Scholar who died on or after May 30, 2005, their **Designated Representative**, who makes or continues a **Claim**;

"Claims Administrator" means such entity as may be designated by the **Parties** from time to time and appointed by the **Court** to carry out the duties assigned to it in this **Agreement**;

"Claims Deadline" means the date which is twenty-one (21) months after the **Implementation Date**;

"Claims Process" means the process outlined in this **Agreement**, including Schedule C and related forms, for the submission of **Claims**, assessment of eligibility, and payment of **Day Scholar Compensation Payments** to **Claimants**;

"Class Counsel" means Peter R. Grant Law Corporation, Diane Soroka Avocate Inc., and Waddell Phillips Professional Corporation;

"Class Period" means the period from and including January 1, 1920, and ending on December 31, 1997;

"Court" means the Federal Court unless the context otherwise requires;

"Day Scholar" means a **Survivor Class Member** who attended but did not simultaneously reside at an **Indian Residential School** that is listed in Schedule E, either on List 1 or List 2, during the time periods indicated therein, for any part of a **School Year**;

"Day Scholar Compensation Payment" means the ten thousand dollar ($10,000) payment referred to in section 25.01 herein;

"Day Scholars Revitalization Fund" or "Fund" means the Fund established in section 21.01 herein, and as described in the **Fund Distribution Plan**;

"Day Scholars Revitalization Society" or "Society" means the not-for-profit society established pursuant to section 22.01 herein;

"Descendant Class" means the first generation of persons descended from **Survivor Class Members** or persons who were legally or traditionally adopted by a **Survivor Class Member** or their spouse;

"Descendant Class Member" means an individual who falls within the definition of the **Descendant Class**;

"Designated Representative" means the individual designated by the validly completed Designated Representative Form, the form and content of which will be approved by the **Court** prior to the **Implementation Date**;

"Fee Agreement" means the **Parties**' standalone legal agreement regarding legal fees, costs, honoraria and disbursements;

"Fund Distribution Plan" is the plan for the distribution of funds allocated to the **Day Scholars Revitalization Fund**, attached as Schedule F;

"Independent Reviewer" means the individual(s) appointed by the **Court** to determine review reconsideration requests from **Claimants** whose **Claims** were denied by the **Claims Administrator**, in accordance with the **Claims Process**;

"Indian Residential Schools" means the institutions identified in the list of Indian Residential Schools attached as Schedule "A" to the **Certification Order**, as that list may be amended by further Order of the **Court**;

"Implementation Date" means the latest of:

a. the day following the last day on which an appeal or motion for leave to appeal the **Approval Order** may be brought; and

b. the date of the final determination of any appeal brought in relation to the **Approval Order**;

"IRSSA" means the Indian Residential Schools Settlement Agreement dated May 8, 2006;

"McLean Settlement" means the McLean Federal Indian Day Schools Settlement Agreement entered into on November 30, 2018, in the matter of *McLean et al. v. Her Majesty the Queen in Right of Canada*, bearing Court File No. T-2169-16;

"Opt Out" means any individual who would otherwise fall within the definition of a **Survivor Class Member** or **Descendant Class Member** who previously validly opted out of the **Action**;

"Parties" means the signatories to this **Agreement**;

"Person Under Disability" means

a. a minor as defined by the legislation of that person's province or territory of residence; or

b. a person who is unable to manage or make reasonable judgments or decisions in respect of their affairs by reason of mental incapacity and for whom a **Personal Representative** has been appointed under the applicable legislation of that person's province or territory of residence;

"Personal Representative" means the person appointed under the applicable legislation of that person's province or territory of residence to manage or make reasonable judgments or decisions in respect of the affairs of a **Person Under Disability**;

"Released Claims" means those causes of action, liabilities, demands, and claims released pursuant to the **Approval Order**, as set out in section 42.01 herein;

"School Year" means from September 1 of one calendar year to August 31 of the subsequent calendar year;

"Settlement Agreement Notice Plan" means the Notice Plan advising **Survivor Class Members** and **Descendant Class Members** of the Agreement;

"Settlement Approval Notice Plan" means the Notice Plan advising **Survivor Class Members** and **Descendant Class Members** of the **Approval Order**.

"Survivor Class" means all **Aboriginal Persons** who attended as a student or for educational purposes for any period at an **Indian Residential School** during the **Class Period**, excluding, for any individual class member, such periods of time for which that class member received compensation by way of the Common Experience Payment under the **IRSSA**;

"Survivor Class Member" means an individual who falls within the definition of the **Survivor Class** and is not an **Opt Out**; and

"**Ultimate Claims Deadline**" means the date which is three (3) months after the **Claims Deadline**.

2. No Admission of Liability or Fact

2.01 This Agreement shall not be construed as an admission by Canada, nor a finding by the Court, of any fact within, or liability by Canada for any of the claims asserted in the Plaintiffs' claims and/or pleadings in the Action as they are currently worded in the First Re-Amended Statement of Claim, were worded in previous versions, or may be worded in the future.

2.02 For greater certainty, and without limiting the foregoing, the Parties agree that, in the further litigation of the Band Class claims, the Parties will not argue that the existence of this Agreement or any terms herein are admissions by the Parties, or findings by the Court, of any fact or law, or an admission of liability by Canada, relevant to the claims asserted by the Band Class in the Action, or

a settlement or resolution of the Band Class claims in the Action. Nothing in the above, however, or anything found elsewhere in this Agreement prevents the Parties from referring to or otherwise relying on the existence of the Agreement and the compensation paid or payable under it in any proceeding, if relevant.

3. Headings

3.01 The division of this Agreement into paragraphs, the use of headings, and the appending of Schedules are for convenience of reference only and do not affect the construction or interpretation of this Agreement.

4. Extended Meanings

4.01 In this Agreement, words importing the singular number include the plural and *vice versa*, words importing any gender include all genders, and words importing persons include individuals, partnerships, associations, trusts, unincorporated organizations, corporations, and governmental authorities. The term “including” means “including without limiting the generality of the foregoing”.

5. No *Contra Proferentem*

5.01 The Parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting Parties is not applicable in interpreting this Agreement.

6. Statutory References

6.01 In this Agreement, unless something in the subject matter or context is inconsistent therewith or unless otherwise herein provided, a reference to any statute is to that statute as enacted on the date thereof or as the same may from

time to time have been amended, re-enacted, or replaced, and includes any regulations made thereunder.

7. Day for Any Action

7.01 Where the time on or by which any action required to be taken hereunder expires or falls on a day that is not a Business Day, such action may be done on the next succeeding day that is a Business Day.

8. Final Order

8.01 For the purpose of this Agreement, a judgment or order becomes final when the time for appealing or seeking leave to appeal the judgment or order has expired without an appeal being taken or leave being sought or, in the event that an appeal is taken or leave to appeal is sought, when such appeal or leave to appeal and such further appeals as may be taken have been disposed of and the time for further appeal, if any, has expired.

9. Currency

9.01 All references to currency herein are to lawful money of Canada.

10. Compensation Inclusive

10.01 The amounts payable under this Agreement are inclusive of any pre-judgment or post-judgment interest or other amounts that may be claimed by Survivor Class Members or Descendant Class Members against Canada arising out of the Released Claims.

11. Schedules

11.01 The following Schedules to this Agreement are incorporated into and form part of this Agreement:

Schedule A: First Re-Amended Statement of Claim, filed June 26, 2015

Schedule B: Certification Order, dated June 18, 2015

Schedule C: Claims Process

Schedule D: Estate Claims Process

Schedule E: Lists of Indian Residential Schools for Claims Process

Schedule F: Day Scholars Revitalization Fund Distribution Plan

Schedule G: Draft Amended Certification Order (re: Band Class claims)

Schedule H: Draft Second Re-Amended Statement of Claim, draft without delineations of prior or currently proposed amendments (re: Band Class claims)

12. No Other Obligations

12.01 All actions, causes of action, liabilities, claims, and demands whatsoever of every nature or kind for damages, contribution, indemnity, costs, expenses, and interest which any Survivor Class Member or Descendant Class Member ever had, now has, or may hereafter have arising in relation to the Action against Canada, whether such claims were made or could have been made in any proceeding, will be finally settled based on the terms and conditions set out in this Agreement upon the date of the Approval Order, and Canada will have no further liability except as set out in this Agreement.

13. Entire Agreement

13.01 This Agreement constitutes the entire agreement among the Parties with respect to the Survivor Class and Descendant Class claims asserted in the Action and cancels and supersedes any prior or other understandings and agreements between or among the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied, or statutory between or among the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement.

14. Benefit of the Agreement

14.01 This Agreement will enure to the benefit of and be binding upon the Parties, the Survivor Class Members, the Descendant Class Members, and their respective heirs, estates, Designated Representatives and Personal Representatives.

15. Band Class Claim

15.01 Nothing in this Agreement is intended to, or does prejudice the rights of the Parties in the continued litigation of the Band Class claims in the Action.

15.02 The Band Class claims that will continue are set out in the Draft Amended Certification Order (re: Band Class claims), attached as Schedule G and the Draft Second Re-Amended Statement of Claim (re: Band Class claims), attached as Schedule H.

16. Applicable Law

16.01 This Agreement will be governed by and construed in accordance with the laws of the province or territory where the Survivor Class Member or Descendant Class Member resides and the laws of Canada applicable therein.

17. Counterparts

17.01 This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same Agreement.

18. Official Languages

18.01 Canada will prepare a French translation of this Agreement for use at the settlement approval hearing before the Court. As soon as practicable after the execution of this Agreement, Canada will arrange for the preparation of an authoritative French version. The French version shall be of equal weight and force at law.

19. Date When Binding and Effective

19.01 This Agreement will become binding and effective on and after the Implementation Date on the Parties and all Survivor Class Members and Descendant Class Members. The Approval Order of the Court constitutes deemed approval of this Agreement by all Survivor Class Members and Descendant Class Members.

20. Effective in Entirety

20.01 None of the provisions of this Agreement will become effective unless and until the Court approves this Agreement.

THE DAY SCHOLARS REVITALIZATION FUND

21. The Day Scholars Revitalization Fund

21.01 Canada agrees to provide the amount of fifty million dollars ($50,000,000.00) to the Day Scholars Revitalization Fund, to support healing, wellness, education,

language, culture, heritage and commemoration activities for the Survivor Class Members and Descendant Class Members.

21.02 The monies described in section 21.01 herein will be paid by Canada to the Day Scholars Revitalization Society within thirty (30) days after the Implementation Date.

THE DAY SCHOLARS REVITALIZATION SOCIETY

22. Establishing the Day Scholars Revitalization Society

22.01 The Parties agree that the Day Scholars Revitalization Society will use the Fund to support healing, wellness, education, language, culture, and commemoration activities for the Survivor Class Members and the Descendant Class Members. The monies for the Fund shall be held by the Day Scholars Revitalization Society, which will be established as a "not for profit" entity under the British Columbia *Societies Act*, S.B.C. 2015, c. 18 or analogous federal legislation or legislation in any of the provinces or territories prior to the Implementation Date, and will be independent of the Government of Canada, although Canada shall have the right to appoint one representative to the Society Board of Directors.

22.02 A draft Day Scholars Revitalization Fund Plan is attached as Schedule F.

22.03 The Fund is intended to benefit the Survivor Class Members and Descendant Class Members and to complement and not duplicate any federal government programs.

23. Directors

23.01 The Society will have five first directors, to be appointed by the Parties.

23.02 The Board of the Society will have national representation and will include one director appointed by Canada. The representative appointed by Canada will not be an employee or public servant of Canada.

24. Responsibilities of Directors

24.01 The Society's Directors shall manage and/or supervise the management of the activities and affairs of the Day Scholars Revitalization Society, which will receive, hold, invest, manage, and disburse the monies described in the Fund provisions of this Agreement and any other monies transferred to the Fund under this Agreement for the purposes of funding healing, wellness, education, language, culture, heritage and commemoration activities for the Survivor Class Members and Descendant Class Members.

COMPENSATION FOR INDIVIDUAL CLAIMANTS

25. Day Scholar Compensation Payments

25.01 Canada will pay the sum of ten thousand dollars ($10,000) as non-pecuniary general damages, with no reductions whatsoever, to each Claimant whose Claim is approved pursuant to the Claims Process.

25.02 A Claimant is entitled to a Day Scholar Compensation Payment, and their Claim shall be approved, if the Claimant satisfies the following Eligibility Criteria:

a. the Claim is made with respect to a Day Scholar who was alive on May 30, 2005;

b. the Claim is delivered to the Claims Administrator prior to the Ultimate Claims Deadline;

c. the Claim is made with respect to that Day Scholar's attendance at an Indian Residential School that is listed in Schedule E on either List 1 or List 2 during the time periods indicated therein, for any part of a specific School Year that meets all three of the following conditions, namely that it is a School Year for which the Day Scholar or their executor, representative, or heir who applied in place of the Day Scholar:

i. has not received a Common Experience Payment under the IRSSA;

ii. has not received and will not receive compensation under the McLean Settlement; and

iii. has not received compensation under any other settlement with respect to a school listed on Schedule K to the McLean Settlement.

25.03 For greater clarity, for any School Year during which a Survivor Class Member was eligible for, but did not make a claim for the Common Experience Payment under the IRSSA, no Claim for a Day Scholar Compensation Payment under this Agreement may be made in regard to that Survivor Class Member for that School Year.

26. No Cap on Claims

26.01 There is no limit or cap on Canada's total obligation to pay approved Claims. All approved Claims will be paid fully by Canada.

27. Transfer of Monies by Canada

27.01 Canada will transfer monies directly to the Claims Administrator to provide for payment of approved Claims, in accordance with the Claims Process.

28. Social Benefits

28.01 Canada will make its best efforts to obtain the agreement of the provinces and territories that the receipt of any payments pursuant to this Agreement will not affect the quantity, nature, or duration of any social benefits or social assistance benefits payable to a Claimant pursuant to any legislation of any province or territory of Canada.

28.02 Further, Canada will make its best efforts to obtain the agreement of the necessary Departments of the Government of Canada that the receipt of any

payments pursuant to this Agreement will not affect the quantity, nature or duration of any social benefits or social assistance benefits payable to a Claimant pursuant to any federal social benefit programs, including Old Age Security and Canada Pension Plan.

IMPLEMENTATION OF THIS AGREEMENT

29. The Action

29.01 The First Re-Amended Statement of Claim in the Action is attached as Schedule A.

29.02 The Parties agree that the Plaintiffs will seek leave of the Court, on consent and as part of the application for Court approval of this Agreement, to file the Draft Second Re-Amended Statement of Claim in the Action, which is attached as Schedule H.

30. Certification Order

30.01 The Certification Order is attached as Schedule B.

30.02 The Parties agree that the Plaintiffs will seek an Order from the Court, on consent and as part of the application for Court approval of this Agreement, issuing the Amended Certification Order, which is attached as Schedule G.

31. Notice Plans

31.01 The Parties agree that the Plaintiffs will seek an Order from the Court, on consent, approving a Settlement Agreement Notice Plan, whereby Survivor Class Members and Descendant Class Members will be provided with notice of the Agreement, its terms, how to obtain more information, and how to share their feedback in advance of, and during, the settlement approval hearing.

31.02 The Parties further agree that the Plaintiffs will seek an Order from the Court, on consent and as part of the application for Court approval of this Agreement, approving a Settlement Approval Notice Plan, which will provide Survivor Class Members and Descendant Class Members with notice of the Approval Order and how a Claim for compensation can be made.

31.03 Canada agrees to pay for the implementation of the Settlement Agreement Notice Plan and the Settlement Approval Notice Plan.

CLAIMS MADE BY PERSONAL REPRESENTATIVES AND DESIGNATED REPRESENTATIVES

32. Compensation If Deceased

32.01 Where a Day Scholar has died on or after May 30, 2005, a Claim may be brought on behalf of the deceased Day Scholar's estate or heirs in accordance with the Estate Claims Process set out in Schedule D.

33. Person Under Disability

33.01 If a Day Scholar submits a Claim to the Claims Administrator prior to the Ultimate Claims Deadline and the Claim is approved but the Day Scholar is or becomes a Person Under Disability prior to their receipt of a Day Scholar Compensation Payment, that payment will be made to the Personal Representative of the Day Scholar.

34. Hold Harmless Agreement for Claims

34.01 Canada, the Claims Administrator, Class Counsel, and the Independent Reviewer, shall not be liable for, and will in fact be held harmless by Claimants, from any and all claims, counterclaims, suits, actions, causes of action, demands, damages, penalties, injuries, setoffs, judgments, debts, costs, expenses (including without limitation legal fees, disbursements, and expenses)

or other liabilities of every character whatsoever by reason of or resulting from a payment or non-payment to a Personal Representative or Designated Representative pursuant to this Agreement and any order of the Court approving it.

CLAIMS PROCESS

35. Principles Governing Claims Administration

35.01 The Claims Process is intended to be expeditious, cost-effective, user-friendly, culturally sensitive, and trauma-informed. The intent is to minimize the burden on the Claimants in pursuing their Claims and to mitigate any likelihood of re-traumatization through the Claims Process. The Claims Administrator and Independent Reviewer shall, in the absence of reasonable grounds to the contrary, assume that a Claimant is acting honestly and in good faith. In considering an Application, the Claims Administrator and Independent Reviewer shall draw all reasonable and favourable inferences that can be drawn in favour of the Claimant.

36. Claims Process

36.01 The Claims Process is set out in Schedule C.

CLAIMS ADMINISTRATOR

37. Duties of the Claims Administrator

37.01 The Claims Administrator's duties and responsibilities include the following:

a. developing, installing, and implementing systems, forms, information, guidelines and procedures for processing Claims in hard or electronic copy, in accordance with this Agreement;

b. developing, installing, and implementing systems and procedures for making payments of Day Scholar Compensation Payments in accordance with this Agreement;

c. providing personnel in such reasonable numbers as are required for the performance of its duties, and training and instructing them;

d. keeping or causing to be kept accurate accounts of its activities and its administration, including preparing such financial statements, reports, and records as are required by the Court;

e. reporting to the Parties on a monthly basis respecting Claims received and determined, and to which Indian Residential Schools the Claims relate;

f. responding to enquiries respecting Claims, reviewing Claims, making decisions in respect of Claims, giving notice of its decisions in accordance with this Agreement, and providing information to Claimants regarding the reconsideration process as set out in the Claims Process;

g. communicating with Claimants in either English or French, as the Claimant elects, and, if a Claimant expresses the desire to communicate in a language other than English or French, making best efforts to accommodate them; and

h. such other duties and responsibilities as the Court may from time to time direct.

38. Appointment of the Claims Administrator

38.01 The Claims Administrator will be appointed by the Court on the recommendation of the Parties.

39. Duties of the Independent Reviewer

39.01 The role of the Independent Reviewer is to determine any request for reconsideration brought by a Claimant pursuant to the Claims Process set out in Schedule C. The Independent Reviewer(s) will be appointed by the Court on the recommendation of the Parties.

40. Costs of Claims Process

40.01 The costs of the Claims Process, including those of the Claims Administrator and the Independent Reviewer, will be paid by Canada.

41. Approval Order

41.01 The Parties agree that an Approval Order of this Agreement will be sought from the Court in a form to be agreed upon by the Parties and shall include the following provisions:

a. incorporating by reference this Agreement in its entirety including all Schedules;

b. ordering and declaring that the Order is binding on all Survivor Class Members and Descendant Class Members, including Persons Under Disability; and

c. ordering and declaring that the Survivor Class and Descendant Class Claims set out in the First Re-Amended Statement of Claim, filed June 26, 2015, are dismissed, and giving effect to the releases and related clauses set out in sections 42.01 and 43.01 herein to ensure the conclusion of all Survivor Class and Descendant Class claims.

42. Conclusion of Survivor Class and Descendant Class Claims

42.01 The Approval Order sought from the Court will declare that:

a. Each Survivor Class Member or, if deceased, their estate (hereinafter "Survivor Releasor"), has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, and demands of every nature or kind available, asserted for the Survivor Class in the First Re-Amended Statement of Claim filed June 26, 2015, in the Action or that could have been asserted by any of the Survivor Releasors as individuals in any civil action, whether known or unknown, including for damages, contribution, indemnity, costs, expenses, and interest which any such Survivor Releasor ever had, now has, or may hereafter have due to their attendance as a Day Scholar at any Indian Residential School at any time.

b. Each Descendant Class Member or, if deceased, their estate (hereinafter "Descendant Releasor"), has fully, finally and forever released Canada, her servants, agents, officers and employees, from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, and demands of every nature or kind available, asserted for the Descendant Class in the First Re-Amended Statement of Claim filed June 26, 2015, in the Action or that could have been asserted by any of the Descendant Releasors as individuals in any civil action, whether known or unknown, including for damages, contribution, indemnity, costs, expenses, and interest which any such Descendant Releasor ever had, now has, or may hereafter have due to their respective parents' attendance as a Day Scholar at any Indian Residential School at any time.

c. All causes of actions/claims asserted by, and requests for pecuniary, declaratory or other relief with respect to the Survivor Class Members and Descendant Class Members in the First Re-Amended Statement of Claim filed June 26, 2015 are dismissed on consent of the Parties without determination on their merits, and will not be adjudicated as part of the determination of the Band Class claims.

d. Canada may rely on the above-noted releases as a defence to any lawsuit that purports to seek compensation from Canada for the claims of the Survivor Class and Descendant Class as set out in the First Re-Amended Statement of Claim. For additional certainty, however, the above-noted releases and the Approval Order will not be interpreted as if they release, bar or remove any causes of action or claims that Band Class Members may have in law as distinct legal entities or as entities with standing and authority to advance legal claims for the violation of collective rights of their respective Aboriginal peoples, including to the extent such causes of action, claims and/or breaches of rights or duties owed to the Band Class are alleged in the First Re-Amended Statement of Claim filed June 26, 2015, even if those causes of action, claims and/or breaches of rights or duties are based on alleged conduct towards Survivor Class Members or Descendant Class Members set out elsewhere in either of those documents.

e. Each Survivor Releasor and Descendant Releasor is deemed to agree that, if they make any claim or demand or take any action or proceeding against another person, persons, or entity in which any claim could arise against Canada for damages or contribution or indemnity and/or other relief over, whether by statute, common law, or Quebec civil law, in relation to allegations and matters set out in the Action, including any claim against provinces or territories or other legal entities or groups, including but not limited to religious or other institutions that were in any way involved with Indian Residential Schools, the Survivor Releasor or Descendant Releasor will expressly limit their claim so as to exclude any portion of Canada's responsibility.

f. Upon a final determination of a Claim made under and in accordance with the Claims Process, each Survivor Releasor and Descendant Releasor is also deemed to agree to release the Parties, Class Counsel, counsel for Canada, the Claims Administrator, the Independent Reviewer, and any other party involved in the Claims Process, with respect to any claims that arise or

could arise out of the application of the Claims Process, including but not limited to the sufficiency of the compensation received.

43. Deemed Consideration by Canada

43.01 Canada's obligations and liabilities under this Agreement constitute the consideration for the releases and other matters referred to in this Agreement and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Survivor Releasors and Descendant Releasors are limited to the benefits provided and compensation payable pursuant to this Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims, and demands.

LEGAL FEES AND DISBURSEMENTS

44. Class Counsel Fees and Disbursements

44.01 All legal fees and disbursements of Class Counsel, and the representative plaintiffs' proposed honoraria are the subject of the Fee Agreement, which is subject to review and approval by the Court.

44.02 Court approval of the Fee Agreement is separate and distinct from Court approval of this Agreement. In the event that the Court does not approve the Fee Agreement, in whole or in part, it will have no effect on the approval or implementation of this Agreement.

45. No Other Fees or Disbursements to Be Charged

45.01 The Parties agree that it is their intention that all payments to Survivor Class Members under this Agreement are to be made without any deductions on account of legal fees or disbursements.

TERMINATION AND OTHER CONDITIONS

46. Termination of Agreement

46.01 This Agreement will continue in full force and effect until all obligations under this Agreement are fulfilled and the Court orders that the Agreement is completed.

47. Amendments

47.01 Except as expressly provided in this Agreement, no amendment may be made to this Agreement, including the Schedules, unless agreed to by the Parties in writing and approved by the Court.

48. No Assignment

48.01 No amount payable under this Agreement can be assigned and any such assignment is null and void except as expressly provided for in this Agreement. Where a Day Scholar is deceased or is a Person Under Disability, payment for an approved Claim will be made to their Designated Representative or Personal Representative, respectively.

CONFIDENTIALITY

49. Confidentiality

49.01 Any information provided, created or obtained in the course of this settlement, whether written or oral, will be kept confidential by the Parties and Class Counsel, all Claimants, the Claims Administrator, and the Independent Reviewer and will not be used for any purpose other than this settlement unless otherwise agreed by the Parties, authorized by this Agreement or applicable federal, provincial or territorial privacy legislation, or ordered by the Court.

50. Destruction of Claimant Information and Records

50.01 Within two (2) years of completing the payments of compensation, the Claims Administrator will destroy all Claimant information and documentation in its possession, unless a Claimant, Designated Representative, or Personal Representative specifically requests the return of such information within the two (2) year period. Upon receipt of such request, the Claims Administrator will forward the Claimant information as directed.

50.02 Within two (2) years of rendering a reconsideration decision, the Independent Reviewer will destroy all Claimant information and documentation in their possession, unless a Claimant, Designated Representative, or Personal Representative specifically requests the return of such information within the two (2) year period. Upon receipt of such request, the Independent Reviewer will forward the Claimant information as directed.

50.03 Prior to destruction of the records, the Claims Administrator and Independent Reviewer shall create and provide to Canada a list showing the (i) Day Scholar, (ii) School Year(s) of attendance, and (iii) Indian Residential School(s), with respect to which each Day Scholar Compensation Payment was made. Notwithstanding anything else in this Agreement, this list must be retained by Canada in strict confidence and can only be used in a legal proceeding or settlement where it is relevant as demonstrating, which the Parties agree they will do without further proof, which individuals received the Day Scholar Compensation Payment for which School Year(s) and with regard to which Indian Residential School(s).

51. Confidentiality of Negotiations

51.01 Save as may otherwise be agreed between the Parties, the undertaking of confidentiality as to the discussions and all communications, whether written or oral, made in and surrounding the negotiations leading to the exchanges of letters of offer and acceptance, and this Agreement continues in force.

CO-OPERATION

52. Co-operation With Canada

52.01 Upon execution of this Agreement, the representative plaintiffs and Class Counsel will co-operate with Canada and make best efforts to obtain Court approval of this Agreement and make reasonable efforts to obtain the support and participation of Survivor Class Members and Descendant Class Members in all aspects of this Agreement.

53. Public Announcements

53.01 At the time agreed upon, the Parties will make public announcements in support of this Agreement and continue to speak publicly in favour of the Agreement.

IN WITNESS WHEREOF the Parties have executed this Agreement as of this 4th day of June, 2021.

For the Plaintiffs
Waddell Phillips Professional Corporation, per
John K. Phillips
Class Counsel

JOHN KINGMAN PHILLIPS
Barrister & Solicitor

For the Plaintiffs

Peter R. Grant Law Corporation, per
Peter R. Grant
Class Counsel

CO-OPERATION

52. Co-operation With Canada

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53.01 At the time agreed upon, the Parties will make public announcements in support of this Agreement and continue to speak publicly in favour of the Agreement.

IN WITNESS WHEREOF the Parties have executed this Agreement as of this 4TH day of June, 2021.

For the Plaintiffs

Waddell Phillips Professional Corporation, per
John K. Phillips
Class Counsel

For the Plaintiffs

Peter R. Grant Law Corporation
Peter R. Grant
Class Counsel

Peter R. Grant
Peter Grant Law
Box 22137
#407-808 Nelson Street
Vancouver B.C. V6Z 2H2

Diane Soroka

For the Plaintiffs

Diane Soroka Avocate Inc., per
Diane H. Soroka
Class Counsel

Boudreau, Annie

Digitally signed by Boudreau, Annie
Date: 2021.06.03 08:32:16 -04'00'

For the Defendants

Annie Boudreau
Chief Finances, Results and Delivery Officer
Crown-Indigenous Relations and Northern Affairs Canada

For the Plaintiffs

Diane Soroka Avocate Inc., per
Diane H. Soroka
Class Counsel

Boudreau, Annie

Digitally signed by Boudreau, Annie
Date: 2021.06.03 08:32:16 -04'00'

For the Defendants

Annie Boudreau
Chief Finances, Results and Delivery Officer
Crown-Indigenous Relations and Northern Affairs Canada

Schedule A

Amended Pursuant to the Order of Justice Harrington
Made June 3, 2015

Court File No. T-1542-13

~~**PROPOSED**~~ **CLASS PROCEEDING**

FORM 171A - Rule 171

FEDERAL COURT

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, on his own behalf and on behalf of all the members of the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND and the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND,

Schedule I v Amended SOC (Band Class)

CHIEF GARRY FESCHUK, on his own behalf and on behalf of all the members of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND,

VIOLET CATHERINE GOTTFRIEDSON, ~~DOREEN LOUISE SEYMOUR,~~ CHARLOTTE ANNE VICTORINE GILBERT, ~~VICTOR FRASER,~~ DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ~~ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE,~~ DAPHNE PAUL~~, AARON JOE~~ and RITA POULSEN

PLAINTIFFS

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

DEFENDANT

FIRST RE-AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiffs' solicitor or, where the plaintiffs do not have a solicitor, serve it on the plaintiffs, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

(Date)

Issued by:_____
(Registry Officer)

Address of local office:_____

TO:

Her Majesty the Queen in Right of Canada,
Minister of Indian Affairs and Northern Development, and
Attorney General of Canada
Department of Justice
900 - 840 Howe Street
Vancouver, B.C. V6Z 2S9

RELIEF SOUGHT

The Survivor Class

1. The Representative Plaintiffs of the Survivor Class, on their own behalf, and on behalf of the members of the Survivor Class, claim:

(a) ~~an Order certifying this proceeding as a Class Proceeding pursuant to the Federal Court Class Proceedings Rules ("CPR") and appointing them as Representative Plaintiffs for the Survivor Class and any appropriate subgroup of that Class~~;

(b) a Declaration that Canada owed and was in breach of fiduciary, constitutionally-mandated, statutory and common law duties to the Plaintiffs and the other Survivor Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the ~~Identified~~ Residential Schools;

(c) a Declaration that members of the Survivor Class have Aboriginal Rights to speak their traditional languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner;

(d) a Declaration that Canada breached the linguistic and cultural rights (Aboriginal Rights or otherwise) ~~Aboriginal Rights~~ of the Survivor Class;

(e) a Declaration that the Residential Schools Policy and the ~~Identified~~ Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Survivor Class;

(f) a Declaration that Canada is liable to the Survivor Class Representative Plaintiffs and other Survivor Class members for the damages caused by its breach of fiduciary, constitutionally-mandated, statutory and common law duties, and Aboriginal Rights and for the intentional infliction of mental distress, as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the ~~Identified~~ Residential Schools;

(g) non-pecuniary general damages for breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights and intentional infliction of mental distress, as well as breaches of International Conventions and Covenants, and breaches of international law,, negligence and intentional infliction of mental distress for which Canada is liable;

(h) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, loss of educational opportunities, breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights and and intentional infliction of mental distress, as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the cost of care, and to restore, protect and preserve the linguistic and cultural heritage of the members of the Survivor Class for which Canada is liable;

(i) exemplary and punitive damages for which Canada is liable ;

(j) prejudgment and post-judgment interest;

(k) the costs of this action; and

(l) such further and other relief as this Honourable Court may deem just.

The Descendant Class

2. The Representative Plaintiffs of the Descendant Class, on their own behalf and on behalf of the members of the Descendant Class, claim:

(a) ~~an Order certifying this proceeding as a Class Proceeding pursuant to the CPR and appointing them as Representative Plaintiffs for the Descendant Class and any appropriate subgroup of that Class~~;

(b) a Declaration that Canada owed and was in breach of fiduciary, constitutionally-mandated, statutory and common law duties to the Plaintiffs and the other Descendant Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the ~~Identified~~ Residential Schools;

(c) a Declaration that the Descendant Class have Aboriginal Rights to speak their traditional languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner;

(d) a Declaration that Canada breached the linguistic and cultural rights (Aboriginal Rights or otherwise) ~~Aboriginal Rights~~ of the Descendant Class;

(e) a Declaration that the Residential Schools Policy and the ~~Identified~~ Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Descendant Class;

(f) a Declaration that Canada is liable to the Plaintiffs and other Descendant Class members for the damages caused by its breach of fiduciary, constitutionally-

mandated, statutory and common law duties and Aboriginal Rights as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the ~~Identified~~ Residential Schools;

(g) non-pecuniary general damages for breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights as well as breaches of International Conventions and Covenants, and breaches of international law, for which Canada is liable;

(h) pecuniary general damages and special damages for breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the cost of care, and to restore, protect and preserve the linguistic and cultural heritage of the members of the Descendant Class for which Canada is liable;

(i) exemplary and punitive damages for which Canada is liable;

(j) pre-judgment and post-judgment interest;

(k) the costs of this action; and

(l) such further and other relief as this Honourable Court may deem just;

The Band Class

3. The Representative Plaintiffs of the Band Class claim:

(a) ~~an Order certifying this proceeding as a Class Proceeding pursuant to the CPR and appointing them as Representative Plaintiffs for the Band Class~~;

(b) a Declaration that the Sechelt Indian Band (referred to as the shíshálh or shíshálh band) and Tk'emlúps Band, and all members of the Band Class, have ~~existing~~ Aboriginal Rights ~~within the meaning of s. 35(1) of the *Constitution Act, 1982*~~ to speak their traditional languages and engage in their traditional customs and religious practices and to govern themselves in their traditional manner;

(c) a Declaration that Canada owed and was in breach of fiduciary, constitutionally-mandated, statutory and common law duties as well as breaches of International Conventions and Covenants, and breaches of international law, to the Band Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the SIRS and the KIRS and other Identified Residential Schools;

(d) a Declaration that the Residential Schools Policy and the KIRS, the SIRS and Identified Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Band Class;

(e) a Declaration that Canada was or is in breach of the Band Class members' linguistic and cultural rights, (Aboriginal Rights or otherwise), as well as breaches of International Conventions and Covenants, and breaches of international law, as a consequence of its establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the Residential Schools Policy, and the Identified Residential Schools; ~~Aboriginal Rights;~~

(f) a Declaration that Canada is liable to the Band Class members for the damages caused by its breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the Identified Residential Schools;

(g) non-pecuniary and pecuniary general damages and special damages for breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the ongoing cost of care and development of wellness plans for individual members of the bands in the Band Class, as well as the costs of restoring, protecting and preserving the linguistic and cultural heritage of the Bands for which Canada is liable;

(h) the construction of healing centres in the Band Class communities by Canada;

(i) exemplary and punitive damages for which Canada is liable;

(j) pre-judgment and post-judgment interest;

(k) the costs of this action; and

(l) such further and other relief as this Honourable Court may deem just.

DEFINITIONS

4. The following definitions apply for the purposes of this Claim:

(a) "Aboriginal(s)", "Aboriginal Person(s)" or "Aboriginal Child(ren)" means a person or persons whose rights are recognized and affirmed by the *Constitution Act*, 1982, s. 35;

(b) "Aboriginal Right(s)" means any or all of the aboriginal and treaty rights recognized and affirmed by the *Constitution Act*, 1982, s. 35;

(c) "Act" means the *Indian Act*, R.S.C. 1985, c. I-5 and its predecessors as have been amended from time to time;

(d) "Agents" means the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of each of the Residential Schools;

(e) "Agreement" means the Indian Residential Schools Settlement Agreement dated May 10, 2006 entered into by Canada to settle claims relating to Residential Schools as approved in the orders granted in various jurisdictions across Canada;

(f) "Band Class" means the Tk'emlúps te Secwépemc Indian Band and the shíshálh band and any other Aboriginal Indian Band(s) which:

(i) has or had some members who are or were members of the Survivor Class, or in whose community a Residential School is located; and

(ii) is specifically added to this claim with one or more specifically identified Residential Schools.

(g) "Canada" means the Defendant, Her Majesty the Queen in right of Canada as represented by the Attorney General of Canada;

(h) "Class" or "Class members" means all members of the Survivor Class, Descendant Class and Band Class as defined herein;

(i) "Class Period" means 1920 to ~~1979~~1997;

(j) "Cultural, Linguistic and Social Damage" means the damage or harm caused by the creation and implementation of Residential Schools and Residential Schools Policy to the educational, governmental, economic, cultural, linguistic, spiritual and social customs, practices and way of life, traditional governance structures, as well as to the community and individual security and wellbeing, of Aboriginal Persons;

(k) "Descendant Class" means the first generation of ~~all~~ persons ~~who are~~ descended from Survivor Class members or persons who were legally or traditionally adopted by a Survivor Class Member or their spouse;

(l) "Identified Residential School(s)" means the KIRS or the SIRS ~~or any other~~ Residential School ~~specifically identified by a member of the Band Class~~;

(m) "KIRS" means the Kamloops Indian Residential School;

(n) "Residential Schools" means all Indian Residential Schools recognized under the Agreement;

(o) "Residential Schools Policy" means the policy of Canada with respect to the implementation of Indian Residential Schools;

(p) "SIRS" means the Sechelt Indian Residential School;

(q) "Survivor Class" means all Aboriginal persons who attended as a student or for educational purposes for any period at ~~an Identified~~ Residential School, during the Class Period excluding, for any individual class member, such periods of time for which that class member received compensation by way of the Common Experience Payment under the Indian Residential Schools Settlement Agreement.

THE PARTIES

The Plaintiffs

5. The Plaintiff, Darlene Matilda Bulpit (nee Joe) resides on shíshálh band lands in British Columbia. Darlene Matilda Bulpit was born on August 23, 1948 and attended the SIRS for nine years, between the years 1954 and 1963. Darlene Matilda Bulpit is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

6. The Plaintiff, Frederick Johnson resides on shíshálh band lands in British Columbia. Frederick Johnson was born on July 21, 1960 and attended the SIRS for ten years, between the years 1966 and 1976. Frederick Johnson is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

~~7. The Plaintiff, Abigail Margaret August (nee Joe) resides on shíshálh band lands in British Columbia. Abigail Margaret August was born on August 21, 1954 and attended the SIRS for eight years, between the years 1959 and 1967. Abigail Margaret August is a proposed Representative Plaintiff for the Survivor Class.~~

~~8. The Plaintiff, Shelly Nadine Hoehne (nee Joe) resides on shíshálh band lands in British Columbia. Shelly Nadine Hoehne was born on June 23, 1952 and attended the SIRS for eight years, between the years 1958 and 1966. Shelly Nadine Hoehne is a proposed Representative Plaintiff for the Survivor Class.~~

9. The Plaintiff, Daphne Paul resides on shíshálh band lands in British Columbia. Daphne Paul was born on January 13, 1948 and attended the SIRS for eight years, between the years 1953 and 1961. Daphne Paul is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

10. The Plaintiff, Violet Catherine Gottfriedson resides on the Tk'emlúps te Secwépemc Indian Band reserve in British Columbia. Violet Catherine Gottfriedson was born on March 30, 1945 and attended the KIRS for four years, between the years 1958 and 1962. Violet Catherine Gottfriedson is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

~~11. The Plaintiff, Doreen Louise Seymour resides on the Tk'emlúps te Secwépemc Indian Band reserve in British Columbia. Doreen Louise Seymour was born on September 7, 1955 and attended the KIRS for five years, between the years 1961 and 1966. Doreen Louise Seymour is a proposed Representative Plaintiff for the Survivor Class.~~

12. The Plaintiff, Charlotte Anne Victorine Gilbert (nee Larue) resides in Williams Lake in British Columbia. Charlotte Anne Victorine Gilbert was born on May 24, 1952 and attended the KIRS for seven years, between the years 1959 and 1966. Charlotte Anne Victorine Gilbert is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

~~13. The Plaintiff, Victor Fraser (also known as Victor Frezie) resides on the Tk'emlúps te Secwépemc Indian Band reserve in British Columbia. Victor Fraser was born on June 11, 1957~~

~~and attended the KIRS for six years, between the years 1962 and 1968. Victor Fraser is a proposed Representative Plaintiff for the Survivor Class.~~

14. The Plaintiff, Diena Marie Jules resides on the Tk'emlúps te Secwépemc Indian Band reserve in British Columbia. Diena Marie Jules was born on September 12, 1955 and attended the KIRS for six years, between the years 1962 and 1968. Diena Marie Jules is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

~~15. The Plaintiff, Aaron Joe, resides on shíshálh band lands. Aaron Joe was born on January 19, 1972 and is the son of Valerie Joe, who attended the SIRS as a day scholar. Aaron Joe is a proposed Representative Plaintiff for the Descendant Class.~~

16. The Plaintiff, Rita Poulsen, resides on shíshálh band lands. Rita Poulsen was born on March 8, 1974 and is the daughter of Randy Joe, who attended the SIRS as a day scholar. Rita Poulsen is a ~~proposed~~ Representative Plaintiff for the Descendant Class.

17. The Plaintiff, Amanda Deanne Big Sorrel Horse resides on the Tk'emlúps te Secwépemc Indian Band reserve. Amanda Deanne Big Sorrel Horse was born on December 26, 1974 and is the daughter of Jo-Anne Gottfriedson who attended the KIRS for six years between the years 1961 and 1967. Amanda Deanne Big Sorrel Horse is a ~~proposed~~ Representative Plaintiff for the Descendant Class.

18. The Tk'emlúps te Secwépemc Indian Band and the shíshálh band are "bands" as defined by the Act and they both ~~propose to~~ act as Representative Plaintiffs for the Band Class. The Band Class members represent the collective interests and authority of each of their respective communities.

19. The individual Plaintiffs and the proposed Survivor and Descendant Class members are largely members of the shíshálh band and Tk'emlúps Indian Band, and members of Canada's First Nations and/or are the sons and daughters of members of these Aboriginal collectives. The individual Plaintiffs and Survivor and Descendant Class members are Aboriginal Persons within the meaning of the *Constitution Act, 1982,* s. 35.

The Defendant

20. Canada is represented in this proceeding by the Attorney General of Canada. The Attorney General of Canada represents the interests of Canada and the Minister of Aboriginal Affairs and Northern Development Canada and predecessor Ministers who were responsible for "Indians" under s.91(24) of the *Constitution Act, 1867*, and who were, at all material times, responsible for the formation and implementation of the Residential Schools Policy, and the maintenance and operation of the KIRS and the SIRS.

STATEMENT OF FACTS

21. Over the course of the last several years, Canada has acknowledged the devastating impact of its Residential Schools Policy on Canada's Aboriginal Peoples. Canada's Residential Schools Policy was designed to eradicate Aboriginal culture and identity and assimilate the Aboriginal Peoples of Canada into Euro-Canadian society. Through this policy, Canada ripped away the foundations of identity for generations of Aboriginal People and caused incalculable harm to both individuals and communities.

22. The direct beneficiary of the Residential Schools Policy was Canada as its obligations would be reduced in proportion to the number, and generations, of Aboriginal Persons who would no longer recognize their Aboriginal identity and would reduce their claims to rights

under the Act and Canada's fiduciary, constitutionally-mandated, statutory and common law duties.

23. Canada was also a beneficiary of the Residential Schools Policy, as the policy served to weaken the claims of Aboriginal Peoples to their traditional lands and resources. The result was a severing of Aboriginal People from their cultures, traditions and ultimately their lands and resources. This allowed for exploitation of those lands and resources by Canada, not only without Aboriginal Peoples' consent but also, contrary to their interests, the Constitution of Canada and the Royal Proclamation of 1763.

24. The truth of this wrong and the damage it has wrought has now been acknowledged by the Prime Minister on behalf of Canada, and through the pan-Canadian settlement of the claims of those who *resided at* Canada's Residential Schools by way of the Agreement implemented in 2007. Notwithstanding the truth and acknowledgement of the wrong and the damages caused, many members of Canada's Aboriginal communities were excluded from the Agreement, not because they did not *attend* Residential Schools and suffer Cultural, Linguistic and Social Damage, but simply because they did not *reside at* Residential Schools.

25. This claim is on behalf of the members of the Survivor Class, namely those who attended ~~an Identified~~ a Residential School for the Cultural, Linguistic and Social Damage occasioned by that attendance, as well as on behalf of the Descendant Class, who are the first generation descendants of those within the Survivor Class, and the Band Class, consisting of the Aboriginal communities within which the ~~Identified~~ Residential Schools were situated, or whose members belong to ~~and within which the majority of~~ the Survivor and Descendant Class ~~members live~~.

26. The claims of the ~~proposed~~ Representative Plaintiffs are for the harm done to the Representative Plaintiffs as a result of members of the Survivor Class *attending* the KIRS and the SIRS and being exposed to the operation of the Residential Schools Policy and do not include the claims arising from residing at the KIRS or the SIRS for which specific compensation has been paid under the Agreement. This claim seeks compensation for the victims of that policy whose claims have been ignored by Canada and were excluded from the compensation in the Agreement.

The Residential School System

27. Residential Schools were established by Canada prior to 1874, for the education of Aboriginal Children. Commencing in the early twentieth century, Canada began entering into formal agreements with various religious organizations (the "Churches") for the operation of Residential Schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of Residential Schools. The Churches assumed the day-to-day operation of many of the Residential Schools under the control, supervision and direction of Canada, for which Canada paid the Churches a *per capita* grant. In 1969, Canada took over operations directly.

28. As of 1920, the Residential Schools Policy included compulsory *attendance* at Residential Schools for all Aboriginal Children aged 7 to 15. Canada removed most Aboriginal Children from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. However, in some cases, Aboriginal Children lived in their homes and communities and were similarly required to attend Residential Schools as day students and not residents. This practice applied to even more children in the later years

of the Residential Schools Policy. While at Residential School, all Aboriginal Children were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them and punished for non-compliance.

29. The purpose of the Residential Schools Policy was the complete integration and assimilation of Aboriginal Children into the Euro-Canadian culture and the obliteration of their traditional language, culture, religion and way of life. Canada set out and intended to cause the Cultural, Linguistic and Social Damage which has harmed Canada's Aboriginal Peoples and Nations. ~~In addition to the inherent cruelty of the~~ As a result of Canada's requirements for the forced attendance of the Survivor Class members under the Residential Schools Policy ~~itself~~, many children attending Residential Schools were also subject to spiritual, physical, sexual and emotional abuse, all of which continued until the year 1997, when the last Residential School was closed.

30. Canada chose to be disloyal to its Aboriginal Peoples, implementing the Residential Schools Policy in its own self-interest, including economic self-interest, and to the detriment and exclusion of the interests of the Aboriginal Persons to whom Canada owed fiduciary and constitutionally-mandated duties. The intended eradication of Aboriginal identity, culture, language, and spiritual practices ~~and religion~~, to the extent successful, results in the reduction of the obligations owed by Canada in proportion to the number of individuals, over generations, who would no longer identify as Aboriginal and who would be less likely to make claims to their rights as Aboriginal Persons.

The Effects of the Residential Schools Policy on the Class Members

31. Tk'emlúpsemc, 'the people of the confluence', now known as the Tk'emlúps te Secwépemc Indian Band are members of the northernmost of the Plateau People and of the Interior-Salish Secwépemc (Shuswap) speaking peoples of British Columbia. The Tk'emlúps Indian Band was established on a reserve now adjacent to the City of Kamloops, where the KIRS was subsequently established. Most, if not all, of the students who *attended*, but did not *reside at* the KIRS were or are members of the Tk'emlúps Indian Band, resident or formerly resident on the reserve.

32. Secwepemctsin is the language of the Secwépemc, and it is the unique means by which the cultural, ecological, and historical knowledge and experience of the Secwépemc people is understood and conveyed between generations. It is through language, spiritual practices and passage of culture and traditions including their rituals, drumming, dancing, songs and stories, that the values and beliefs of the Secwépemc people are captured and shared. From the Secwépemc perspective all aspects of Secwépemc knowledge, including their culture, traditions, laws and languages, are vitally and integrally linked to their lands and resources.

33. Language, like the land, was given to the Secwépemc by the Creator for communication to the people and to the natural world. This communication created a reciprocal and cooperative relationship between the Secwépemc and the natural world which enabled them to survive and flourish in harsh environments. This knowledge, passed down to the next generation orally, contained the teachings necessary for the maintenance of Secwépemc culture, traditions, laws and identity.

34. For the Secwépemc, their spiritual practices, songs, dances, oral histories, stories and ceremonies were an integral part of their lives and societies. These practices and traditions are

absolutely vital to maintain. Their songs, dances, drumming and traditional ceremonies connect the Secwépemc to their land and continually remind the Secwépemc of their responsibilities to the land, the resources and to the Secwépemc people.

35. Secwépemc ceremonies and spiritual practices, including their songs, dances, drumming and passage of stories and history, perpetuate their vital teachings and laws relating to the harvest of resources, including medicinal plants, game and fish, and the proper and respectful protection and preservation of resources. For example, in accordance with Secwépemc laws, the Secwépemc sing and pray before harvesting any food, medicines, and other materials from the land, and make an offering to thank the Creator and the spirits for anything they take. The Secwépemc believe that all living things have spirits and must be shown utmost respect. It was these vital, integral beliefs and traditional laws, together with other elements of Secwépemc culture and identity, that Canada sought to destroy with the Residential Schools Policy.

Shíshálh band

36. The shíshálh Nation, a division of the Coast Salish First Nations, originally occupied the southern portion of the lower coast of British Columbia. The shíshálh People settled the area thousands of years ago, and occupied approximately 80 village sites over a vast tract of land. The shíshálh People are made up of four sub-groups that speak the language of Shashishalhem, which is a distinct and unique language, although it is part of the Coast Salish Division of the Salishan Language.

37. Shíshálh tradition describes the formation of the shíshálh world (Spelmulh story). Beginning with the creator spirits, who were sent by the Divine Spirit to form the world, they

carved out valleys leaving a beach along the inlet at Porpoise Bay. Later, the transformers, a male raven and a female mink, added details by carving trees and forming pools of water.

38. The shíshálh culture includes singing, dancing and drumming as an integral part of their culture and spiritual practices, a connection with the land and the Creator and passing on the history and beliefs of the people. Through song and dance the shíshálh People would tell stories, bless events and even bring about healing. Their songs, dances and drumming also signify critical seasonal events that are integral to the shíshálh. Traditions also include making and using masks, baskets, regalia and tools for hunting and fishing. It was these vital, integral beliefs and traditional laws, together with other elements of the shíshálh culture and identity, that Canada sought to destroy with the Residential Schools Policy.

The Impact of the ~~Identified~~ Residential schools

39. For all of the Aboriginal Children who were compelled to attend the ~~Identified~~ Residential Schools, rigid discipline was enforced as per the Residential Schools Policy. While at school, children were not allowed to speak their Aboriginal language, even to their parents, and thus members of these Aboriginal communities were forced to learn English.

40. Aboriginal culture was strictly suppressed by the school administrators in compliance with the policy directives of Canada including the Residential Schools Policy. At the SIRS, ~~converts to Catholicism~~ members of shishalh were forced to burn or give to the agents of Canada centuries-old totem poles, regalia, masks and other "paraphernalia of the medicine men" and to abandon their potlatches, dancing and winter festivities, and other elements integral to the Aboriginal culture and society of the shíshálh and Secwépemc peoples.

41. Because the SIRS was physically located in the shíshálh community, ~~thechurch and~~Canada's ~~government~~ eyes, both directly and through its Agents, were upon the elders and they were punished severely for practising their culture or speaking their language or passing this on to future generations. In the midst of that scrutiny, the Class members struggled, often unsuccessfully, to practice, protect and preserve their songs, masks, dancing or other cultural practices

42. The Tk'emlúps te Secwépemc suffered a similar fate due to their proximity to the KIRS.

43. The children at the ~~Identified~~ Residential Schools were ~~indoctrinated into Christianity, and~~ taught to be ashamed of their Aboriginal identity, culture, spirituality and practices. They were referred to as, amongst other derogatory epithets, "dirty savages" and "heathens" and taught to shun their very identities. The Class members' Aboriginal way of life, traditions, cultures and spiritual practices were supplanted with the Euro-Canadian identity imposed upon them by Canada through the Residential Schools Policy.

44. This implementation of the Residential Schools Policy further damaged the Survivor Class members of the ~~Identified~~ Residential Schools, who returned to their homes at the end of the school day and, having been taught in the school that the traditional teachings of their parents, grandparents and elders were of no value and, in some cases, "heathen" practices and beliefs, would dismiss the teachings of their parents, grandparents and elders.

45. The assault on their traditions, laws, language and culture through the implementation of the Residential Schools Policy by Canada, directly and through its

Agents, has continued to undermine the individual Survivor Class members, causing a loss of self-esteem, depression, anxiety, suicidal ideation, suicide, physical illnesses without clear causes, difficulties in parenting, difficulties in maintaining positive relationships, substance abuse and violence, among other harms and losses, all of which has impacted the Descendant Class.

46. The Band Class members have lost, in whole or in part, their traditional economic viability, self-government and laws, language, land base and land-based teachings, traditional spiritual practices and religious practices, and the integral sense of their collective identity.

47. The Residential Schools Policy, delivered through the ~~Identified~~ Residential Schools, wrought cultural, linguistic and social devastation on the communities of the Band Class and altered their traditional way of life.

Canada's Settlement with Former Residential School Residents

48. From the closure of the ~~Identified~~ Residential Schools ~~in the 1970's~~ until the late 1990's, Canada's Aboriginal communities were left to battle the damages and suffering of their members as a result of the Residential Schools Policy, without any acknowledgement from Canada. During this period, Residential School survivors increasingly began speaking out about the horrible conditions and abuse they suffered, and the dramatic impact it had on their lives. At the same time, many survivors committed suicide or self-medicated to the point of death. The deaths devastated not only the members of the Survivor Class and the Descendant Class, but also the life and stability of the communities represented by the Band Class.

49. In January 1998, Canada issued a Statement of Reconciliation acknowledging and apologizing for the failures of the Residential Schools Policy. Canada admitted that the Residential Schools Policy was designed to assimilate Aboriginal Persons and that it was wrong to pursue that goal. The Plaintiffs plead that the Statement of Reconciliation by Canada is an admission by Canada of the facts and duties set out herein and is relevant to the Plaintiffs' claim for damages, particularly punitive damages.

50. The Statement of Reconciliation stated, in part, as follows:

> *Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We must acknowledge that the results of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.*
>
> *Against the backdrop of these historical legacies, it is a remarkable tribute to the strength and endurance of Aboriginal people that they have maintained their historic diversity and identity. The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the Federal Government which have contributed to these difficult pages in the history of our relationship together.*
>
> *One aspect of our relationship with Aboriginal people over this period that requires particular attention is the Residential School System. This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures. In the worst cases, it left legacies of personal pain and distress that continued to reverberate in Aboriginal communities to this date. Tragically, some children were the victims of physical and sexual abuse.*

> *The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse at Residential Schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at Residential Schools, we are deeply sorry. In dealing with the legacies of the Residential School program, the Government of Canada proposes to work with First Nations, Inuit, Metis people, the Churches and other interested parties to resolve the longstanding issues that must be addressed. We need to work together on a healing strategy to assist individuals and communities in dealing with the consequences of this sad era of our history...*
>
> *Reconciliation is an ongoing process. In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong community...*

51. On or about May 10, 2006, Canada entered into the Agreement to provide compensation primarily to those who *resided at* Residential Schools.

52. The Agreement provides for two types of individualized compensation: the Common Experience Payment ("CEP") for the fact of having resided at a Residential School, and compensation based upon an Independent Assessment Process ("IAP"), to provide compensation for certain abuses suffered and harms these abuses caused.

53. The CEP consisted of compensation for former *residents* of a Residential School in the amount of $10,000 for the first school year or part of a school year and a further $3,000 for each subsequent school year or part of a school year of *residence* at a Residential School. The CEP was payable based upon residence at a Residential School out of a recognition that the experience of assimilation was damaging and worthy of compensation, regardless of whether a student experienced physical, sexual or other abuse while at the Residential School. Compensation for the latter was payable through the IAP. The CEP was available only to former

residents of a Residential School while, in some cases, the IAP was available not only to former residents but also other young people who were lawfully on the premises of a Residential School, including former day students.

54. The implementation of the Agreement represented the first time Canada agreed to pay compensation for Cultural, Linguistic and Social Damage. Canada refused to incorporate compensation for members of the Survivor Class, namely, those students who *attended* the ~~Identified Residential Schools, or other~~ Residential Schools, but who did not *reside* there.

55. The Agreement was approved by provincial and territorial superior courts from British Columbia to Quebec, and including the Northwest Territories, Yukon Territory and Nunavut, and the Agreement was implemented beginning on September 20, 2007.

56. On June 11, 2008, Prime Minister Stephen Harper on behalf of Canada, delivered an apology ("Apology") that acknowledged the harm done by Canada's Residential Schools Policy:

> *For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities. In the 1870's, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools.* ***Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture.*** *These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said,* ***"to kill the Indian in the child".*** *Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.* ***[emphasis added]***

57. In this Apology, the Prime Minister made some important acknowledgments regarding the Residential Schools Policy and its impact on Aboriginal Children:

> *The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities. Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities. First Nations, Inuit and Métis languages and cultural practices were prohibited in these schools. Tragically, some of these children died while attending residential schools and others never returned home.*
>
> *The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language.*
>
> *The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.*
>
> * * *
>
> *We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.*
>
> *The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey. The Government of Canada sincerely apologizes and asks the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.*

58. Notwithstanding the Apology and the acknowledgment of wrongful conduct by Canada, as well as the call for recognition from Canada's Aboriginal communities and from the *Truth and Reconciliation Commission* in its Interim Report of February 2012, the exclusion of

the Survivor Class from the Agreement by Canada reflects Canada's continued failure to members of the Survivor Class. Canada continues, as it did from the 1970s until 2006 with respect to 'residential students', to deny the damage suffered by the individual Plaintiffs and the members of the Survivor, Descendant and Band Classes.

Canada's Breach of Duties to the Class Members

59. From the formation of the Residential Schools Policy to its execution in the form of forced attendance at the ~~Identified~~ Residential Schools, Canada utterly failed the Survivor Class members, and in so doing, destroyed the foundations of the individual identities of the Survivor Class members, stole the heritage of the Descendant Class members and caused incalculable losses to the Band Class members.

60. The Survivor Class members, Descendant Class members and Band Class members have all been affected by family dysfunction, a crippling or elimination of traditional ceremonies, and a loss of the hereditary governance structure which allowed for the ability to govern their peoples and their lands.

61. While attending the ~~Identified~~ Residential School the Survivor Class members were utterly vulnerable, and Canada owed them the highest fiduciary, moral, statutory, constitutionally-mandated and common law duties, which included, but were not limited to, the duty to protect Aboriginal Rights and prevent Cultural, Linguistic and Social Damage. Canada breached these duties, and failed in its special responsibility to ensure the safety and well-being of the Survivor Class while at the ~~Identified~~ Residential Schools.

Canada's Duties

62. Canada was responsible for developing and implementing all aspects of the Residential Schools Policy, including carrying out all operational and administrative aspects of Residential Schools. While the Churches were ~~often~~used as Canada's Agents to assist Canada in carrying out its objectives, those objectives and the manner in which they were carried out were the obligations of Canada. Canada was responsible for:

(a) the administration of the Act and its predecessor statutes as well as all other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;

(b) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessors and related Ministries and Departments, as well as the decisions taken by those ministries and departments;

(c) the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the ~~Identified~~ Residential Schools and for the creation, design and implementation of the program of education for Aboriginal Persons in attendance;

(d) the selection, control, training, supervision and regulation of the operators of the ~~Identified~~ Residential Schools, including their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons attending the ~~Identified~~ Residential Schools;

(e) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities; and

(f) the care and supervision of all members of the Survivor Class while they were in attendance at the ~~Identified~~ Residential Schools during the Class Period.

63. Further, Canada has at all material times committed itself to honour international law in relation to the treatment of its people, which obligations form minimum commitments to Canada's Aboriginal Peoples, including the Survivor, Descendant and Band Classes, and which have been breached. In particular, Canada's breaches include the failure to comply with the terms and spirit of:

(a) the *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, entered into force Jan. 12, 1951,, and in particular Article 2(b), (c) and (e) of that convention, by engaging in the intentional destruction of the culture of Aboriginal Children and communities, causing profound and permanent cultural, psychological, emotional and physical injuries to the Class;

(b) the *Declaration of the Rights of the Child* (1959) G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 by failing to provide Aboriginal Children with the means necessary for normal development, both materially and spiritually, and failing to put them in a position to earn a livelihood and protect them against exploitation;

(c) the *Convention on the Rights of the Child*, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989), and in particular Articles 29 and 30 of that convention, by failing to provide Aboriginal Children with education that is directed to the development of respect for their parents, their cultural identities, language and values, and by denying the right of Aboriginal Children to enjoy their own cultures, to profess and practise their own religions and to use their own languages;

(d) the *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, in particular Articles 1 and 27 of that convention, by interfering with Class members' rights to retain and practice their culture, spirituality, language and traditions, the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities and the right to teach their culture, spirituality, language and traditions to their own children, grandchildren, extended families and communities.

(e) the *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System,* OEA/Ser.L.V//II.82 doc.6 rev.1 at 17 (1992), and in particular Article XIII, by violating Class members' right to take part in the cultural life of their communities.

(f) the *United Nations Declaration on the Rights of Indigenous Peoples,* G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007), endorsed by Canada 12 November 2010, and in particular article 8, 2(d), which commits to the provision of effective mechanisms for redress for forced assimilation.

64. Canada's obligations under international law inform Canada's common law, statutory, fiduciary, constitutionally-mandated and other duties, and a breach of the aforementioned international obligations is evidence of, or constitutes, a breach under domestic law.

Breach of Fiduciary and Constitutionally-Mandated Duties

65. Canada has constitutional obligations to, and a fiduciary relationship with, Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the ~~Identified~~ Residential Schools and established the Residential Schools Policy. Through these acts, and by virtue of the *Constitution Act 1867*, the *Constitution Act, 1982*, and the provisions of the Act, as amended, Canada assumed the power and obligation to act in a fiduciary capacity with respect to the education and welfare of Class members.

66. Canada's constitutional duties include the obligation to uphold the honour of the Crown in all of its dealings with Aboriginal Peoples, including the Class members. This obligation arose with the Crown's assertion of sovereignty from the time of first contact and continues through post-treaty relationships. This is and remains an obligation of the Crown and was an obligation on the Crown at all material times. The honour of the Crown is a legal principle which requires the Crown to operate at all material times in its relations with Aboriginal Peoples from contact to post-treaty in the most honourable manner to protect the interests of the Aboriginal Peoples.

67. Canada's fiduciary duties obliged Canada to act as a protector of Class members' Aboriginal Rights, including the protection and preservation of their language, culture and their way of life, and the duty to take corrective steps to restore the Plaintiffs' culture, history and status, or assist them to do so. At a minimum, Canada's duty to Aboriginal Persons included the duty not to deliberately reduce the number of the beneficiaries to whom Canada owed its duties.

68. Canada's fiduciary duties and the duties otherwise imposed by the constitutional mandate assumed by Canada extend to the Descendant Class because the purpose of the assumption of control over the Survivor Class education was to eradicate from those Aboriginal Children their culture and identity, thereby removing their ability, as adults, to pass on to succeeding generations the linguistic, spiritual, cultural and behavioural bases of their people, as well as to relate to their families and communities and, ultimately, their ability to identify themselves as Aboriginal Persons to whom Canada owed its duties.

69. The fiduciary and constitutional duties owed by Canada extend to the Band Class because the Residential Schools Policy was intended to, and did, undermine and seek to destroy the way of life established and enjoyed by these Nations whose identities were and are viewed as collective.

70. Canada acted in its own self-interest and contrary to the interests of Aboriginal Children, not only by being disloyal to, but by actually betraying the Aboriginal Children and communities whom it had a duty to protect. Canada wrongfully exercised its discretion and power over Aboriginal People, and in particular children, for its own benefit. The Residential Schools Policy was pursued by Canada, in whole or in part, to eradicate what Canada saw as the "Indian Problem". Namely, Canada sought to relieve itself of its moral and financial responsibilities for Aboriginal People, the expense and inconvenience of dealing with cultures, languages, habits and values different from Canada's predominant Euro-Canadian heritage, and the challenges arising from land claims.

71. In breach of its ongoing fiduciary, constitutionally-mandated, statutory and common law duties to the Survivor, Descendant and Band Classes, Canada failed, and continues to fail, to

adequately remediate the damage caused by its wrongful acts, failures and omissions. In particular, Canada has failed to take adequate measures to ameliorate the Cultural, Linguistic and Social Damage suffered by the Survivor, Descendant and Band Classes, notwithstanding Canada's admission of the wrongfulness of the Residential Schools Policy since 1998.

Breach of Aboriginal Rights

72. The shíshálh and Tk'emlúps people, and indeed all members of the Band Class, from whom the individual Plaintiffs have descended have exercised laws, customs and traditions integral to their distinctive societies prior to contact with Europeans. In particular, and from a time prior to contact with Europeans, these Nations have sustained their individual members, communities and distinctive cultures by speaking their languages and practicing their customs and traditions.

73. During the time when Survivor Class members attended the ~~Identified~~ Residential Schools, in compliance with the Residential Schools Policy, they were taught to speak English, were punished for using their traditional languages and were made ashamed of their traditional language and way of life. Consequently, by reason of the attendance at the ~~Identified~~ Residential Schools, the Survivor Class members' ability to speak their traditional languages and practice their shíshálh, Tk'emlúps, and other, spiritual, religious and cultural activities was seriously impaired and, in some cases, lost entirely. These Class members were denied the ability to exercise and enjoy their Aboriginal Rights, both individually and in the context of their collective expression within the Bands, some particulars of which include, but are not limited to:

(a) shíshálh, Tk'emlúps and other Aboriginal cultural, spiritual and traditional activities have been lost or impaired;

(b) the traditional social structures, including the equal authority of male and female leaders have been lost or impaired;

(c) the shíshálh, Tk'emlúps and other Aboriginal languages have been lost or impaired;

(d) traditional shíshálh, Tk'emlúps and Aboriginal parenting skills have been lost or impaired;

(e) shíshálh, Tk'emlúps and other Aboriginal skills for gathering, harvesting, hunting and preparing traditional foods have been lost or impaired; and,

(f) shíshálh, Tk'emlúps and Aboriginal spiritual beliefs have been lost or impaired.

74. The interference in the Aboriginal Rights of the Survivor Class has resulted in that same loss being suffered by their descendants and communities, namely the Descendant and Band Classes, all of which was the result sought by Canada.

75. Canada had at all material times and continues to have a duty to protect the Class members' Aboriginal Rights, including the exercise of their spiritual practices and traditional protection of their lands and resources, and an obligation not to undermine or interfere with the individual Plaintiffs' and Class members' Aboriginal Rights. Canada has failed in these duties, without justification, through its Residential Schools Policy.

Intentional Infliction of Mental Distress

76. The design and implementation of the Residential Schools Policy as a program of assimilation to eradicate Aboriginal culture constituted flagrant, extreme and outrageous conduct which was plainly calculated to result in the Cultural, Social and Linguistic Damage, and the mental distress arising from that damage, which was actually suffered by the members of the Survivor and Descendant Classes.

Negligence giving rise to Spiritual, ~~Physical, Sexual,~~ Emotional and Mental Abuse

77. Through its Agents, Canada was negligent and in breach of its duties of care to the Survivor Class, particulars of which include, but are not limited to, the following:

(a) it failed to adequately screen and select the individuals ~~to whom it delegated~~ who it hired either directly or through its ~~a~~Agents for the operation of the ~~Identified~~ Residential Schools, to adequately supervise and control the operations of the ~~Identified~~ Residential Schools, and to protect Aboriginal children from spiritual, ~~physical, sexual~~, emotional and mental abuse at the ~~Identified~~ Residential Schools, and as a result, such abuses did occur to Survivor Class members and Canada is liable for such abuses;

(b) it failed to respond appropriately or at all to disclosure of abuses in the ~~Identified~~ Residential Schools, and in fact, covered up such abuse and suppressed information relating to those abuses; and

(c) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed.

Vicarious Liability

78. Through its Agents, Canada breached its duty of care to the Survivor Class resulting in damages to the Survivor Class and is vicariously liable for all of the breaches and abuses committed on its behalf.

79. Further, or in the alternative, Canada is vicariously liable for the negligent performance of the fiduciary, constitutionally-mandated, statutory and common law duties of its Agents.

80. Additionally, the Plaintiffs hold Canada solely responsible for the creation and implementation of the Residential Schools Policy and, furthermore:

a. The Plaintiffs expressly waive any and all rights they may possess to recover from Canada, or any other party, any portion of the Plaintiffs' loss that may be attributable to the fault or liability of any third-party and for which Canada might reasonably be entitled to claim from any one or more third-party for contribution,

indemnity or an apportionment at common law, in equity, or pursuant to the British Columbia *Negligence Act*, R.S.B.C. 1996, c. 333, as amended; and

b. The Plaintiffs will not seek to recover from any party, other than Canada, any portion of their losses which have been claimed, or could have been claimed, against any third-parties.

Damages

81. As a consequence of the breach of fiduciary, constitutionally-mandated, statutory and common law duties, and the intentional infliction of mental distress and the breaches of Aboriginal Rights by Canada and its Agents, for whom Canada is vicariously liable, the Survivor Class members, including the Representative Plaintiffs, suffered injury and damages including:

(a) loss of language, culture, spirituality, and Aboriginal identity;

(b) emotional and psychological harm;

(c) isolation from their family, community and Nation;

(d) deprivation of the fundamental elements of an education, including basic literacy;

(e) an impairment of mental and emotional health, in some cases amounting to a permanent disability;

(f) an impaired ability to trust other people, to form or sustain intimate relationships, to participate in normal family life, or to control anger;

(g) a propensity to addiction;

(h) alienation from community, family, spouses and children;

(i) an impaired ability to enjoy and participate in recreational, social, cultural, athletic and employment activities;

(j) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;

(k) deprivation of education and skills necessary to obtain gainfully employment;

(l) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the Residential School experience;

(m) sexual dysfunction;

(n) depression, anxiety and emotional dysfunction;

(o) suicidal tendencies;

(p) pain and suffering;

(q) loss of self-esteem and feelings of degradation, shame, fear and loneliness;,

(r) nightmares, flashbacks and sleeping problems;

(s) fear, humiliation and embarrassment as a child and adult;

(t) sexual confusion and disorientation as a child and young adult;

(u) impaired ability to express emotions in a normal and healthy manner;

(v) loss of ability to participate in, or fulfill, cultural practices and duties;

(w) loss of ability to live in their community and Nation; and

(x) constant and intense emotional, psychological pain and suffering.

82. As a consequence of the breach of fiduciary, constitutionally-mandated, statutory and common law duties, and the intentional infliction of harm and breach of Aboriginal Rights by Canada and its Agents, for whom Canada is vicariously liable, the Descendant Class members, including the Representative Plaintiffs, suffered injury and damages including:

(a) their relationships with Survivor Class members were impaired, damaged and distorted as a result of the experiences of Survivor Class members in the ~~Identified~~ Residential Schools; and,

(b) their culture and languages were undermined and in some cases eradicated by, amongst other things, as pleaded, the forced assimilation of Survivor Class members into Euro-Canadian culture through the operation of the ~~Identified~~ Residential Schools.

83. As a consequence of the breach of fiduciary, constitutionally-mandated, statutory and common law duties, and the intentional infliction of harm and breach of Aboriginal Rights by Canada and its Agents, for whom Canada is vicariously liable, the Band Class has suffered from the loss of the ability to fully exercise their Aboriginal Rights collectively, including the right to have a traditional government based on their own languages, spiritual practices, traditional laws

and practices and to have those traditions fully respected by the members of the Survivor and Descendant Classes and subsequent generations, all of which flowed directly from the individual losses of the Survivor Class and Descendant Class members' Cultural, Linguistic and Social Damage.

Grounds for Punitive and Aggravated Damages

84. Canada deliberately planned the eradication of the language, religion and culture of Survivor Class members and Descendant Class members, and the destruction of the Band Class. The actions were malicious and intended to cause harm, and in the circumstances punitive and aggravated damages are appropriate and necessary.

85. The Class members plead that Canada and its Agents had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class members that were occurring at the ~~Identified~~ Residential Schools.

86. Despite this knowledge, Canada continued to operate the Residential Schools and took no steps, or in the alternative no reasonable steps, to protect the Survivor Class members from these abuses and the grievous harms that arose as a result. In the circumstances, the failure to act on that knowledge to protect vulnerable children in Canada's care amounts to a wanton and reckless disregard for their safety and renders punitive and aggravated damages both appropriate and necessary.

Legal Basis of Claim

87. The Survivor and Descendant Class members are Indians as defined by the *Indian Act*, R.S.C. 1985, c. 1-5. The Band Class members are bands made up of Indians so defined.

88. The Class members' Aboriginal Rights existed and were exercised at all relevant times pursuant to the *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

89. At all material times, Canada owed the Plaintiffs and Class members a special and constitutionally-mandated duty of care, good faith, honesty and loyalty pursuant to Canada's constitutional obligations and Canada's duty to act in the best interests of Aboriginal People and especially Aboriginal Children who were particularly vulnerable. Canada breached those duties, causing harm.

90. The Class members descend from Aboriginal Peoples who have exercised their respective laws, customs and traditions integral to their distinctive societies prior to contact with Europeans. In particular, and from a time prior to contact with Europeans to the present, the Aboriginal Peoples from whom the Plaintiffs and Class members descend have sustained their people, communities and distinctive culture by exercising their respective laws, customs and traditions in relation to their entire way of life, including language, dance, music, recreation, art, family, marriage and communal responsibilities, and use of resources.

Constitutionality of Sections of the *Indian Act*

91. The Class members plead that any section of the Act and its predecessors and any Regulation passed under the Act and any other statutes relating to Aboriginal Persons that provide or purport to provide the statutory authority for the eradication of Aboriginal People through the destruction of their languages, culture, practices, traditions and way of life, are in violation of sections 25 and 35(1) of the *Constitution Act* 1982, sections 1 and 2 of the *Canadian*

Bill of Rights, R.S.C. 1985, as well as sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and should therefore be treated as having no force and effect.

92. Canada deliberately planned the eradication of the language, spirituality and culture of the Plaintiffs and Class members.

93. Canada's actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.

94. The Plaintiffs plead and rely upon the following:

Federal Courts Act, R.S.C., 1985, c. F-7, s. 17;

Federal Courts Rules, SOR/98-106, Part 5.1 Class Proceedings;

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;

Canadian Charter of Rights and Freedoms, ss. 7, 15 and 24;

Constitution Act, 1982, ss. 25 and 35(1),

Negligence Act (British Columbia), R.S.B.C. 1996, c. 333;

The Canadian Bill of Rights, R.S.C. 1985, App. III, Preamble, ss. 1 and 2;

The Indian Act, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122 and its predecessors.

International Treaties:

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951;

Declaration of the Rights of the Child (1959), G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354;

Convention on the Rights of the Child, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989);

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976;

American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System,* OEA/Ser.L.V//II.82 doc.6 rev.1 at 17 (1992); and

United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007), endorsed by Canada 12 November 2010.

The plaintiffs propose that this action be tried at Vancouver, BC.

June 11th, 2013

Peter R. Grant, on behalf of
all Solicitors for the Plaintiffs

Solicitors for the Plaintiffs

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Schedule B

Federal Court  Cour fédérale

Date: 20150618

Docket: T-1542-12

Citation: 2015 FC 766

Ottawa, Ontario, June 18, 2015

PRESENT: The Honourable Mr. Justice Harrington

PROPOSED CLASS ACTION

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND AND THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSEN

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER

FOR REASONS GIVEN on 3 June 2015, reported at 2015 FC 706;

THIS COURT ORDERS that:

1. The above captioned proceeding shall be certified as a class proceeding with the following conditions:

a. The Classes shall be defined as follows:

Survivor Class: all Aboriginal persons who attended as a student or for educational purposes for any period at a Residential School, during the Class Period, excluding, for any individual class member, such periods of time for which that class member received compensation by way of the Common Experience Payment under the Indian Residential Schools Settlement Agreement.

Descendant Class: the first generation of persons descended from Survivor Class Members or persons who were legally or traditionally adopted by a Survivor Class Member or their spouse.

Band Class: the Tk'emlúps te Secwépemc Indian Band and the Sechelt Indian Band and any other Indian Band(s) which:

(i) has or had some members who are or were members of the Survivor Class, or in whose community a Residential School is located; and

(ii) is specifically added to this claim with one or more specifically Identified Residential Schools.

b. The Representative Plaintiffs shall be:

For the Survivor Class:

Violet Catherine Gottfriedson

Charlotte Anne Victorine Gilbert

Diena Marie Jules

Darlene Matilda Bulpit

Frederick Johnson

Daphne Paul

For the Descendant Class:

Amanda Deanne Big Sorrel Horse

Rita Poulsen

For the Band Class:

Tk'emlúps te Secwépemc Indian Band

Sechelt Indian Band

c. The Nature of the Claims are:

Breaches of fiduciary and constitutionally mandated duties, breach of Aboriginal Rights, intentional infliction of mental distress, breaches of International Conventions and/or Covenants, breaches of international law, and negligence committed by or on behalf Canada for which Canada is liable.

d. The Relief claimed is as follows:

By the Survivor Class:

i. a Declaration that Canada owed and was in breach of the fiduciary, constitutionally-mandated, statutory and common law duties to the Survivor Class Representative Plaintiffs and the other Survivor Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the Residential Schools;

ii. a Declaration that members of the Survivor Class have Aboriginal Rights to speak their traditional languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner;

iii. a Declaration that Canada breached the linguistic and cultural rights (Aboriginal Rights or otherwise) of the Survivor Class;

iv. a Declaration that the Residential Schools Policy and the Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Survivor Class;

v. a Declaration that Canada is liable to the Survivor Class Representative Plaintiffs and other Survivor Class members for the damages caused by its breach of fiduciary, constitutionally-mandated, statutory and common law duties, and Aboriginal Rights and for the intentional infliction of mental distress, as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose,

establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the Residential Schools;

vi. general damages for negligence, breach of fiduciary, constitutionally-mandated, statutory and common law duties, Aboriginal Rights and intentional infliction of mental distress, as well as breaches of International Conventions and Covenants, and breaches of international law, for which Canada is liable;

vii. pecuniary damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, loss of educational opportunities, breach of fiduciary, constitutionally-mandated, statutory and common law duties, Aboriginal Rights and for intentional infliction of mental distress, as well as breaches of International Conventions and Covenants, and breaches of international law including amounts to cover the cost of care, and to restore, protect and preserve the linguistic and cultural heritage of the members of the Survivor Class for which Canada is liable;

viii. exemplary and punitive damages for which Canada is liable; and

ix. pre-judgment and post-judgment interest and costs.

By the Descendant Class:

i. a Declaration that Canada owed and was in breach of the fiduciary, constitutionally-mandated, statutory and common law duties owed to the Descendant Class Representative Plaintiffs and the other Descendant Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the Residential Schools;

ii. a Declaration that the Descendant Class have Aboriginal Rights to speak their traditional languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner

iii. a Declaration that Canada breached the linguistic and cultural rights (Aboriginal Rights or otherwise) of the Descendant Class;

iv. a Declaration that the Residential Schools Policy and the Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Descendant Class;

v. a Declaration that Canada is liable to the Descendant Class Representative Plaintiffs and other Descendant Class members for the damages caused by its breach of fiduciary and constitutionally-mandated duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at, and support of, the Residential Schools;

vi. general damages for breach of fiduciary and constitutionally-mandated duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, for which Canada is liable;

vii. pecuniary damages and special damages for breach of fiduciary and constitutionally-mandated duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the cost of care, and to restore, protect and preserve the linguistic and cultural heritage of the members of the Descendant Class for which Canada is liable;

viii. exemplary and punitive damages for which Canada is liable; and

ix. pre-judgment and post-judgment interest and costs.

By the Band Class:

i. a Declaration that the Sechelt Indian Band and Tk'emlúps te Secwépemc Indian Band, and all members of the Band Class, have Aboriginal Rights to speak their traditional languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner;

ii. a Declaration that Canada owed and was in breach of the fiduciary, constitutionally-mandated, statutory and common law duties, as well as breaches of International Conventions and Covenants, and breaches of international law, to the Band Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance,

obligatory attendance of Survivor Class members at, and support of, the SIRS and the KIRS and other Identified Residential Schools;

iii. a Declaration that the Residential Schools Policy and the KIRS, the SIRS and Identified Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Band Class;

iv. a Declaration that Canada was or is in breach of the Band Class members' linguistic and cultural rights, (Aboriginal Rights or otherwise), as well as breaches of International Conventions and Covenants, and breaches of international law, as a consequence of its establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the Residential Schools Policy, and the Identified Residential Schools;

v. a Declaration that Canada is liable to the Band Class members for the damages caused by its breach of fiduciary and constitutionally mandated duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the Identified Residential Schools;

vi. non-pecuniary and pecuniary damages and special damages for breach of fiduciary and constitutionally mandated duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the ongoing cost

of care and development of wellness plans for members of the bands in the Band Class, as well as the costs of restoring, protecting and preserving the linguistic and cultural heritage of the Band Class for which Canada is liable;

vii. The construction and maintenance of healing and education centres in the Band Class communities and such further and other centres or operations as may mitigate the losses suffered and that this Honourable Court may find to be appropriate and just;

viii. exemplary and punitive damages for which Canada is liable; and

ix. pre-judgment and post-judgment interest and costs.

e. The Common Questions of Law or Fact are:

a. Through the purpose, operation or management of any of the Residential Schools during the Class Period, did the Defendant breach a fiduciary duty owed to the Survivor, Descendant and Band Class, or any of them, not to destroy their language and culture?

b. Through the purpose, operation or management of any of the Residential Schools during the Class Period, did the Defendant breach the cultural and/or linguistic rights, be they Aboriginal Rights or otherwise of the Survivor, Descendant and Band Class, or any of them?

c. Through the purpose, operation or management of any of the Residential Schools during the Class Period, did the Defendant breach a fiduciary duty owed to the Survivor Class to protect them from actionable mental harm?

d. Through the purpose, operation or management of any of the Residential Schools during the Class Period, did the Defendant breach a duty of care owed to the Survivor Class to protect them from actionable mental harm?

e. If the answer to any of (a)-(d) above is yes, can the Court make an aggregate assessment of the damages suffered by the Class as part of the common issues trial?

f. If the answer to any of (a)-(d) above is yes, was the Defendant guilty of conduct that justifies an award of punitive damages; and

g. If the answer to (f) above is yes, what amount of punitive damages ought to be awarded?

f. The following definitions apply to this Order:

a. "Aboriginal(s)", "Aboriginal Person(s)" or "Aboriginal Child(ren)" means a person or persons whose rights are recognized and affirmed by the *Constitution Act* , 1982, s. 35;

b. "Aboriginal Right(s)" means any or all of the Aboriginal and treaty rights recognized and affirmed by the *Constitution Act*, *1982*, section. 35;

c. “Act” means the *Indian Act*, R.S.C. 1985, c. I-5 and its predecessors as have been amended from time to time;

d. “Agreement” means the Indian Residential Schools Settlement Agreement dated May 10, 2006 entered into by Canada to settle claims relating to Residential Schools as approved in the orders granted in various jurisdictions across Canada;

e. "Canada" means the Defendant, Her Majesty the Queen;

f. "Class Period” means 1920 to 1997;

g. "Cultural, Linguistic and Social Damage" means the damage or harm caused by the creation and implementation of Residential Schools and Residential Schools Policy to the educational, governmental, economic, cultural, linguistic, spiritual and social customs, practices and way of life, traditional governance structures, as well as to the community and individual security and wellbeing, of Aboriginal Persons;

h. “Identified Residential School(s)” means the KIRS or the SIRS or any other Residential School specifically identified as a member of the Band Class;

i. “KIRS” means the Kamloops Indian Residential School;

j. “Residential Schools” means all Indian Residential Schools recognized under the Agreement and listed in Schedule “A” appended to this Order

which Schedule may be amended from time to time by Order of this Court.;

k. "Residential Schools Policy" means the policy of Canada with respect to the implementation of Indian Residential Schools; and

l. "SIRS" means the Sechelt Indian Residential School.

g. The manner and content of notices to class members shall be approved by this Court. Class members in the Survivor and Descendent class shall have until October 30, 2015 in which to opt-out, or such other time as this Court may determine. Members of the Band Class will have 6 months within which to opt-in from the date of publication of the notice as directed by the Court, or other such time as this Court may determine.

h. Either party may apply to this Court to amend the list of Residential Schools set out in Schedule "A" for the purpose of these proceedings.

"Sean Harrington"
Judge

SCHEDULE "A"
to the Order of Justice Harrington

LIST OF RESIDENTIAL SCHOOLS

British Columbia Residential Schools

Ahousaht

Alberni

Cariboo (St. Joseph's, William's Lake)

Christie (Clayoquot, Kakawis)

Coqualeetza from 1924 to 1940

Cranbrook (St. Eugene's, Kootenay)

Kamloops

Kuper Island

Lejac (Fraser Lake)

Lower Post

St George's (Lytton)

St. Mary's (Mission)

St. Michael's (Alert Bay Girls' Home, Alert Bay Boys' Home)

Sechelt

St. Paul's (Squamish, North Vancouver)

Port Simpson (Crosby Home for Girls)

Kitimaat

Anahim Lake Dormitory (September 1968 to June 1977)

Alberta Residential Schools

Assumption (Hay Lake)

Blue Quills (Saddle Lake, Lac la Biche, Sacred Heart)

Crowfoot (Blackfoot, St. Joseph's, Ste. Trinité)

Desmarais (Wabiscaw Lake, St. Martin's, Wabisca Roman Catholic)

Edmonton (Poundmaker, replaced Red Deer Industrial)

Ermineskin (Hobbema)

Holy Angels (Fort Chipewyan, École des Saint-Anges)

Fort Vermilion (St. Henry's)

Joussard (St. Bruno's)

Lac La Biche (Notre Dame des Victoires)

Lesser Slave Lake (St. Peter's)

Morley (Stony/Stoney, replaced McDougall Orphanage)

Old Sun (Blackfoot)

Sacred Heart (Peigan, Brocket)

St. Albert (Youville)

St. Augustine (Smokey-River)

St. Cyprian (Queen Victoria's Jubilee Home, Peigan)

St. Joseph's (High River, Dunbow)

St. Mary's (Blood, Immaculate Conception)

St. Paul's (Blood)

Sturgeon Lake (Calais, St. Francis Xavier)

Wabasca (St. John's)

Whitefish Lake (St. Andrew's)

Grouard to December 1957

Sarcee (St. Barnabas)

Saskatchewan Residential Schools

Beauval (Lac la Plonge)

File Hills

Gordon's

Lac La Ronge (see Prince Albert)

Lebret (Qu'Appelle, Whitecalf, St. Paul's High School)

Marieval (Cowesess, Crooked Lake)

Muscowequan (Lestock, Touchwood)

Onion Lake Anglican (see Prince Albert)

Prince Albert (Onion Lake, St. Alban's, All Saints, St. Barnabas, Lac La Ronge)

Regina

Round Lake

St. Anthony's (Onion Lake, Sacred Heart)

St. Michael's (Duck Lake)

St. Philip's

Sturgeon Landing (replaced by Guy Hill, MB)

Thunderchild (Delmas, St. Henri)

Crowstand

Fort Pelly

Cote Improved Federal Day School (September 1928 to June 1940)

Manitoba Residential Schools

Assiniboia(Winnipeg)

Birtle

Brandon

Churchill Vocational Centre

Cross Lake (St. Joseph's, Norway House)

Dauphin (replaced McKay)

Elkhorn (Washakada)

Fort Alexander (Pine Falls)

Guy Hill (Clearwater, the Pas, formerly Sturgeon Landing, SK)

McKay (The Pas, replaced by Dauphin)

Norway House

Pine Creek (Campeville)

Portage la Prairie

Sandy Bay

Notre Dame Hostel (Norway House Catholic, Jack River Hostel, replaced Jack River Annex at Cross Lake)

Ontario Residential Schools

Bishop Horden Hall (Moose Fort, Moose Factory)

Cecilia Jeffrey (Kenora, Shoal Lake)

Chapleau (St. Joseph's)

Fort Frances (St. Margaret's)

McIntosh (Kenora)

Mohawk Institute

Mount Elgin (Muncey, St. Thomas)

Pelican Lake (Pelican Falls)

Poplar Hill

St. Anne's (Fort Albany)

St. Mary's (Kenora, St. Anthony's)

Shingwauk

Spanish Boys' School (Charles Garnier, St. Joseph's)

Spanish Girls' School (St. Joseph's, St. Peter's, St. Anne's)

St. Joseph's/Fort William

Stirland Lake High School (Wahbon Bay Academy) from September 1, 1971 to June 30, 1991

Cristal Lake High School (September 1, 1976 to June 30, 1986)

Quebec Residential Schools

Amos

Fort George (Anglican)

Fort George (Roman Catholic)

La Tuque

Point Bleue

Sept-Îles

Federal Hostels at Great Whale River

Federal Hostels at Port Harrison

Federal Hostels at George River

Federal Hostel at Payne Bay (Bellin)

Fort George Hostels (September 1, 1975 to June 30, 1978)

Mistassini Hostels (September 1, 1971 to June 30, 1978)

Nova Scotia Residential Schools

Shubenacadie

Nunavut Residential Schools

Chesterfield Inlet (Joseph Bernier, Turquetil Hall)

Federal Hostels at Panniqtuug/Pangnirtang

Federal Hostels at Broughton Island/Qikiqtarjuaq

Federal Hostels at Cape Dorset Kinngait

Federal Hostels at Eskimo Point/Arviat

Federal Hostels at Igloolik/Iglulik

Federal Hostels at Baker Lake/Qamani'tuaq

Federal Hostels at Pond Inlet/Mittimatalik

Federal Hostels at Cambridge Bay

Federal Hostels at Lake Harbour

Federal Hostels at Belcher Islands

Federal Hostels at Frobisher Bay/Ukkivik

Federal Tent Hostel at Coppermine

Northwest Territories Residential Schools

Aklavik (Immaculate Conception)

Aklavik (All Saints)

Fort McPherson (Fleming Hall)

Ford Providence (Sacred Heart)

Fort Resolution (St. Joseph's)

Fort Simpson (Bompas Hall)

Fort Simpson (Lapointe Hall)

Fort Smith (Breynat Hall)

HayRiver-(St. Peter's)

Inuvik (Grollier Hall)

Inuvik (Stringer Hall)

Yellowknife (Akaitcho Hall)

Fort Smith -Grandin College

Federal Hostel at Fort Franklin

Yukon Residential Schools

Carcross (Chooulta)

Yukon Hall (Whitehorse/Protestant Hostel)

Coudert Hall (Whitehorse Hostel/Student Residence -replaced by Yukon Hall)

Whitehorse Baptist Mission

Shingle Point Eskimo Residential School

St. Paul's Hostel from September 1920 to June 1943

SCHEDULE C

CLAIMS PROCESS FOR DAY SCHOLAR COMPENSATION PAYMENT

Principles Governing Claims Administration

1. The following principles shall govern the Claims administration ("Claims Process Principles"):

    a. the Claims Process shall be expeditious, cost-effective, user-friendly, culturally sensitive, and trauma-informed;

    b. the Claims Process shall minimize the burden on the Claimants in pursuing their Claims;

    c. the Claims Process shall mitigate any likelihood of re-traumatization through the Claims Process;

    d. the Claims Administrator and Independent Reviewer shall assume that a Claimant is acting honestly and in good faith unless there is reasonable evidence to the contrary;

    e. the Claims Administrator and Independent Reviewer shall draw all reasonable and favourable inferences that can be drawn in favour of the Claimant.

2. The above Claims Process Principles shall be applied throughout the Claims Process, including in any reconsideration.

Eligibility Criteria

3. Pursuant to the Settlement Agreement, a Claimant is entitled to a Day Scholar Compensation Payment, and their Claim shall be approved, if the Claimant satisfies the following eligibility criteria:

    a. the Claim is made with respect to a Day Scholar who was alive on May 30, 2005;

b. the Claim is made with respect to that Day Scholar's attendance at an Indian Residential School listed in Schedule E during all or part of a School Year for which the Day Scholar has not received a Common Experience Payment under the IRSSA, has not and will not receive compensation under the McLean Settlement, and has not received compensation under any other settlement with respect to a school listed in Schedule K to the McLean Settlement; and

c. the Claim is delivered to the Claims Administrator prior to the Ultimate Claims Deadline.

Intake

4. To apply for a Day Scholar Compensation Payment, a Claimant must complete a Claim Form and deliver it to the Claims Administrator prior to the Claims Deadline, through either the electronic or hard copy processes established by the Claims Administrator.

5. Notwithstanding the Claims Deadline, a Claimant may submit a Claim Form along with a request for a Claims Deadline extension to the Claims Administrator after the Claims Deadline but before the Ultimate Claims Deadline. Under no circumstances will the Claims Administrator accept any Claim Forms after the Ultimate Claims Deadline, except as specifically provided for herein and in the Estate Claims Process set out in Schedule D.

6. The Claims Administrator will provide the Claimant with confirmation of receipt of the Claim.

7. The Claims Administrator will digitize all paper applications and maintain electronic copies for use only as provided for by this Agreement.

8. The Claims Administrator will review each Claim for completeness. If any required information is missing from the Claim Form that renders it incomplete, including a request for a Claims Deadline extension, the Claims Administrator will contact the

Claimant and request that the Claimant provide the missing information or resubmit the Claim Form. The Claimant will have 60 days from the date of the resubmission request to resubmit their Claim Form, notwithstanding that the Ultimate Claims Deadline may have elapsed.

9. The Claims Administrator shall, without taking any further action, dismiss any Claim made with respect to an individual who died on or before May 29, 2005.

Information Provided by Canada

10. The Claims Administrator will provide a copy of each Claim made with respect to an individual alive on May 30, 2005, to Canada for use only as provided for by this Agreement.

11. Canada will review the Claim against any information in its possession for the purposes of:

    a. determining whether the individual at issue in the Claim or their executor, representative, or heir who applied in place of the individual received a Common Experience Payment pursuant to the IRSSA for any of the same School Years set out in the Claim;

    b. determining whether the individual at issue in the Claim or their executor, representative, or heir who applied in place of the individual was denied a Common Experience Payment claim pursuant to the IRSSA for any of the same School Years set out in the Claim;

    c. determining whether the individual at issue or their executor, representative, or heir who applied in place of the individual received compensation under any other settlement with respect to a school listed in Schedule K to the McLean Settlement, for any of the same School Years set out in the Claim;

    d. determining whether the individual at issue attended a school not listed in List 1 or List 2 as set out in Schedule E for any of the same School Years set out in the Claim; and

e. any other information that may be relevant to a Claim with respect to a school listed in List 2 of Schedule E.

12. In order to ensure that the Claim is not denied by reason only of the Claimant having been mistaken as to the School Year(s) of attendance as a Day Scholar, Canada will review the attendance records at the identified Indian Residential School(s) with respect to which the Claim was made for the five School Years before and after the School Year(s) identified in the Claim. If, as a result of this process, it is found that the individual at issue was a Day Scholar in (a) School Year(s) not claimed, this information shall be provided to the Claims Administrator and the Claim will be assessed as if it included that/those School Year(s).

13. Canada may forward to the Claims Administrator any information/documentation that supports or contradicts the individual at issue's attendance as a Day Scholar within 45 days of its receipt of a Claim from the Claims Administrator but will endeavour to do so as quickly as possible so as not to delay the determination of any Claim.

Assessment by the Claims Administrator

14. Where the Claim is with respect to an individual who was denied a Common Experience Payment claim pursuant to the IRSSA for any of the same School Years set out in the Claim on the grounds that they attended but did not reside at the Indian Residential School(s), regardless of which Indian Residential School(s) are named in the Claim, the Claims Administrator will consider the Claim to be presumptively valid, subject to the provisions below.

15. For all other Claims, the Claims Administrator will first make a determination whether the Claim is made with respect to a Day Scholar, in accordance with the following protocol:

    a. where the Claim is with respect to one or more Indian Residential Schools listed in List 1 of Schedule E within any time periods specified in that list, and the Claim Form states positively that the Claim is with respect to an

individual who attended the School as a Day Scholar, the Claims Administrator will consider the Claim to be presumptively valid, subject to the provisions below;

b. where the Claim is with respect only to one or more Indian Residential Schools listed in List 2 of Schedule E within any time periods specified in that list, and the Claimant provides a statutory declaration stating that the individual with respect to whom the Claim is made was a Day Scholar and identifying where the individual resided during the time they were a Day Scholar, the Claims Administrator will review the Claim and any information provided by Canada under ss. 11 – 13 above. Unless Canada has provided positive evidence demonstrating on a balance of probabilities that the individual was not a Day Scholar, the Claim will be considered presumptively valid, subject to the provisions below; and

c. where the Claim does not name any Indian Residential School listed in Schedule E, the Claims Administrator shall make best efforts to determine if there is any possibility of mistake or misnomer in the name of an Indian Residential School, including, where necessary, by contacting the Claimant. The Claims Administrator shall correct any such mistakes or misnomers. Where the Claims Administrator is satisfied that the Claim is not regarding any Indian Residential School listed in Schedule E, the Claims Administrator shall dismiss the Claim.

16. The Claims Administrator will review any information provided by Canada pursuant to ss. 11 - 13 above and any information in its possession as part of the McLean Settlement. If the Claims Administrator finds that there is positive evidence demonstrating on a balance of probabilities that, for all of the School Years set out in the Claim Form, the individual at issue or her/his executor, representative, or heir who applied in place of the individual:

    a. Received a Common Experience Payment under the IRSSA;

b. Received compensation under the McLean Settlement;

c. Received compensation as part of any other settlement with respect to a school listed in Schedule K to the McLean Settlement;

d. attended a school not listed in Schedule E; or

e. any combination of (a), (b), (c), or (d).

the Claims Administrator shall dismiss the Claim.

17. The Claims Administrator shall inform any Claimant whose Claim is dismissed by delivering a letter to them, via the Claimant's preferred method of communication:

a. providing clear reasons why the Claim has been dismissed;

b. in cases where the Claimant has a right to seek reconsideration:

i. informing the Claimant of their right to seek reconsideration, the process for seeking reconsideration, and any applicable deadlines;

ii. informing the Claimant of their right to assistance from Class Counsel at no cost and their right to assistance from another counsel of their choice at their own expense; and

iii. attaching copies of any information and documents that were considered as part of the Claims Administrator's decision to dismiss the Claim.

Reconsideration

18. A Claimant whose Claim is dismissed because:

a. it is in relation to a school that the Claims Administrator is satisfied is not an Indian Residential School listed in Schedule E; or

b. it is on behalf of an individual who died on or before May 29, 2005,

has no right to seek reconsideration.

19. A Claimant whose Claim is denied for any other reason has a right to seek reconsideration before the Independent Reviewer. Notice of intent to seek reconsideration must be delivered to the Independent Reviewer within 60 days of the date of the Claims Administrator's decision.

20. Canada has no right to seek reconsideration under any circumstances.

21. Claimants seeking reconsideration have the right to be represented by Class Counsel for the purposes of reconsideration at no cost to them or to retain another counsel of their choice at their own expense.

22. The Independent Reviewer will provide the Claimant with confirmation of receipt of the notice of intent to seek reconsideration and will provide Canada with a copy of the notice of intent to seek reconsideration.

23. The Independent Reviewer will advise the Claimant that they have a right to submit new evidence on reconsideration. The Claimant shall have 60 days to submit any new evidence on reconsideration, with such further reasonable extensions as the Claimant may request and the Independent Reviewer may grant.

24. The Independent Reviewer will provide Canada with any new evidence submitted by the Claimant and Canada will have the right to provide additional information to the Independent Reviewer that responds to any new evidence provided within 60 days.

25. The Independent Reviewer shall then consider each Claim, including its supporting documentation, *de novo*, and render a decision in accordance with the Claims Process Principles set out above. In particular, the Independent Reviewer shall:

    a. assume that a Claimant is acting honestly and in good faith, in the absence of reasonable grounds to the contrary; and

b. draw all reasonable and favourable inferences that can be drawn in favour of the Claimant.

26. If the Independent Reviewer decides the Claim should be accepted, the Claims Administrator and the Claimant will be informed, and the Claims Administrator will pay the Claimant forthwith.

27. If the Independent Reviewer decides the Claim should be dismissed, they will inform the Claimant by delivering a letter to them, via the Claimant's preferred method of communication:

a. providing clear reasons why the Claim has been dismissed; and

b. attaching copies of any information and documents that were considered as part of the Independent Reviewer's decision to dismiss the Claim.

28. All requests for reconsideration shall be resolved by the Independent Reviewer within 30 days of the receipt of any responding material provided by Canada or the expiry of time for Canada to provide responding material, whichever is sooner. If the Claimant does not file any new evidence on reconsideration, the Independent Reviewer shall resolve the reconsideration within 30 days of the expiry of time for the Claimant to provide new evidence. The timelines within this section may be modified by agreement between Class Counsel and Canada in consultation with the Independent Reviewer.

29. The decision of the Independent Reviewer is final without any further right of appeal or judicial review.

SCHEDULE D

ESTATE CLAIMS PROCESS FOR DAY SCHOLAR COMPENSATION PAYMENT

Where There is an Executor/Administrator/Trustee/Liquidator

1. The Claimant shall:

    a. complete the appropriate Claim Form;

    b. provide evidence that the Day Scholar is deceased;

    c. provide evidence of when the Day Scholar died; and

    d. provide evidence that they have been appointed as the executor, administrator, trustee, or liquidator.

2. The Claim Form will contain release, indemnity, and hold harmless provisions in favour of Canada, the representative plaintiffs, Class Counsel, the Claims Administrator, and the Independent Reviewer.

3. The Claims Administrator will assess the Claim in accordance with the Claims Process.

4. Payment of any approved Claim will be made payable to “the estate of” the deceased Day Scholar.

Where There is no Executor/Administrator/Trustee/Liquidator

5. The Claimant shall:

    a. complete the appropriate Claim Form;

    b. provide evidence that the Day Scholar is deceased;

    c. provide evidence of when the Day Scholar died;

    d. provide an attestation/declaration that the Day Scholar did not have a will and that no executor, administrator, trustee, or liquidator has been appointed by the court;

e. provide proof of their relationship to the Day Scholar, which may take the form of an attestation/declaration from a third party;

f. provide an attestation/declaration from the Claimant that there is/are no higher priority heir(s);

g. list all individuals (if any) at the same priority level of heirs as the Claimant; and

h. provide the written consent of all individuals (if any) at the same priority level of heirs as the Claimant for the Claimant to submit a claim on behalf of the deceased Day Scholar.

6. The Claim Form will contain release, indemnity, and hold harmless provisions in favour of Canada, the representative plaintiffs, class counsel, the Claims Administrator, and the Independent Reviewer.

7. The Claims Administrator will assess the Claim in accordance with the Claims Process but will only make a payment for an approved Claim or communicate a dismissed Claim with a right of reconsideration in accordance with the provisions below. In cases where the Claim is dismissed with no right of reconsideration, the Claims Administrator will inform the Claimant in accordance with the Claims Administrator's normal process.

8. If no additional Claims with respect to the same deceased Day Scholar are received by the Claims Administrator before the Ultimate Claims Deadline, the Claims Administrator shall:

a. in the case of a Claim that is approved, pay the Claimant; and

b. in the case of a Claim that is dismissed, advise the Claimant of the dismissal in accordance with paragraph 17 of the Claims Process. The Claimant is able to seek reconsideration in accordance with the Claims Process.

9. If the Claims Administrator receives another Claim with respect to the same deceased Day Scholar before the Ultimate Claims Deadline, where the Claimant is the estate executor, administrator, trustee, or liquidator, the Claims Administrator shall dismiss the Claim from the non-executor, administrator, trustee, or liquidator Claimant, without any right of reconsideration.

10. If any additional Claim(s) with respect to the same deceased Day Scholar is/are received by the Claims Administrator before the Ultimate Claims Deadline, from a Claimant who is not the estate executor, administrator, trustee, or liquidator, and who is of a different priority level of heirs than the previous Claimant(s), the Claims Administrator shall contact the Claimant with the lower priority to inquire as to whether that Claimant disputes the existence of the higher priority level heir. If the existence of a higher priority level heir is disputed, the matter shall be referred to the Independent Reviewer for a determination regarding which Claimant has the highest valid priority level and deem them to be the Designated Representative of the deceased Day Scholar. The decision of the Independent Reviewer is final without any right of appeal or judicial review. The Independent Reviewer shall inform the Claims Administrator of their decision, and the Claims Administrator shall:

    a. in the case of a Claim that is approved, pay the Designated Representative; and

    b. in the case of a Claim that is dismissed, advise the Claimant of the dismissal in accordance with paragraph 17 of the Claims Process. The Designated Representative is able to seek reconsideration in accordance with the Claims Process.

11. If any additional Claim(s) with respect to the same deceased Day Scholar is/are received by the Claims Administrator before the Ultimate Claims Deadline, from a Claimant who is not the estate executor, administrator, trustee, or liquidator and who is of the same priority level of heirs as the previous Claimant(s), the Claims Administrator shall reject all of the Claims and notify each Claimant accordingly.

Notwithstanding the Ultimate Claims Deadline, the Claimants who submitted competing Claims will then have three months to submit one new Claim signed by all previously competing Claimants designating one Designated Representative on behalf of all of them and any other heirs. Upon receipt of the new Claim, the Claims Administrator shall:

a. in the case of a Claim that is approved, pay the Designated Representative;

b. in the case of a Claim that is dismissed, advise the Claimant of the dismissal in accordance with paragraph 17 of the Claims Process. The Designated Representative is able to seek reconsideration in accordance with the Claims Process.

Priority Level of Heirs

12. The priority level of heirs follows the distribution of property intestacy provisions of the *Indian Act* and all terms have the definitions as set out in the *Indian Act*.

13. The priority level of heirs from highest to lowest priority are as follows:

a. surviving spouse or common-law partner;

b. children;

c. grandchildren;

d. parents;

e. siblings; and

f. children of siblings.

SCHEDULE E – Lists of Indian Residential Schools for Claims Process

List 1 – Schools with Confirmed Day Scholars

School	Location	Opening Date (January 1, 1920 as per the Class Period or later, as applicable)	School Closing or Transfer Date
British Columbia Residential Schools			
Alberni	Port Alberni (Tseshaht Reserve)	January 1, 1920 **Interim Closures:** June 2, 1917, to December 1, 1920 February 21, 1937 to September 23, 1940	August 31, 1965
Cariboo (St. Joseph's, William's Lake)	Williams Lake	January 1, 1920	February 28, 1968
Christie (Clayoquot, Kakawis)	Tofino	January 1, 1920	June 30, 1983
Kamloops	Kamloops (Kamloops Indian Reserve)	January 1, 1920	August 31, 1969
Kuper Island	Kuper Island	January 1, 1920	August 31, 1968
Lejac (Fraser Lake)	Fraser Lake (on reserve)	January 1, 1920	August 31, 1976
Lower Post	Lower Post (on reserve)	September 1, 1951	August 31, 1968
St. George's (Lytton)	Lytton	January 1, 1920	August 31, 1972
St. Mary's (Mission)	Mission	January 1, 1920	August 31, 1973
Sechelt	Sechelt (on reserve)	January 1, 1920	August 31, 1969
St. Paul's (Squamish, North Vancouver)	Squamish, North Vancouver	January 1, 1920	August 31, 1959
Alberta Residential Schools			
Assumption (Hay Lake)	Assumption (Hay Lakes)	February 1, 1951	September 8, 1968

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School	Location	Opening Date (January 1, 1920 as per the Class Period or later, as applicable)	School Closing or Transfer Date
Blue Quills	Saddle Lake Indian Reserve (1898 to 1931) St. Paul (1931 to 1990)	January 1, 1920	January 31, 1971
Crowfoot (Blackfoot, St. Joseph's, Ste. Trinité)	Cluny	January 1, 1920	December 31, 1968
Desmarais (Wabiscaw Lake, St. Martin's, Wabisca Roman Catholic)	Desmarais, Wabasca / Wabisca	January 1, 1920	August 31, 1964
Ermineskin (Hobbema)	Hobbema (Ermineskin Indian Reserve)	January 1, 1920	March 31, 1969
Holy Angels (Fort Chipewyan, École des Saint-Anges)	Fort Chipewyan	January 1, 1920	August 31, 1956
Fort Vermillion (St. Henry's)	Fort Vermillion	January 1, 1920	August 31, 1964
Joussard (St. Bruno's)	Lesser Slave Lake	1920	October 31, 1969
Morley (Stony/Stoney, replaced McDougall Orphanage)	Morley (Stony Indian Reserve)	September 1, 1922	July 31, 1969
Old Sun (Blackfoot)	Gleichen (Blackfoot Reserve)	January 1, 1920 **Interim Closures:** 1922 to February 1923 June 26, 1928 to February 17, 1931	June 30, 1971
Sacred Heart (Peigan, Brocket)	Brocket (Peigan Indian Reserve)	January 1, 1920	June 30, 1961
St. Cyprian (Queen Victoria's Jubliee Home, Peigan)	Brocket (Peigan Indian Reserve)	January 1, 1920 **Interim Closure:** September 1, 1953 to October 12, 1953	June 30, 1961

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School	Location	Opening Date (January 1, 1920 as per the Class Period or later, as applicable)	School Closing or Transfer Date
St. Mary's (Blood, Immaculate Conception)	Cardston (Blood Indian Reserve)	1920 **Interim Closure:** September 1, 1965 to January 6, 1966	August 31, 1969
St. Paul's (Blood)	Cardston (Blood Indian Reserve)	January 1, 1920	August 31, 1965
Sturgeon Lake (Calais, St. Francis Xavier)	Calais	January 1, 1920	August 31, 1959
Wabasca (St. John's)	Wabasca Lake	January 1, 1920	August 31, 1965
Whitefish Lake (St. Andrew's)	Whitefish Lake	January 1, 1920	June 30, 1950
Grouard	West side of Lesser Slave Lake, Grouard	January 1, 1920	September 30, 1957
Saskatchewan Residential Schools			
Beauval (Lac la Plonge)	Beauval	January 1, 1920	August 31, 1968
File Hills	Balcarres	January 1, 1920	June 30, 1949
Gordon's	Punnichy (Gordon's Reserve)	January 1, 1920 **Interim Closures:** June 30, 1947, to October 14, 1949 January 25, 1950 to September 1, 1953	August 31, 1968

School	Location	Opening Date (January 1, 1920 as per the Class Period or later, as applicable)	School Closing or Transfer Date
Lebret (Qu'Appelle, Whitecalf, St. Paul's High School)	Lebret	January 1, 1920 **Interim Closure:** November 13, 1932 to May 29, 1936	August 31, 1968
Marieval (Cowesess, Crooked Lake)	Cowesess Reserve	January 1, 1920	August 31, 1969
Muscowequan (Lestock, Touchwood)	Lestock	January 1, 1920	August 31, 1968
Prince Albert (Onion Lake Anglican, St. Alban's, All Saints, St. Barnabas, Lac La Ronge)	Onion Lake / Lac La Ronge / Prince Albert	January 1, 1920	August 31, 1968
St. Anthony's (Onion Lake, Sacred Heart)	Onion Lake	January 1, 1920	March 31, 1969
St. Michael's (Duck Lake)	Duck Lake	January 1, 1920	August 31, 1968
St. Philip's	Kamsack	April 16, 1928	August 31, 1968
Manitoba Residential Schools			
Assiniboia (Winnipeg)	Winnipeg	September 2, 1958	August 31, 1967
Brandon	Brandon	1920 **Interim Closure:** July 1, 1929 to July 18, 1930	August 31, 1968
Churchill Vocational Centre	Churchill	September 9, 1964	June 30, 1973
Cross Lake (St. Joseph's, Norway House)	Cross Lake	January 1, 1920	June 30, 1969
Fort Alexander (Pine Falls)	Fort Alexander Reserve No. 3, near Pine Falls	January 1, 1920	September 1, 1969

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School	Location	Opening Date (January 1, 1920 as per the Class Period or later, as applicable)	School Closing or Transfer Date
Guy Hill (Clearwater, the Pas, formerly Sturgeon Landing, SK)	Clearwater Lake	September 5, 1952	August 31, 1968
Norway House	Norway House	January 1, 1920 **Interim Closure:** May 29, 1946 to September 1, 1954	June 30, 1967
Pine Creek (Camperville)	Camperville	January 1, 1920	August 31, 1969
Portage la Prairie	Portage la Prairie	January 1, 1920	August 31, 1960
Sandy Bay	Sandy Bay Reserve	January 1, 1920	June 30, 1970
Ontario Residential Schools			
Bishop Horden Hall (Moose Fort, Moose Factory)	Moose Island	January 1, 1920	August 31, 1964
Cecilia Jeffrey (Kenora, Shoal Lake)	Shoal Lake	January 1, 1920	August 31, 1965
Fort Frances (St. Margaret's)	Fort Frances	January 1, 1920	August 31, 1968
McIntosh (Kenora)	McIntosh	May 27, 1925	June 30, 1969
Pelican Lake (Pelican Falls)	Sioux Lookout	September 1, 1927	August 31, 1968
Poplar Hill	Poplar Hill	September 1, 1962	June 30, 1989
St. Anne's (Fort Albany)	Fort Albany	January 1, 1920	June 30, 1976
St. Mary's (Kenora, St. Anthony's)	Kenora	January 1, 1920	August 31, 1968
Spanish Boys' School (Charles Garnier, St. Joseph's)	Spanish	January 1, 1920	June 30, 1958
Spanish Girls' School (St. Joseph's, St. Peter's, St. Anne's)	Spanish	January 1, 1920	June 30, 1962

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School	Location	Opening Date (January 1, 1920 as per the Class Period or later, as applicable)	School Closing or Transfer Date
Quebec Residential Schools			
Fort George (Anglican)	Fort George	September 1, 1933 **Interim Closure:** January 26, 1943 to July 9, 1944	August 31, 1971
Fort George (Roman Catholic)	Fort George	September 1, 1937	June 30, 1978
Point Bleue	Point Bleue	October 6, 1960	August 31, 1968
Sept-Îles	Sept-Îles	September 2, 1952	August 31, 1969
Nova Scotia Residential Schools			
Shubenacadie	Shubenacadie	September 1, 1929	June 30, 1967
Northwest Territories Residential Schools			
Aklavik (Immaculate Conception)	Aklavik	July 1, 1926	June 30, 1959
Aklavik (All Saints)	Aklavik	August 1, 1936	August 31, 1959
Fort Providence (Sacred Heart)	Fort Providence	January 1, 1920	June 30, 1960
Fort Resolution (St. Joseph's)	Fort Resolution	January 1, 1920	December 31, 1957
Hay River (St. Peter's)	Hay River	January 1, 1920	August 31, 1937
Yukon Residential Schools			
Carcross (Chooutla)	Carcross	January 1, 1920 **Interim Closure:** June 15, 1943 to September 1, 1944	June 30, 1969
Whitehorse Baptist Mission	Whitehorse	September 1, 1947	June 30, 1960
Shingle Point Eskimo Residential School	Shingle Point	September 16, 1929	August 31, 1936

List 2 – Schools Not Known to Have Day Scholars

School	Location	Opening Date (January 1, 1920 as per the Class Period or later, as applicable)	Closing or Transfer Date
British Columbia Residential Schools			
Ahousaht	Ahousaht (Maktosis Reserve)	January 1, 1920	January 26, 1940
Coqualeetza from 1924 to 1940	Chilliwack	January 1, 1924	June 30, 1940
Cranbrook (St. Eugene's, Kootenay)	Cranbrook (on reserve)	January 1, 1920	June 23, 1965
St. Michael's (Alert Bay Girls' Home, Alert Bay Boys' Home)	Alert Bay (on reserve)	January 1, 1920	August 31, 1960
Alberta Residential Schools			
Edmonton (Poundmaker, replaced Red Deer Industrial)	St. Albert	March 1, 1924 **Interim Closures:** July 1, 1946 to October 1, 1946 July 1, 1951 to November 5, 1951	August 31, 1960
Lesser Slave Lake (St. Peter's)	Lesser Slave Lake	January 1, 1920	June 30, 1932
St. Albert (Youville)	St. Albert, Youville	January 1, 1920	June 30, 1948
Sarcee (St. Barnabas)	Sarcee Junction, T'suu Tina (Sarcee Indian Reserve)	January 1, 1920	September 30, 1921
Saskatchewan Residential Schools			
Round Lake	Broadview	January 1, 1920	August 31, 1950
Sturgeon Landing (replaced by Guy Hill, MB)	Sturgeon Landing	September 1, 1926	October 21, 1952
Thunderchild (Delmas, St. Henri)	Delmas	January 1, 1920	January 13, 1948
Manitoba Residential Schools			
Birtle	Birtle	January 1, 1920	June 30, 1970

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School	Location	Opening Date (January 1, 1920 as per the Class Period or later, as applicable)	Closing or Transfer Date
Dauphin (replaced McKay)	The Pas / Dauphin	See McKay below	See McKay below
Elkhorn (Washakada)	Elkhorn	January 1, 1920 **Interim Closure:** 1920 to September 1, 1923	June 30, 1949
McKay (The Pas, replaced by Dauphin)	The Pas / Dauphin	January 1, 1920 **Interim Closure:** March 19, 1933 to September 1, 1957	August 31, 1968
Ontario Residential Schools			
Chapleau (St. John's)	Chapleau	January 1, 1920	July 31, 1948
Mohawk Institute	Brantford	January 1, 1920	August 31, 1968
Mount Elgin (Muncey, St. Thomas)	Muncey	January 1, 1920	June 30, 1946
Shingwauk	Sault Ste. Marie	January 1, 1920	June 30, 1970
St. Joseph's / Fort William	Fort William	January 1, 1920	September 1, 1968
Stirland Lake High School (Wahbon Bay Academy)	Stirland Lake	September 1, 1971	June 30, 1991
Cristal Lake High School	Stirland Lake	September 1, 1976	June 30, 1986
Quebec Residential Schools			
Amos	Amos	October 1, 1955	August 31, 1969
La Tuque	La Tuque	September 1, 1963	June 30, 1970

SCHEDULE F

DAY SCHOLARS REVITALIZATION SOCIETY PLAN

The Parties have agreed to settle the claims of the Survivor Class and the Descendant Class ("Survivors", "Descendants") in the *Gottfriedson v. AGC* proceeding. Under the Settlement Agreement, the Parties have agreed that Canada will fund $50 million to establish the Day Scholars Revitalization Society (the "Society"). The Parties agree the intention of the Society will be to support Survivors and Descendants in healing, wellness, education, language, culture, heritage, and commemoration activities and programs.

The monies will be used by the Society to support activities and programs for the benefit of the Survivors and Descendants as follows:

a. to revitalize and protect the Survivors' and Descendants' Indigenous languages;

b. to protect and revitalize the Survivors' and Descendants' Indigenous cultures;

c. to pursue healing and wellness for the Survivors and Descendants;

d. to protect the Survivors' and Descendants' Indigenous heritage; and,

e. to promote education and commemoration.

The activities and programs will not duplicate those of the Government of Canada. Grants will be made to Survivors and Descendants for activities and programs designed to support healing and address any losses to languages, culture, wellness, and heritage that Survivors suffered while attending Indian Residential Schools as Day Scholars.

The Society will be incorporated under the B.C. *Societies Act* prior to the Implementation Date and will be properly registered in each jurisdiction in Canada to the extent required by those jurisdictions. The Society will have between 5 and 11 Directors. One of those Directors will be named by Canada, but will not be a Government

employee. The Parties will ensure the other Directors provide adequate regional representation from across Canada.

The Society will have a small administrative staff and will retain financial consultants to provide investment advice. Once funds have been invested, the expenses of the Society will be funded from investment income.

Advisory Board

The Directors will be guided by an Advisory Board consisting of individuals, appointed by the Directors, who provide regional representation, understanding and knowledge of the loss and revitalization of Indigenous languages, cultures, wellness and heritage.

The Advisory Board shall advise the Directors regarding all activities of the Directors in the pursuit of the activities of the Society, including the development and implementation of a policy for applications to obtain funding from the Society in that pursuit.

SCHEDULE G

ORDER

THIS COURT ORDERS that:

1. The above captioned proceeding is certified as a class proceeding with the following conditions:

a. The Class shall be defined as:

The Tk'emlúps te Secwépemc Indian Band and the Sechelt Indian Band and any other Indian Band(s) which:

(i) has or had some members who are or were members who were Survivors, or in whose community a Residential School is located; and

(ii) is specifically added to this claim with one or more specifically Identified Residential Schools.

b. The Class's Representative Plaintiffs shall be:

Tk'emlúps te Secwépemc Indian Band; and

Sechelt Indian Band.

c. The nature of the claims of the Class are:

Breaches of fiduciary and constitutionally mandated duties, breach of Aboriginal Rights, breaches of International Conventions and/or Covenants, and breaches of international law committed by or on behalf of Canada for which Canada is liable.

d. The relief claimed by the Class is as follows:

i. a Declaration that the Sechelt Indian Band and Tk'emlúps te Secwépemc Indian Band, and all members of the Class, have Aboriginal Rights to speak their traditional languages, to engage in their traditional customs and religious practices;

ii. a Declaration that Canada owed and was in breach of the fiduciary, constitutionally-mandated, statutory and common law duties, as well as breaches of International Conventions and Covenants, and breaches of international law, to the Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivors at, and support of, the SIRS and the KIRS and other Identified Residential Schools;

iii. a Declaration that the Residential Schools Policy and the KIRS, the SIRS and Identified Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Class;

iv. a Declaration that Canada was or is in breach of the Class members' linguistic and cultural rights (Aboriginal Rights or otherwise), as well as breaches of International Conventions and Covenants, and breaches of international law, as a consequence of its establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivors at and support of the Residential Schools Policy, and the Identified Residential Schools;

v. a Declaration that Canada is liable to the Class members for the damages caused by its breach of fiduciary and constitutionally mandated duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivors at and support of the Identified Residential Schools;

vi. non-pecuniary and pecuniary damages and special damages for breach of fiduciary and constitutionally mandated duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the ongoing cost of care and development of wellness plans for members of the bands in the Class, as well as the costs of restoring, protecting and preserving the linguistic and cultural heritage of the Class for which Canada is liable;

vii. The construction and maintenance of healing and education centres in the Class communities and such further and other centres or operations as may mitigate the losses suffered and that this Honourable Court may find to be appropriate and just;

viii. exemplary and punitive damages for which Canada is liable; and

ix. pre-judgment and post-judgment interest and costs.

e. The common questions of law or fact are:

a. Through the purpose, operation or management of any of the Residential Schools during the Class Period, did the Defendant breach a fiduciary duty owed to the Class not to destroy their language and culture?

b. Through the purpose, operation or management of any of the Residential Schools during the Class Period, did the Defendant breach the cultural and/or linguistic rights, be they Aboriginal Rights or otherwise, of the Class?

c. If the answer to any of (a)-(b) above is yes, can the Court make an aggregate assessment of the damages suffered by the Class as part of the common issues trial?

d. If the answer to any of (a)-(b) above is yes, was the Defendant guilty of conduct that justifies an award of punitive damages; and

e. If the answer to (d) above is yes, what amount of punitive damages ought to be awarded?

f. The following definitions apply to this Order:

a. "Aboriginal(s)", "Aboriginal Person(s)" or "Aboriginal Child(ren)" means a person or persons whose rights are recognized and affirmed by the *Constitution Act, 1982*, s. 35;

b. "Aboriginal Right(s)" means any or all of the Aboriginal and treaty rights recognized and affirmed by the *Constitution Act*, *1982*, s. 35;

c. "Agreement" means the Indian Residential Schools Settlement Agreement dated May 10, 2006, entered into by Canada to settle claims relating to Residential Schools as approved in the orders granted in various jurisdictions across Canada;

d. "Canada" means the Defendant, Her Majesty the Queen;

e. "Class Period" means 1920 to 1997;

f. "Cultural, Linguistic and Social Damage" means the damage or harm caused by the creation and implementation of Residential Schools and Residential Schools Policy to the educational, governmental, economic, cultural, linguistic, spiritual and social customs, practices and way of life, traditional governance structures, as well as to the community and individual security and wellbeing, of Aboriginal Persons;

g. "Identified Residential School(s)" means the KIRS or the SIRS or any other Residential School specifically identified as a member of the Band Class;

h. "KIRS" means the Kamloops Indian Residential School;

i. "Residential Schools" means all Indian Residential Schools recognized under the Agreement and listed in Schedule "A" appended to this Order which Schedule may be amended from time to time by Order of this Court;

j. "Residential Schools Policy" means the policy of Canada with respect to the implementation of Indian Residential Schools;

k. "Survivors" means all Aboriginal persons who attended as a student or for educational purposes for any period at a Residential School, during the Class Period, excluding, for any individual Survivor, such periods of time for which that Survivor received compensation by way of the Common Experience Payment under the Agreement. For greater clarity, Survivors are all those who were members of the formerly certified Survivor Class in this proceeding, whose claims were settled on terms set out in the Settlement Agreement signed on [DATE], and approved by the Federal Court on [DATE]; and

l. "SIRS" means the Sechelt Indian Residential School.

g. Members of the Class are the representative plaintiff Indian Bands as well as those Indian Bands that opted in by the opt-in deadline previously set by this Court.

h. Either party may apply to this Court to amend the list of Residential Schools set out in Schedule "A" hereto, for the purpose of this proceeding.

_____

Judge

SCHEDULE "A"
to the Order of Justice MacDonald

LIST OF RESIDENTIAL SCHOOLS

British Columbia Residential Schools

Ahousaht
Alberni
Cariboo (St. Joseph's, William's Lake)
Christie (Clayoquot, Kakawis)
Coqualeetza from 1924 to 1940
Cranbrook (St. Eugene's, Kootenay)
Kamloops
Kuper Island
Lejac (Fraser Lake)
Lower Post
St George's (Lytton)
St. Mary's (Mission)
St. Michael's (Alert Bay Girls' Home, Alert Bay Boys' Home)
Sechelt
St. Paul's (Squamish, North Vancouver)
Port Simpson (Crosby Home for Girls)
Kitimaat
Anahim Lake Dormitory (September 1968 to June 1977)

Alberta Residential Schools

Assumption (Hay Lake)
Blue Quills (Saddle Lake, Lac la Biche, Sacred Heart)
Crowfoot (Blackfoot, St. Joseph's, Ste. Trinité)
Desmarais (Wabiscaw Lake, St. Martin's, Wabisca Roman Catholic)
Edmonton (Poundmaker, replaced Red Deer Industrial)
Ermineskin (Hobbema)
Holy Angels (Fort Chipewyan, École des Saint-Anges)
Fort Vermilion (St. Henry's)

Joussard (St. Bruno's)
Lac La Biche (Notre Dame des Victoires)
Lesser Slave Lake (St. Peter's)
Morley (Stony/Stoney, replaced McDougall Orphanage)
Old Sun (Blackfoot)
Sacred Heart (Peigan, Brocket)
St. Albert (Youville)
St. Augustine (Smokey-River)
St. Cyprian (Queen Victoria's Jubilee Home, Peigan)
St. Joseph's (High River, Dunbow)
St. Mary's (Blood, Immaculate Conception)
St. Paul's (Blood)
Sturgeon Lake (Calais, St. Francis Xavier)
Wabasca (St. John's)
Whitefish Lake (St. Andrew's)
Grouard to December 1957
Sarcee (St. Barnabas)

Saskatchewan Residential Schools

Beauval (Lac la Plonge)
File Hills
Gordon's
Lac La Ronge (see Prince Albert)
Lebret (Qu'Appelle, Whitecalf, St. Paul's High School)
Marieval (Cowesess, Crooked Lake)
Muscowequan (Lestock, Touchwood)
Onion Lake Anglican (see Prince Albert)
Prince Albert (Onion Lake, St. Alban's, All Saints, St. Barnabas, Lac La Ronge)
Regina
Round Lake
St. Anthony's (Onion Lake, Sacred Heart)
St. Michael's (Duck Lake)
St. Philip's

Sturgeon Landing (replaced by Guy Hill, MB)

Thunderchild (Delmas, St. Henri)

Crowstand

Fort Pelly

Cote Improved Federal Day School (September 1928 to June 1940)

Manitoba Residential Schools

Assiniboia (Winnipeg)

Birtle

Brandon

Churchill Vocational Centre

Cross Lake (St. Joseph's, Norway House)

Dauphin (replaced McKay)

Elkhorn (Washakada)

Fort Alexander (Pine Falls)

Guy Hill (Clearwater, the Pas, formerly Sturgeon Landing, SK)

McKay (The Pas, replaced by Dauphin)

Norway House

Pine Creek (Campeville)

Portage la Prairie

Sandy Bay

Notre Dame Hostel (Norway House Catholic, Jack River Hostel, replaced Jack River Annex at Cross Lake)

Ontario Residential Schools

Bishop Horden Hall (Moose Fort, Moose Factory)

Cecilia Jeffrey (Kenora, Shoal Lake)

Chapleau (St. John's)

Fort Frances (St. Margaret's)

McIntosh (Kenora)

Mohawk Institute

Mount Elgin (Muncey, St. Thomas)

Pelican Lake (Pelican Falls)

Poplar Hill
St. Anne's (Fort Albany)
St. Mary's (Kenora, St. Anthony's)
Shingwauk
Spanish Boys' School (Charles Garnier, St. Joseph's)
Spanish Girls' School (St. Joseph's, St. Peter's, St. Anne's)
St. Joseph's/Fort William
Stirland Lake High School (Wahbon Bay Academy) from September 1, 1971 to June 30, 1991
Cristal Lake High School (September 1, 1976 to June 30, 1986)

Quebec Residential Schools

Amos
Fort George (Anglican)
Fort George (Roman Catholic)
La Tuque
Point Bleue
Sept-Îles
Federal Hostels at Great Whale River
Federal Hostels at Port Harrison
Federal Hostels at George River
Federal Hostel at Payne Bay (Bellin)
Fort George Hostels (September 1, 1975 to June 30, 1978)
Mistassini Hostels (September 1, 1971 to June 30, 1978)

Nova Scotia Residential Schools

Shubenacadie

Nunavut Residential Schools

Chesterfield Inlet (Joseph Bernier, Turquetil Hall)
Federal Hostels at Panniqtuug/Pangnirtang
Federal Hostels at Broughton Island/Qikiqtarjuaq
Federal Hostels at Cape Dorset Kinngait
Federal Hostels at Eskimo Point/Arviat

Federal Hostels at Igloolik/Iglulik
Federal Hostels at Baker Lake/Qamani'tuaq
Federal Hostels at Pond Inlet/Mittimatalik
Federal Hostels at Cambridge Bay
Federal Hostels at Lake Harbour
Federal Hostels at Belcher Islands
Federal Hostels at Frobisher Bay/Ukkivik
Federal Tent Hostel at Coppermine

Northwest Territories Residential Schools
Aklavik (Immaculate Conception)
Aklavik (All Saints)
Fort McPherson (Fleming Hall)
Ford Providence (Sacred Heart)
Fort Resolution (St. Joseph's)
Fort Simpson (Bompas Hall)
Fort Simpson (Lapointe Hall)
Fort Smith (Breynat Hall)
HayRiver-(St. Peter's)
Inuvik (Grollier Hall)
Inuvik (Stringer Hall)
Yellowknife (Akaitcho Hall)
Fort Smith -Grandin College
Federal Hostel at Fort Franklin

Yukon Residential Schools
Carcross (Chooulta)
Yukon Hall (Whitehorse/Protestant Hostel)
Coudert Hall (Whitehorse Hostel/Student Residence -replaced by Yukon Hall)
Whitehorse Baptist Mission
Shingle Point Eskimo Residential School
St. Paul's Hostel from September 1920 to June 1943

SCHEDULE H

Amended Pursuant to the Order of Justice McDonald
Made _____

Court File No. T-1542-13

CLASS PROCEEDING

FORM 171A - Rule 171

FEDERAL COURT

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, on behalf of the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, and

CHIEF GARRY FESCHUK, on behalf of the SECHELT INDIAN BAND

PLAINTIFFS

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

DEFENDANT

SECOND RE-AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiffs' solicitor or, where the plaintiffs do not have a solicitor, serve it on the plaintiffs, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

(Date)

Issued by:_____
(Registry Officer)

Address of local office:_____

TO:

Her Majesty the Queen in Right of Canada,
Minister of Indian Affairs and Northern Development, and
Attorney General of Canada
Department of Justice
900 - 840 Howe Street
Vancouver, B.C. V6Z 2S9

RELIEF SOUGHT

1. The Representative Plaintiffs, on behalf of Tk'emlúps te Secwépemc Indian Band and Sechelt Indian Band, and on behalf of the members of the Class, claim:

(a) a Declaration that the Sechelt Indian Band (referred to as the shíshálh or shíshálh band) and Tk'emlúps Band, and all members of the certified Class of Indian Bands, have Aboriginal Rights to speak their traditional languages and engage in their traditional customs and religious practices;

(b) a Declaration that Canada owed and was in breach of fiduciary, constitutionally-mandated, statutory and common law duties as well as breaches of International Conventions and Covenants, and breaches of international law, to the Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivors at, and support of, the SIRS and the KIRS and other Identified Residential Schools;

(c) a Declaration that the Residential Schools Policy and the KIRS, the SIRS and Identified Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Class;

(d) a Declaration that Canada was or is in breach of the Class members' linguistic and cultural rights, (Aboriginal Rights or otherwise), as well as breaches of International Conventions and Covenants, and breaches of international law, as a consequence of its establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivors at and support of the Residential Schools Policy, and the Identified Residential Schools;

(e) a Declaration that Canada is liable to the Class members for the damages caused by its breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivors at and support of the Identified Residential Schools;

(f) non-pecuniary and pecuniary general damages and special damages for breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the ongoing cost of care and development of wellness plans for individual members of the bands in the Class, as well as the costs of restoring, protecting and preserving the linguistic and cultural heritage of the Bands for which Canada is liable;

(g) the construction of healing centres in the Class communities by Canada;

(h) exemplary and punitive damages for which Canada is liable;

(i) pre-judgment and post-judgment interest;

(j) the costs of this action; and

(k) such further and other relief as this Honourable Court may deem just.

DEFINITIONS

2. The following definitions apply for the purposes of this Claim:

(a) "Aboriginal(s)", "Aboriginal Person(s)" or "Aboriginal Child(ren)" means a person or persons whose rights are recognized and affirmed by the *Constitution Act*, 1982, s. 35;

(b) "Aboriginal Right(s)" means any or all of the aboriginal and treaty rights recognized and affirmed by the *Constitution Act*, 1982, s. 35;

(c) "Act" means the *Indian Act*, R.S.C. 1985, c. I-5 and its predecessors as have been amended from time to time;

(d) "Agents" means the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of each of the Residential Schools;

(e) "Agreement" means the Indian Residential Schools Settlement Agreement dated May 10, 2006 entered into by Canada to settle claims relating to Residential Schools as approved in the orders granted in various jurisdictions across Canada;

(f) "Class" means the Tk'emlúps te Secwépemc Indian Band and the shíshálh band and any other Aboriginal Indian Band(s) which:

(i) has or had some members who are or were Survivors, or in whose community a Residential School is located; and

(ii) is specifically added to this claim with one or more specifically identified Residential Schools.

(g) "Canada" means the Defendant, Her Majesty the Queen in right of Canada as represented by the Attorney General of Canada;

(h) "Class Period" means 1920 to 1997**;**

(i) "Cultural, Linguistic and Social Damage" means the damage or harm caused by the creation and implementation of Residential Schools and Residential Schools Policy to the educational, governmental, economic, cultural, linguistic, spiritual and social

customs, practices and way of life, traditional governance structures, as well as to the community and individual security and wellbeing, of Aboriginal Persons;

(j) "Identified Residential School(s)" means the KIRS or the SIRS Residential School;

(k) "KIRS" means the Kamloops Indian Residential School;

(l) "Residential Schools" means all Indian Residential Schools recognized under the Agreement;

(m) "Residential Schools Policy" means the policy of Canada with respect to the implementation of Indian Residential Schools;

(n) "SIRS" means the Sechelt Indian Residential School;

(o) "Survivors" means all Aboriginal persons who attended as a student or for educational purposes for any period at a Residential School, during the Class Period excluding, for any individual class member, such periods of time for which that class member received compensation by way of the Common Experience Payment under the Indian Residential Schools Settlement Agreement. For greater clarity, Survivors are all those who were members of the formerly certified Survivor Class in this proceeding, whose claims were settled on terms set out in the Settlement Agreement signed on [DATE], and approved by the Federal Court on [DATE].

THE PARTIES

The Plaintiffs

3. The Tk'emlúps te Secwépemc Indian Band and the shíshálh band are Aboriginal Indian Bands and they both act as Representative Plaintiffs for the Class. The Class members represent the collective interests and authority of each of their respective communities.

The Defendant

4. Canada is represented in this proceeding by the Attorney General of Canada. The Attorney General of Canada represents the interests of Canada and the Minister of Aboriginal Affairs and Northern Development Canada and predecessor Ministers who were responsible for

"Indians" under s.91 (24) of the *Constitution Act, 1867*, and who were, at all material times, responsible for the formation and implementation of the Residential Schools Policy, and the maintenance and operation of the KIRS and the SIRS.

STATEMENT OF FACTS

5. Over the course of the last several years, Canada has acknowledged the devastating impact of its Residential Schools Policy on Canada's Aboriginal Peoples. Canada's Residential Schools Policy was designed to eradicate Aboriginal culture and identity and assimilate the Aboriginal Peoples of Canada into Euro-Canadian society. Through this policy, Canada ripped away the foundations of identity for generations of Aboriginal People and caused incalculable harm to both individuals and communities.

6. The direct beneficiary of the Residential Schools Policy was Canada as its obligations would be reduced in proportion to the number, and generations, of Aboriginal Persons who would no longer recognize their Aboriginal identity and would reduce their claims to rights under the Act and Canada's fiduciary, constitutionally-mandated, statutory and common law duties.

7. Canada was also a beneficiary of the Residential Schools Policy, as the policy served to weaken the claims of Aboriginal Peoples to their traditional lands and resources. The result was a severing of Aboriginal People from their cultures, traditions and ultimately their lands and resources. This allowed for exploitation of those lands and resources by Canada, not only without Aboriginal Peoples' consent but also, contrary to their interests, the Constitution of Canada and the Royal Proclamation of 1763.

8. The truth of this wrong and the damage it has wrought has now been acknowledged by the Prime Minister on behalf of Canada, and through the pan-Canadian settlement of the claims of

those who *resided at* Canada's Residential Schools by way of the Agreement implemented in 2007. Notwithstanding the truth and acknowledgement of the wrong and the damages caused, many members of Canada's Aboriginal communities were excluded from the Agreement, not because they did not *attend* Residential Schools and suffer Cultural, Linguistic and Social Damage, but simply because they did not *reside at* Residential Schools.

9. This claim is on behalf of the members of the Class, consisting of the Aboriginal communities within which the Residential Schools were situated, or whose members are or were Survivors.

The Residential School System

10. Residential Schools were established by Canada prior to 1874, for the education of Aboriginal Children. Commencing in the early twentieth century, Canada began entering into formal agreements with various religious organizations (the "Churches") for the operation of Residential Schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of Residential Schools. The Churches assumed the day-to-day operation of many of the Residential Schools under the control, supervision and direction of Canada, for which Canada paid the Churches a *per capita* grant. In 1969, Canada took over operations directly.

11. As of 1920, the Residential Schools Policy included compulsory *attendance* at Residential Schools for all Aboriginal Children aged 7 to 15. Canada removed most Aboriginal Children from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. However, in some cases, Aboriginal Children lived in their homes and communities and were similarly required to attend Residential Schools as

day students and not residents. This practice applied to even more children in the later years of the Residential Schools Policy. While at Residential School, all Aboriginal Children were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them and punished for non-compliance.

12. The purpose of the Residential Schools Policy was the complete integration and assimilation of Aboriginal Children into the Euro-Canadian culture and the obliteration of their traditional language, culture, religion and way of life. Canada set out and intended to cause the Cultural, Linguistic and Social Damage which has harmed Canada's Aboriginal Peoples and Nations.

13. Canada chose to be disloyal to its Aboriginal Peoples, implementing the Residential Schools Policy in its own self-interest, including economic self-interest, and to the detriment and exclusion of the interests of the Aboriginal Persons to whom Canada owed fiduciary and constitutionally-mandated duties. The intended eradication of Aboriginal identity, culture, language, and spiritual practices, to the extent successful, results in the reduction of the obligations owed by Canada in proportion to the number of individuals, over generations, who would no longer identify as Aboriginal and who would be less likely to make claims to their rights as Aboriginal Persons.

The Effects of the Residential Schools Policy on the Class Members

Tk'emlúps Indian Band

14. Tk'emlúpsemc, 'the people of the confluence', now known as the Tk'emlúps te Secwépemc Indian Band are members of the northernmost of the Plateau People and of the Interior-Salish Secwépemc (Shuswap) speaking peoples of British Columbia. The Tk'emlúps

Indian Band was established on a reserve now adjacent to the City of Kamloops, where the KIRS was subsequently established.

15. Secwepemctsin is the language of the Secwépemc, and it is the unique means by which the cultural, ecological, and historical knowledge and experience of the Secwépemc people is understood and conveyed between generations. It is through language, spiritual practices and passage of culture and traditions including their rituals, drumming, dancing, songs and stories, that the values and beliefs of the Secwépemc people are captured and shared. From the Secwépemc perspective all aspects of Secwépemc knowledge, including their culture, traditions, laws and languages, are vitally and integrally linked to their lands and resources.

16. Language, like the land, was given to the Secwépemc by the Creator for communication to the people and to the natural world. This communication created a reciprocal and cooperative relationship between the Secwépemc and the natural world which enabled them to survive and flourish in harsh environments. This knowledge, passed down to the next generation orally, contained the teachings necessary for the maintenance of Secwépemc culture, traditions, laws and identity.

17. For the Secwépemc, their spiritual practices, songs, dances, oral histories, stories and ceremonies were an integral part of their lives and societies. These practices and traditions are absolutely vital to maintain. Their songs, dances, drumming and traditional ceremonies connect the Secwépemc to their land and continually remind the Secwépemc of their responsibilities to the land, the resources and to the Secwépemc people.

18. Secwépemc ceremonies and spiritual practices, including their songs, dances, drumming and passage of stories and history, perpetuate their vital teachings and laws relating to the harvest

of resources, including medicinal plants, game and fish, and the proper and respectful protection and preservation of resources. For example, in accordance with Secwépemc laws, the Secwépemc sing and pray before harvesting any food, medicines, and other materials from the land, and make an offering to thank the Creator and the spirits for anything they take. The Secwépemc believe that all living things have spirits and must be shown utmost respect. It was these vital, integral beliefs and traditional laws, together with other elements of Secwépemc culture and identity, that Canada sought to destroy with the Residential Schools Policy.

Shíshálh band

19. The shíshálh Nation, a division of the Coast Salish First Nations, originally occupied the southern portion of the lower coast of British Columbia. The shíshálh People settled the area thousands of years ago, and occupied approximately 80 village sites over a vast tract of land. The shíshálh People are made up of four sub-groups that speak the language of Shashishalhem, which is a distinct and unique language, although it is part of the Coast Salish Division of the Salishan Language.

20. Shíshálh tradition describes the formation of the shíshálh world (Spelmulh story). Beginning with the creator spirits, who were sent by the Divine Spirit to form the world, they carved out valleys leaving a beach along the inlet at Porpoise Bay. Later, the transformers, a male raven and a female mink, added details by carving trees and forming pools of water.

21. The shíshálh culture includes singing, dancing and drumming as an integral part of their culture and spiritual practices, a connection with the land and the Creator and passing on the history and beliefs of the people. Through song and dance the shíshálh People would tell stories, bless events and even bring about healing. Their songs, dances and drumming also signify critical

seasonal events that are integral to the shíshálh. Traditions also include making and using masks, baskets, regalia and tools for hunting and fishing. It was these vital, integral beliefs and traditional laws, together with other elements of the shíshálh culture and identity, that Canada sought to destroy with the Residential Schools Policy.

The Impact of the Residential schools

22. For all of the Aboriginal Children who were compelled to attend the Residential Schools, rigid discipline was enforced as per the Residential Schools Policy. While at school, children were not allowed to speak their Aboriginal language, even to their parents, and thus members of these Aboriginal communities were forced to learn English.

23. Aboriginal culture was strictly suppressed by the school administrators in compliance with the policy directives of Canada including the Residential Schools Policy. At the SIRS, members of shishalh were forced to burn or give to the agents of Canada centuries-old totem poles, regalia, masks and other "paraphernalia of the medicine men" and to abandon their potlatches, dancing and winter festivities, and other elements integral to the Aboriginal culture and society of the shíshálh and Secwépemc peoples.

24. Because the SIRS was physically located in the shíshálh community, Canada's eyes, both directly and through its Agents, were upon the elders and they were punished severely for practising their culture or speaking their language or passing this on to future generations. In the midst of that scrutiny, members of the shíshálh band struggled, often unsuccessfully, to practice, protect and preserve their songs, masks, dancing or other cultural practices.

25. The Tk'emlúps te Secwépemc suffered a similar fate due to their proximity to the KIRS.

26. The children at the Residential Schools were taught to be ashamed of their Aboriginal identity, culture, spirituality and practices. They were referred to as, amongst other derogatory epithets, “dirty savages” and “heathens” and taught to shun their very identities. The Class members’ Aboriginal way of life, traditions, cultures and spiritual practices were supplanted with the Euro-Canadian identity imposed upon them by Canada through the Residential Schools Policy.

27. The Class members have lost, in whole or in part, their traditional economic viability, self-government and laws, language, land base and land-based teachings, traditional spiritual practices and religious practices, and the integral sense of their collective identity.

28. The Residential Schools Policy, delivered through the Residential Schools, wrought cultural, linguistic and social devastation on the communities of the Class and altered their traditional way of life.

Canada’s Settlement with Former Residential School Residents

29. From the closure of the Residential Schools until the late 1990’s, Canada’s Aboriginal communities were left to battle the damages and suffering of their members as a result of the Residential Schools Policy, without any acknowledgement from Canada. During this period, Residential School survivors increasingly began speaking out about the horrible conditions and abuse they suffered, and the dramatic impact it had on their lives. At the same time, many survivors committed suicide or self-medicated to the point of death. The deaths devastated the life and stability of the communities represented by the Class.

30. In January 1998, Canada issued a Statement of Reconciliation acknowledging and apologizing for the failures of the Residential Schools Policy. Canada admitted that the Residential

Schools Policy was designed to assimilate Aboriginal Persons and that it was wrong to pursue that goal. The Plaintiffs plead that the Statement of Reconciliation by Canada is an admission by Canada of the facts and duties set out herein and is relevant to the Plaintiffs' claim for damages, particularly punitive damages.

31. The Statement of Reconciliation stated, in part, as follows:

> *Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We must acknowledge that the results of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.*
>
> *Against the backdrop of these historical legacies, it is a remarkable tribute to the strength and endurance of Aboriginal people that they have maintained their historic diversity and identity. The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the Federal Government which have contributed to these difficult pages in the history of our relationship together.*
>
> *One aspect of our relationship with Aboriginal people over this period that requires particular attention is the Residential School System. This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures. In the worst cases, it left legacies of personal pain and distress that continued to reverberate in Aboriginal communities to this date. Tragically, some children were the victims of physical and sexual abuse.*
>
> *The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse at Residential Schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what*

> *you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at Residential Schools, we are deeply sorry. In dealing with the legacies of the Residential School program, the Government of Canada proposes to work with First Nations, Inuit, Metis people, the Churches and other interested parties to resolve the longstanding issues that must be addressed. We need to work together on a healing strategy to assist individuals and communities in dealing with the consequences of this sad era of our history...*

32. Reconciliation is an ongoing process. In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong community...On June 11, 2008, Prime Minister Stephen Harper on behalf of Canada, delivered an apology ("Apology") that acknowledged the harm done by Canada's Residential Schools Policy:

> *For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities. In the 1870's, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools.* ***Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture.*** *These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said,* ***"to kill the Indian in the child"****. Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.* ***[emphasis added]***

33. In this Apology, the Prime Minister made some important acknowledgments regarding the Residential Schools Policy and its impact on Aboriginal Children:

> *The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities. Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities. First Nations, Inuit and Métis languages and cultural practices were prohibited in these schools.*

> *Tragically, some of these children died while attending residential schools and others never returned home.*
>
> *The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language.*
>
> *The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.*
>
> * * *
>
> *We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.*
>
> *The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey. The Government of Canada sincerely apologizes and asks the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.*

Canada's Breach of Duties to the Class Members

34. From the formation of the Residential Schools Policy to its execution in the form of forced attendance at the Residential Schools, Canada caused incalculable losses to the Class members.

35. The Class members have all been affected by a crippling or elimination of traditional ceremonies and a loss of the hereditary governance structure which allowed for the ability to govern their peoples and their lands.

Canada's Duties

36. Canada was responsible for developing and implementing all aspects of the Residential Schools Policy, including carrying out all operational and administrative aspects of Residential Schools. While the Churches were used as Canada's Agents to assist Canada in carrying out its objectives, those objectives and the manner in which they were carried out were the obligations of Canada. Canada was responsible for:

(a) the administration of the Act and its predecessor statutes as well as all other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;

(b) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessors and related Ministries and Departments, as well as the decisions taken by those ministries and departments;

(c) the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the Residential Schools and for the creation, design and implementation of the program of education for Aboriginal Persons in attendance;

(d) the selection, control, training, supervision and regulation of the operators of the Residential Schools, including their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons attending the Residential Schools;

(e) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities; and

(f) the care and supervision of all Survivors while they were in attendance at the Residential Schools during the Class Period.

37. Further, Canada has at all material times committed itself to honour international law in relation to the treatment of its people, which obligations form minimum commitments to Canada's Aboriginal Peoples, including the Class, and which have been breached. In particular, Canada's breaches include the failure to comply with the terms and spirit of:

(a) the *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, entered into force Jan. 12, 1951,, and in particular Article 2(b), (c) and (e) of that convention, by engaging in the intentional destruction of the culture of Aboriginal Children and communities, causing profound and permanent cultural injuries to the Class;

(b) the *Declaration of the Rights of the Child* (1959) G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 by failing to provide Aboriginal Children with the means necessary for normal development, both materially and spiritually, and failing to put them in a position to earn a livelihood and protect them against exploitation;

(c) the *Convention on the Rights of the Child*, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989), and in particular Articles 29 and 30 of that convention, by failing to provide Aboriginal Children with education that is directed to the development of respect for their parents, their cultural identities, language and values, and by denying the right of Aboriginal Children to enjoy their own cultures, to profess and practise their own religions and to use their own languages;

(d) the *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, in particular Articles 1 and 27 of that convention, by interfering with Class members' rights to retain and practice their culture, spirituality, language and traditions, the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities and the right to teach their culture, spirituality, language and traditions to their own children, grandchildren, extended families and communities;

(e) the *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System,* OEA/Ser.L.V//II.82 doc.6 rev.1 at 17 (1992), and in particular Article XIII, by violating Class members' right to take part in the cultural life of their communities;

(f) the *United Nations Declaration on the Rights of Indigenous Peoples,* G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007), endorsed by Canada 12 November 2010, and in particular article 8, 2(d), which commits to the provision of effective mechanisms for redress for forced assimilation.

38. Canada's obligations under international law inform Canada's common law, statutory, fiduciary, constitutionally-mandated and other duties, and a breach of the aforementioned international obligations is evidence of, or constitutes, a breach under domestic law.

Breach of Fiduciary and Constitutionally-Mandated Duties

39. Canada has constitutional obligations to, and a fiduciary relationship with, Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the Residential Schools and established the Residential Schools Policy. Through these acts, and by virtue of the *Constitution Act 1867*, the *Constitution Act, 1982*, and the provisions of the Act, as amended, Canada owed a fiduciary duty to Class members.

40. Canada's constitutional duties include the obligation to uphold the honour of the Crown in all of its dealings with Aboriginal Peoples, including the Class members. This obligation arose with the Crown's assertion of sovereignty from the time of first contact and continues through post-treaty relationships. This is and remains an obligation of the Crown and was an obligation on the Crown at all material times. The honour of the Crown is a legal principle which requires the Crown to operate at all material times in its relations with Aboriginal Peoples from contact to post-treaty in the most honourable manner to protect the interests of the Aboriginal Peoples.

41. Canada's fiduciary duties obliged Canada to act as a protector of Class members' Aboriginal Rights, including the protection and preservation of their language, culture and their way of life, and the duty to take corrective steps to restore the Plaintiffs' culture, history and status, or assist them to do so. At a minimum, Canada's duty to Aboriginal Persons included the duty not to deliberately reduce the number of the beneficiaries to whom Canada owed its duties.

42. The fiduciary and constitutional duties owed by Canada extend to the Class because the Residential Schools Policy was intended to, and did, undermine and seek to destroy the way of life established and enjoyed by these Nations whose identities were and are viewed as collective.

43. Canada acted in its own self-interest and contrary to the interests of Aboriginal Children, not only by being disloyal to, but by actually betraying the Aboriginal Children and communities whom it had a duty to protect. Canada wrongfully exercised its discretion and power over Aboriginal People, and in particular children, for its own benefit. The Residential Schools Policy was pursued by Canada, in whole or in part, to eradicate what Canada saw as the "Indian Problem". Namely, Canada sought to relieve itself of its moral and financial responsibilities for Aboriginal People, the expense and inconvenience of dealing with cultures, languages, habits and values different from Canada's predominant Euro-Canadian heritage, and the challenges arising from land claims.

44. In breach of its ongoing fiduciary, constitutionally-mandated, statutory and common law duties to the Class, Canada failed, and continues to fail, to adequately remediate the damage caused by its wrongful acts, failures and omissions. In particular, Canada has failed to take adequate measures to ameliorate the Cultural, Linguistic and Social Damage suffered by the Class, notwithstanding Canada's admission of the wrongfulness of the Residential Schools Policy since 1998.

Breach of Aboriginal Rights

45. The shíshálh and Tk'emlúps people, and indeed all members of the Class have exercised laws, customs and traditions integral to their distinctive societies prior to contact with Europeans. In particular, and from a time prior to contact with Europeans, these Nations have sustained

their individual members, communities and distinctive cultures by speaking their languages and practicing their customs and traditions.

46. As a result of Residential School Policy, Class members were denied the ability to exercise and enjoy their Aboriginal Rights in the context of their collective expression within the Bands, some particulars of which include, but are not limited to:

(a) shíshálh, Tk'emlúps and other Aboriginal cultural, spiritual and traditional activities have been lost or impaired;

(b) the traditional social structures, including the equal authority of male and female leaders have been lost or impaired;

(c) the shíshálh, Tk'emlúps and other Aboriginal languages have been lost or impaired;

(d) traditional shíshálh, Tk'emlúps and Aboriginal parenting skills have been lost or impaired;

(e) shíshálh, Tk'emlúps and other Aboriginal skills for gathering, harvesting, hunting and preparing traditional foods have been lost or impaired; and,

(f) shíshálh, Tk'emlúps and Aboriginal spiritual beliefs have been lost or impaired.

47. Canada had at all material times and continues to have a duty to protect the Class members' Aboriginal Rights, including the exercise of their spiritual practices and traditional protection of their lands and resources, and an obligation not to undermine or interfere with the Class members' Aboriginal Rights. Canada has failed in these duties, without justification, through its Residential Schools Policy.

Vicarious Liability

48. Canada is vicariously liable for the negligent performance of the fiduciary, constitutionally-mandated, statutory and common law duties of its Agents.

49. Additionally, the Plaintiffs hold Canada solely responsible for the creation and implementation of the Residential Schools Policy and, furthermore:

a. The Plaintiffs expressly waive any and all rights they may possess to recover from Canada, or any other party, any portion of the Plaintiffs' loss that may be attributable to the fault or liability of any third-party and for which Canada might reasonably be entitled to claim from any one or more third-party for contribution, indemnity or an apportionment at common law, in equity, or pursuant to the British Columbia *Negligence Act*, R.S.B.C. 1996, c. 333, as amended; and

b. The Plaintiffs will not seek to recover from any party, other than Canada, any portion of their losses which have been claimed, or could have been claimed, against any third-parties.

Damages

50. As a consequence of the breach of fiduciary, constitutionally-mandated, statutory and common law duties, and breach of Aboriginal Rights by Canada and its Agents, for whom Canada is vicariously liable, the Class has suffered from the loss of the ability to fully exercise their Aboriginal Rights collectively, including the right to have a traditional government based on their own languages, spiritual practices, traditional laws and practices.

Grounds for Punitive and Aggravated Damages

51. Canada deliberately planned the eradication of the language, religion and culture of the Class. The actions were malicious and intended to cause harm, and in the circumstances punitive and aggravated damages are appropriate and necessary.

Legal Basis of Claim

52. The Class members are Aboriginal Indian Bands

53. The Class members' Aboriginal Rights existed and were exercised at all relevant times pursuant to the *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

54. At all material times, Canada owed the Plaintiffs and Class members a special and constitutionally-mandated duty of care, good faith, honesty and loyalty pursuant to Canada's constitutional obligations and Canada's duty to act in the best interests of Aboriginal People and especially Aboriginal Children who were particularly vulnerable. Canada breached those duties, causing harm.

55. The Class members are comprised of Aboriginal Peoples who have exercised their respective laws, customs and traditions integral to their distinctive societies prior to contact with Europeans. In particular, and from a time prior to contact with Europeans to the present, the Aboriginal Peoples who comprise the Class members have sustained their people, communities and distinctive culture by exercising their respective laws, customs and traditions in relation to their entire way of life, including language, dance, music, recreation, art, family, marriage and communal responsibilities, and use of resources.

Constitutionality of Sections of the *Indian Act*

56. The Class members plead that any section of the Act and its predecessors and any Regulation passed under the Act and any other statutes relating to Aboriginal Persons that provide or purport to provide the statutory authority for the eradication of Aboriginal People through the destruction of their languages, culture, practices, traditions and way of life, are in violation of sections 25 and 35(1) of the *Constitution Act* 1982, sections 1 and 2 of the *Canadian Bill of Rights*,

R.S.C. 1985, as well as sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and should therefore be treated as having no force and effect.

57. Canada deliberately planned the eradication of the language, spirituality and culture of the Plaintiffs and Class members.

58. Canada's actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.

59. The Plaintiffs plead and rely upon the following:

Federal Courts Act, R.S.C., 1985, c. F-7, s. 17;

Federal Courts Rules, SOR/98-106, Part 5.1 Class Proceedings;

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;

Canadian Charter of Rights and Freedoms, ss. 7, 15;

Constitution Act, 1982, ss. 25 and 35(1),

The Canadian Bill of Rights, R.S.C. 1985, App. III, Preamble, ss. 1 and 2;

The Indian Act, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122 and its predecessors.

International Treaties:

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951;

Declaration of the Rights of the Child (1959), G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354;

Convention on the Rights of the Child, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989);

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976;

American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System,* OEA/Ser.L.V//II.82 doc.6 rev.1 at 17 (1992); and

United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007), endorsed by Canada 12 November 2010.

The plaintiffs propose that this action be tried at Vancouver, BC.

April 30, 2021

Peter R. Grant, on behalf of
all Solicitors for the Plaintiffs

Solicitors for the Plaintiffs

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Dossier nº T-1542-12

COUR FÉDÉRALE

RECOURS COLLECTIF

ENTRE :

LE CHEF SHANE GOTTFRIEDSON, en son propre nom et au nom de tous les membres de la BANDE INDIENNE TK'EMLUPS TE SECWÉPEMC et de la BANDE TK'EMLUPS TE SECWÉPEMC,

LE CHEF GARRY FESCHUK, en son propre nom et au nom de tous les membres de la BANDE DE SECHELT et de la BANDE DE SECHELT,

VIOLET CATHERINE GOTTFRIEDSON, CHARLOTTE ANNE VICTORINE GILBERT, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, DAPHNE PAUL et RITA POULSEN

DEMANDEURS

et

SA MAJESTÉ LA REINE DU CHEF DU CANADA

DÉFENDERESSE

CONVENTION DE RÈGLEMENT DU RECOURS COLLECTIF CONCERNANT LES SURVIVANTS ET DESCENDANTS D'ÉLÈVES D'EXTERNATS

ATTENDU QUE :

A. Le Canada et des organismes religieux ont géré des pensionnats indiens, dont la mission consistait à éduquer de jeunes autochtones et dans lesquels des enfants ont subi des préjudices.

B. Le 8 mai 2006, le Canada a conclu la Convention de règlement relative aux pensionnats indiens, qui prévoit une indemnisation et d'autres prestations, y compris le paiement d'expérience commune, liées la fréquentation de pensionnats indiens.

C. Le 15 août 2012, les demandeurs ont déposé un recours collectif putatif devant la Cour fédérale du Canada portant le n° du dossier T-1542-12, *Gottfriedson et al. c. Sa Majesté la Reine du chef du Canada* (le « recours »). Le 11 juin 2013, une déclaration amendée a été déposée et le 26 juin 2015, une nouvelle déclaration modifiée a été déposée.

D. Le recours a été certifié comme recours collectif par une ordonnance de la Cour fédérale datée du 18 juin 2015, au nom de trois sous-groupes : le groupe des survivants, le groupe des descendants et le groupe des bandes.

E. Les parties ont l'intention de parvenir à un règlement équitable et exhaustif des réclamations du groupe des survivants et du groupe des descendants, et souhaitent en outre promouvoir la vérité, la guérison, l'éducation, la commémoration et la réconciliation. Ils ont négocié cette convention en gardant ces objectifs à l'esprit.

F. Sous réserve de l'ordonnance d'approbation du règlement, les réclamations des membres du groupe des survivants et des membres du groupe des descendants seront réglées conformément aux conditions énoncées dans cette convention.

G. Les parties ont convenu de maintenir les réclamations du groupe des bandes, nonobstant le règlement des réclamations du groupe des survivants et du groupe des descendants. Il a également été convenu que la présente convention ne portera pas atteinte aux droits des parties en ce qui concerne la poursuite du litige relatif aux réclamations des membres du groupe des bandes dans le cadre du recours.

EN CONSÉQUENCE, compte tenu des accords et engagements mutuels décrits dans la présente, les parties conviennent de ce qui suit :

INTERPRÉTATION ET DATE DE PRISE D'EFFET

1. Définitions

1.01 Les définitions suivantes s'appliquent à la présente convention :

« Autochtone » désigne une personne dont les droits sont reconnus et garantis par l'article 35 de la *Loi constitutionnelle de 1982*;

« Action » désigne le recours collectif *Gottfriedson et al. c Sa Majesté la Reine du chef du Canada* (dossier n° T-1542-12);

« Convention » désigne la présente convention de règlement, y compris les annexes qui y sont jointes;

« Date d'approbation » correspond à la date à laquelle la **Cour** rend son **ordonnance d'approbation**;

« Ordonnance d'approbation » s'entend de l'ordonnance ou des ordonnances de la **Cour** approuvant la présente **convention**;

« groupe des bandes » La bande indienne Tk'emlúps te Secwépmec et la bande indienne de Sechelt et de toute autre bande qui :

a. a ou avait des membres qui sont ou ont été membres du **groupe des survivants**, ou dont la communauté abrite un **pensionnat indien**;

b. est expressément associé à **l'action** concernant un ou plusieurs **pensionnats indiens**;

« Jour ouvrable » signifie une journée autre que le samedi, le dimanche, un jour considéré férié en vertu des lois de la province ou du territoire où vit la personne qui doit prendre des mesures conformément aux présentes, ou encore un jour décrété férié par une loi fédérale du Canada et observé dans la province ou le territoire en question;

« Canada » s'entend de Sa Majesté la Reine du chef du Canada, du Procureur général du Canada, ainsi que de leurs représentants légaux, salariés, agents, préposés, prédécesseurs, successeurs, exécuteurs, administrateurs, héritiers et ayants droit;

« Ordonnance d'autorisation » désigne l'ordonnance de la **Cour** datée du 18 juin 2015, autorisant la présente **action** en vertu des *Règles des Cours fédérales*, jointe à titre d'annexe B;

« Réclamation » désigne une demande d'indemnité présentée par un **demandeur** en vertu de la présente **convention** en soumettant un **formulaire de réclamation**, y compris toute documentation connexe, à l'**administrateur des réclamations**;

« Formulaire de réclamation » désigne la demande **d'indemnisation liée à la fréquentation d'externat** qui doit être soumise par un **demandeur** à **l'administrateur des réclamations** avant la **date limite des réclamations,** dont la forme et le contenu doivent être approuvés par la **Cour** avant la **date de mis en œuvre**;

« Demandeur » désigne un **ancien élève d'externat**, son **représentant personnel**, ou dans le cas d'un ancien élève d'externat décédé le 30 mai 2005 ou après, de son **représentant désigné**, qui présente ou maintient une **réclamation**;

« Administrateur des réclamations » désigne toute entité pouvant être désignée par les **parties** le cas échéant et qui est nommée par la **Cour** afin de remplir les fonctions qui lui sont assignées dans le cadre de la présente **convention**;

« Date limite des réclamations » correspond à la date qui tombe vingt-et-un (21) mois après la **date de mise en œuvre**;

« Processus de réclamation » correspond au processus décrit dans la présente **convention**, y compris l'annexe C et les formulaires connexes, visant la soumission des **réclamations**, l'évaluation de l'admissibilité et le paiement de **l'indemnité liée à la fréquentation d'externat** aux **demandeurs**;

« Avocat du groupe » désigne Peter R. Grant Law Corporation, Diane Soroka Avocate Inc., et Waddell Phillips Professional Corporation;

« Période visée par le recours collectif » désigne la période commençant le 1er janvier 1920 et se terminant le 31 décembre 1997 inclusivement;

« Cour » s'entend de la Cour fédérale, sauf si le contexte ne s'y prête pas;

« Ancien élève externe » s'entend de tout **membre du groupe des survivants** qui a fréquenté pour toute partie d'une **année scolaire**, sans y résider, un **pensionnat indien** figurant à l'annexe E, soit sur la liste 1 ou la liste 2, pendant les périodes qui y sont indiquées;

« Indemnité liée à la fréquentation d'externat » désigne le paiement de dix mille dollars (10 000 $) mentionné au paragraphe 25.01 de la présente;

« Fonds de revitalisation destiné aux anciens élèves externes » ou « Fonds » établi en vertu du paragraphe 21.01 des présentes, et comme décrit dans le **plan de distribution du Fonds**;

« Société de revitalisation pour les élèves externes » (*Day Scholars Revitalization Society*) **ou « Société »** désigne la société sans but lucratif établie en vertu du paragraphe 22.01 des présentes;

« Groupe des descendants » désigne les personnes faisant partie de la première génération de descendants des **membres du groupe des survivants** qui ont été légalement ou techniquement adoptées par un **membre du groupe des survivants** ou son conjoint;

« Membre du groupe des descendants » désigne une personne qui correspond à la définition du **groupe des descendants**;

« Représentant désigné » désigne la personne physique désignée dans le formulaire du représentant désigné dûment rempli, dont la forme et le contenu seront approuvés par la **Cour** avant la **date de mise en œuvre**;

« Accord sur les honoraires » désigne l'accord juridique distinct conclu par les **parties** concernant les frais juridiques, les coûts, les honoraires et les débours;

« Plan de distribution du Fonds » désigne le plan de distribution des fonds alloués au **Fonds de revitalisation destiné aux anciens élèves externes**, joint à titre d'annexe F;

« Examinateur indépendant » désigne la ou les personnes désignées par la **Cour** pour statuer sur les demandes de réexamen des **demandeurs** dont les **réclamations** ont été rejetées par **l'administrateur des réclamations**, conformément au **processus de réclamation**;

« Pensionnats indiens » désigne les établissements figurant sur la liste des pensionnats indiens jointe à titre d'annexe « A » de **l'ordonnance d'autorisation**, cette liste pouvant être modifiée par une autre ordonnance de la **Cour**;

« Date de mise en œuvre » signifie la date la plus tardive parmi :

a. le lendemain de la date limite à laquelle un recours ou une requête en autorisation d'appel de **l'ordonnance d'approbation** peut être déposé,

b. la date de la décision finale rendue à la suite d'un appel ayant trait à l'ordonnance d'approbation;

« CRRPI » désigne la Convention de règlement relative aux pensionnats indiens datée du 8 mai 2006;

« Règlement McLean » désigne la convention de règlement relative aux externats indiens fédéraux (McLean) conclue le 30 novembre 2018, dans le cadre de l'affaire *McLean et al. c. Sa Majesté la Reine du chef du Canada* (dossier n° T-2169-16);

« Exclue » s'entend de toute personne qui répondrait autrement à la définition d'un **membre du groupe des survivants** ou d'un **membre du groupe des descendants** ayant déjà dûment renoncé à prendre part à l'**action**;

« Parties » correspond aux signataires de la présente **convention**;

« Personne frappée d'incapacité » désigne :

a. une personne mineure telle que définie par les lois de la province ou du territoire de résidence de cette personne;

b. une personne incapable de gérer ses affaires, de porter des jugements ou de prendre des décisions raisonnables à cet égard en raison d'une incapacité mentale et pour laquelle un **représentant personnel** a été nommé en vertu des lois applicables dans la province ou dans le territoire de résidence de cette personne;

« Représentant personnel » désigne la personne nommée en vertu des lois en vigueur dans la province ou le territoire de résidence de cette personne pour gérer les affaires d'une **personne frappée d'incapacité** ou porter des jugements ou prendre des décisions raisonnables à cet égard;

« Réclamations abandonnées » désigne les causes d'action, les responsabilités, les demandes et les réclamations abandonnées conformément à **l'ordonnance d'approbation**, comme indiqué au paragraphe 42.01 de la présente;

« Année scolaire » s'entend de la période allant du 1er septembre d'une année civile au 31 août de l'année civile suivante;

« Plan de notification de la convention de règlement » s'entend du plan de notification visant à informer les **membres du groupe des survivants** et les **membres du groupe des descendants** du contenu de la présente convention;

« Plan d'approbation du règlement » s'entend du plan de notification visant à informer les **membres du groupe des survivants** et les **membres du groupe des descendants** du contenu de l'ordonnance d'approbation;

« Groupe des survivants » désigne tous les **Autochtones** qui ont fréquenté un **pensionnat indien** en tant qu'élèves ou à des fins éducatives pendant une période quelconque au cours de la **période visée par le recours**, à l'exclusion, pour chacun des membres du groupe, des périodes pour lesquelles ce membre a reçu une indemnité au moyen du paiement d'expérience commune en vertu de la **CRRPI**;

« Membre du groupe des survivants » désigne toute personne qui correspond à la définition du **groupe des survivants** et qui n'est pas réputée **exclue**;

« **Date limite ultime des réclamations** » désigne la date qui tombe trois (3) mois après la **date limite des réclamations**.

2. Aucune admission de fait ou de responsabilité

2.01 La présente convention ne constitue pas une admission de la part du Canada, ni une constatation par la Cour, d'un fait quelconque, ou d'une responsabilité du Canada concernant l'une ou l'autre des réclamations formulées dans les demandes ou le plaidoyer des demandeurs dans le cadre de l'action, telles qu'elles sont actuellement formulées dans la nouvelle déclaration modifiée, qu'elles ont été formulées dans des versions antérieures ou qu'elles pourraient être formulées à l'avenir.

2.02 Sans limiter la portée de ce qui précède, il est entendu que les parties conviennent que, dans le cadre de litiges ultérieurs concernant les réclamations du groupe des bandes, les parties ne soutiendront pas que l'existence de la présente convention ou de toute autre disposition des présentes constitue une reconnaissance de la part des parties, ou une constatation par la Cour, de tout fait ou de toute loi, ou une reconnaissance de la responsabilité du Canada, se rapportant aux réclamations formulées par le groupe des bandes dans le cadre de l'action, ou un règlement ou une résolution des réclamations du groupe des bandes dans le cadre de l'action. Toutefois, aucune disposition susmentionnée ni aucune autre disposition de la présente convention n'empêche les parties de faire référence ou de s'appuyer par ailleurs sur l'existence de la convention et de l'indemnité payée ou payable en vertu de celle-ci dans toute procédure, le cas échéant.

3. Titres

3.01 La division de la présente convention en paragraphes, titres et l'ajout d'annexes visent uniquement à en faciliter la consultation et ne sauraient affecter l'interprétation de la présente convention.

4. Sens étendu

4.01 Dans les présentes, le singulier comprend le pluriel et *vice versa*, le masculin ou le féminin s'applique aux personnes de l'un ou de l'autre sexe, et le mot personne comprend les particuliers, les partenariats, les associations, les fiducies, les organismes non constitués en société, les sociétés et les autorités gouvernementales. L'expression « y compris » signifie « y compris, sans restreindre la généralité de ce qui précède ».

5. Ambiguïté

5.01 Les parties reconnaissent qu'elles ont examiné les modalités de la présente convention et qu'elles ont contribué à les établir, et elles conviennent que toute règle d'interprétation selon laquelle les ambiguïtés seront réglées à l'encontre des parties chargées de la rédaction ne s'appliquera pas à l'interprétation des présentes.

6. Renvois législatifs

6.01 Dans la présente convention, à moins que l'objet ou le contexte n'exige une interprétation différente ou sauf disposition contraire des présentes, toute référence à une loi renvoie à cette loi telle quelle a été promulguée à la date de son entrée en vigueur ou telle qu'elle a pu être modifiée, promulguée de nouveau ou remplacée, et comprend tout règlement pris en vertu de celle-ci.

7. Jour de prise de mesures

7.01 Si le délai dans lequel une mesure doit être prise en vertu des présentes expire ou lors d'un jour non ouvrable, cette mesure peut être prise le prochain jour ouvrable suivant cette journée.

8. Ordonnance définitive

8.01 Aux fins des présentes, un jugement ou une ordonnance devient définitif à l'expiration du délai d'appel ou de demande d'autorisation d'en appeler d'un jugement ou d'une ordonnance, sans qu'un appel ne soit porté ou sans qu'on ait demandé l'autorisation d'interjeter appel ou, dans les cas contraires, lorsque l'appel ou la demande d'autorisation et les autres appels ont été tranchés et que tout autre dernier délai d'appel est expiré.

9. Devise

9.01 Tous les montants en devise dans les présentes sont indiqués en dollars canadiens.

10. Indemnité globale

10.01 Il est entendu que les montants payables en vertu des présentes sont inclusifs de tout intérêt avant ou après jugement ou de tout autre montant pouvant être réclamé par les membres du groupe des survivants ou les membres du groupe des descendants au Canada en raison des réclamations abandonnées.

11. Annexes

11.01 Les annexes suivantes sont incorporées aux présentes et en font partie intégrante :

Annexe A : Nouvelle déclaration modifiée, déposée le 26 juin 2015

Annexe B : Ordonnance d'autorisation, datée du 18 juin 2015

Annexe C : Processus de règlement des revendications

Annexe D : Processus de réclamation successorale

Annexe E : Liste des pensionnats indiens concernés par le processus réclamation

Annexe F : Plan de distribution du Fonds de revitalisation destiné aux anciens élèves externes

Annexe G : Projet d'ordonnance d'autorisation modifié (re : réclamations du groupe des bandes)

Annexe H : Projet de deuxième déclaration modifiée, projet sans description des modifications antérieures ou actuellement proposées.(re : réclamations du groupe des bandes)

12. Aucune autre obligation

12.01 Toute action, cause d'action, responsabilité, réclamation et demande de quelque nature que ce soit visant à réclamer des dommages-intérêts, des contributions, des indemnités, des coûts, des dépenses et des intérêts que tout membre du groupe des survivants ou du groupe des descendants a déjà eus, a actuellement ou pourrait avoir à l'avenir en rapport avec l'action contre le Canada, que ces réclamations ont été présentées ou auraient pu l'être dans le cadre de toute procédure, sera définitivement réglée selon les conditions énoncées dans la présente convention à la date de l'ordonnance d'approbation, et le Canada n'aura aucune autre responsabilité que celles énoncées dans les présentes.

13. Intégralité de la convention

13.01 La présente convention constitue la convention complète entre les parties en ce qui concerne les réclamations du groupe des survivants et du groupe des descendants présentées dans le cadre de l'action, et annule et remplace tous les accords et conventions antérieurs ou autres conclus entre les parties à cet égard. Il n'existe aucune déclaration, aucune garantie, aucune modalité, aucune condition, aucun engagement, aucune entente ou aucune convention accessoire, expresse, implicite ou statutaire entre les parties, en ce qui concerne l'objet des présentes, autre que ce qui est expressément énoncé ou mentionné dans les présentes.

14. Portée de la Convention

14.01 La présente convention est exécutoire et s'applique au profit des parties, des membres du groupe des survivants, des membres du groupe des descendants et de leurs héritiers, ayants droit, représentants désignés et représentants personnels respectifs.

15. Réclamation du groupe des bandes

15.01 Rien dans les présentes n'a pour but de porter atteinte aux droits des parties en ce qui concerne la poursuite du litige relatif aux réclamations du groupe des bandes dans le cadre de l'action.

15.02 Les réclamations du groupe des bandes qui sont maintenues sont énoncées dans le projet d'ordonnance d'autorisation modifiée (re : réclamations du groupe des bandes), joint à titre d'annexe G et le projet de deuxième déclaration modifiée concernant les réclamations du groupe des bandes (re : réclamations du groupe des bandes), joint à titre d'annexe H.

16. Lois applicables

16.01 La présente convention est régie par les lois de la province ou du territoire où réside le membre du groupe des survivants ou le membre du groupe des descendants et par les lois du Canada qui s'y appliquent et est interprétée conformément à celles-ci.

17. Exemplaires

17.01 La présente convention peut être signée en plusieurs exemplaires, chacun étant réputé être un original et, pris dans leur ensemble, étant réputé constituer une seule et même convention.

18. Langues officielles

18.01 Le Canada préparera la traduction française des présentes pour utilisation lors des audiences d'approbation du règlement devant la Cour. Dès que possible après la signature de la présente convention, le Canada prendra des dispositions pour la préparation d'une version française faisant autorité. La version française aura le même poids et la même force de loi que la version anglaise.

19. Caractère exécutoire

19.01 Cette convention deviendra exécutoire à compter de sa date d'entrée en vigueur, et liera toutes les parties, tous les membres du groupe des survivants et du groupe et tous les membres du groupe des descendants. L'ordonnance d'approbation de la Cour constitue une approbation des présentes à l'égard de tous les membres du groupe des survivants et des membres du groupe des descendants.

20. Indivisibilité de la convention

20.01 Aucune disposition de la présente convention n'entrera en vigueur tant que la Cour n'aura pas approuvé les présentes.

LE FONDS DE REVITALISATION DESTINÉ AUX ANCIENS ÉLÈVES EXTERNES

21. Fonds de revitalisation destiné aux anciens élèves externes

21.01 Le Canada accepte de verser la somme de cinquante millions de dollars (50 000 000,00 $) au Fonds de revitalisation destiné aux anciens élèves externes pour financer des activités, destinées aux membres du groupe des survivants et les membres du groupe des descendants, visant à promouvoir la guérison, le mieux-être, l'éducation, la langue, la culture, le patrimoine et la commémoration.

21.02 Les sommes indiquées au paragraphe 21.01 de la présente seront versées par le Canada à la Société de revitalisation pour les élèves externes dans les trente (30) jours suivant la date de mise en œuvre.

SOCIÉTÉ DE REVITALISATION POUR LES ÉLÈVES EXTERNES

22. Création de la Société de revitalisation pour les élèves externes

22.01 Les parties conviennent que la Société de revitalisation pour les élèves externes utilisera le Fonds pour financer des activités destinées aux membres du groupe des survivants et les membres du groupe des descendants, visant à promouvoir la guérison, le mieux-être, l'éducation, la langue, la culture, le patrimoine et la commémoration. L'argent du Fonds sera détenu par la Société de revitalisation pour les élèves externes, qui sera constituée en tant qu'organisme « sans but lucratif » en vertu de la British Columbia *Societies Act* (S.B.C. 2015, c. 18), de toute législation fédérale analogue ou de toute loi de l'une des provinces ou de l'un des territoires avant la date de mise en œuvre. La Société sera indépendante du gouvernement du Canada, ce dernier ayant toutefois le droit de nommer un représentant au sein de son conseil d'administration.

22.02 Un projet de plan de Fonds de revitalisation destiné aux anciens élèves des externats est joint aux présentes à titre d'annexe F.

22.03 Le Fonds est destiné à soutenir les membres du groupe des survivants et les membres du groupe des descendants en complément aux programmes du gouvernement fédéral et ne sauraient en faire double emploi.

23. Administrateurs

23.01 Les cinq premiers administrateurs de la Société seront nommés par les parties.

23.02 Le conseil d'administration de la Société aura une représentation nationale et sera composé d'un administrateur nommé par le Canada. Le représentant nommé par le Canada ne sera pas un salarié ou un fonctionnaire du Canada.

24. Responsabilités des administrateurs

24.01 Les administrateurs de la Société géreront ou superviseront la gestion des activités et des affaires de la Société de revitalisation pour les élèves externes, qui recevra, détiendra, investira, gérera et décaissera les sommes décrites dans les dispositions sur le Fonds contenues dans les présentes et toute autre somme transférée dans le Fonds en vertu de la présente convention dans le but de financer des activités visant à promouvoir la guérison, le mieux-être, l'éducation, la langue, la culture, le patrimoine et la commémoration pour les membres du groupe des survivants et les membres du groupe des descendants.

INDEMNITÉS POUR LES DEMANDEURS INDIVIDUELS

25. Indemnité liée à la fréquentation d'externat

25.01 Le Canada versera la somme de dix mille dollars (10 000 $) à titre de dommages-intérêts généraux non pécuniaires, sans aucune déduction, à chaque demandeur dont la réclamation a été approuvée dans le cadre du processus de réclamation.

25.02 Le demandeur a droit au versement d'une indemnité lié à la fréquentation d'externat et sa réclamation sera approuvée s'il satisfait aux critères d'admissibilité suivants :

a. la réclamation concerne un ancien élève externe qui était vivant le 30 mai 2005;

b. la réclamation est remise à l'administrateur des réclamations avant la date limite ultime des réclamations;

c. la réclamation concerne la fréquentation par d'anciens élèves externes de pensionnats indiens figurant sur la liste 1 ou la liste 2 de l'annexe E pendant les périodes qui y sont indiquées pour toute partie d'une année scolaire donnée satisfaisant aux trois conditions suivantes, à savoir qu'il doit s'agir d'une année scolaire pour laquelle l'ancien élève externe ou l'exécuteur testamentaire, le représentant ou l'héritier qui a présenté une demande à la place de l'ancien élève :

i. n'a pas reçu un paiement d'expérience commune en vertu de la CRRPI;

ii. n'a pas reçu et ne recevra pas d'indemnisation en vertu du règlement McLean;

iii. n'a pas reçu une indemnisation en vertu de tout autre règlement concernant une école figurant à l'Annexe K du règlement McLean.

25.03 Pour plus de clarté, pour toute année scolaire au cours de laquelle un membre du groupe des survivants était admissible au paiement d'expérience commune en vertu de la CRRPI, mais qui n'en a pas fait la demande, aucune réclamation relative au paiement d'indemnité lié à la fréquentation d'externat en vertu de la présente convention ne peut être faite en ce qui concerne ce membre du groupe des survivants pour cette année scolaire.

26. Aucune limite pour les réclamations

26.01 Il a été convenu qu'il n'y a pas de limite ou de plafond imposé au Canada en ce qui concerne son obligation de payer les réclamations approuvées. Toutes les réclamations approuvées seront entièrement payées par le Canada.

27. Transfert de fonds par le Canada

27.01 Conformément au processus de réclamation, le Canada transférera des fonds directement à l'administrateur des réclamations pour garantir le paiement des indemnités en ce qui concerne les réclamations approuvées.

28. Prestations sociales

28.01 Le Canada fera de son mieux pour obtenir l'accord des provinces et des territoires afin que la réception de tout paiement en vertu des présentes n'affecte pas le montant, la nature ou la durée des prestations sociales ou des prestations d'aide sociale payables à un demandeur en vertu des lois de toute province ou de tout territoire du Canada.

28.02 En outre, le Canada fera de son mieux pour obtenir l'accord des ministères du gouvernement du Canada concernés pour que la réception de tout paiement en vertu des présentes n'affecte pas le montant, la nature ou la durée de toute prestation sociale ou d'aide sociale payable à un demandeur en vertu de tout programme fédéral de prestations sociales, y compris la Sécurité de la vieillesse et le Régime de pensions du Canada.

MISE EN ŒUVRE DE LA PRÉSENTE CONVENTION

29. L'action

29.01 La nouvelle déclaration modifiée dans le cadre de l'action est jointe aux présentes à titre d'annexe A.

29.02 Les parties conviennent que les demandeurs solliciteront l'autorisation de la Cour, sur consentement et dans le cadre de la demande d'approbation des présentes, de déposer le projet de deuxième déclaration modifiée dans le cadre de l'action, qui est jointe à titre d'annexe H.

30. Ordonnance d'autorisation

30.01 L'ordonnance d'autorisation est jointe à titre d'annexe B.

30.02 Les parties conviennent que les demandeurs solliciteront une ordonnance de la Cour, sur consentement et dans le cadre de la demande d'approbation de la présente convention par la Cour, qui émettra l'ordonnance d'autorisation modifiée, laquelle est jointe à titre d'annexe G.

31. Plans de notification

31.01 Les parties conviennent que les demandeurs solliciteront une ordonnance de la Cour, sur consentement, approuvant le plan de notification de la convention de règlement, par lequel les membres du groupe des survivants et les membres du groupe des descendants seront notifiés de la convention, de ses modalités, de la procédure à suivre pour obtenir de plus amples informations et de la procédure à suivre pour faire part de leurs commentaires avant et pendant l'audience d'approbation du règlement.

31.02 Les parties conviennent, en outre, que les demandeurs solliciteront une ordonnance de la Cour, sur consentement et dans le cadre de la demande d'approbation de la convention par la Cour, approuvant un plan de notification de l'approbation du règlement, par lequel les membres du groupe des survivants et les membres du groupe des descendants seront notifiés de l'ordonnance d'approbation et de la procédure de demande d'indemnisation.

31.03 Le Canada accepte de payer les frais de mise en œuvre du plan de notification de la convention de règlement et du plan de notification de l'approbation du règlement.

RÉCLAMATIONS FAITES PAR LES REPRÉSENTANTS PERSONNELS ET LES REPRÉSENTANTS DÉSIGNÉS

32. Indemnité en cas de décès

32.01 Si un ancien élève externe est mort le 30 mai 2005 ou meurt après, une réclamation peut être soumise au nom des héritiers ou de la succession de l'ancien élève externe décédé, conformément au processus de réclamation de la succession décrit à l'annexe D.

33. Personne frappée d'incapacité

33.01 Si un ancien élève externe jour soumet une réclamation à l'administrateur des réclamations avant la date limite ultime des réclamations et que la réclamation est approuvée, mais que l'ancien élève est ou devient frappé d'incapacité avant de recevoir une indemnité liée à la fréquentation d'externat, cette indemnité sera versée à son représentant personnel.

34. Exclusion de responsabilité relative aux réclamations

34.01 Le Canada, l'administrateur des réclamations, les avocats du groupe et l'examinateur indépendant ne seront pas responsables, et seront de fait dégagés de toute responsabilité par les demandeurs, en ce qui concerne les réclamations, demandes reconventionnelles, poursuites, actions, causes d'action, demandes, dommages, pénalités, blessures, compensations, jugements, dettes, coûts (y compris, mais sans s'y limiter, les honoraires d'avocat, les débours et les dépenses) ou toute autre responsabilité de quelque nature que ce soit découlant d'un paiement ou d'un non-paiement à un représentant personnel ou à un représentant désigné dans le cadre de la présente convention et de toute ordonnance du tribunal l'approuvant.

PROCESSUS DE RÉCLAMATION

35. Principes régissant l'administration des réclamations

35.01 Le processus de réclamation se veut rapide, peu coûteux, convivial, sensible aux aspects culturels et tenant compte des traumatismes subis. L'objectif est de réduire au minimum le fardeau imposé aux demandeurs qui formulent leurs réclamations et de limiter toute probabilité de nouveau traumatisme au cours du processus de réclamation. L'administrateur des réclamations et l'examinateur indépendant doivent, en l'absence de motifs raisonnables contraires, tenir pour acquis que le demandeur agit honnêtement et de bonne foi. Lors de l'examen d'une demande, l'administrateur des réclamations et l'examinateur indépendant tireront toutes les conclusions raisonnables et favorables possibles en faveur du demandeur.

36. Processus de règlement des revendications

36.01 Le processus de réclamation est décrit à l'annexe C.

ADMINISTRATEUR DES RÉCLAMATIONS

37. Fonctions de l'administrateur des réclamations

37.01 Les fonctions et les responsabilités de l'administrateur des réclamations sont les suivantes :

a. élaborer, installer et mettre en œuvre des systèmes ainsi que des formulaires et fournir des renseignements, des lignes directrices et des procédures pour le traitement des réclamations par copie papier ou par voie électronique, conformément à la présente convention;

b. élaborer, installer et mettre en œuvre des systèmes et des procédures pour le paiement des indemnités des anciens élèves externes conformément à la présente convention;

c. prévoir l'embauche du personnel requis pour lui permettre de s'acquitter de ses fonctions, et assurer leur formation et leur instruction;

d. tenir des comptes exacts ou s'assurer de la tenue de comptes exacts en ce qui concerne ses activités et son administration, y compris la préparation des états financiers, des rapports et des dossiers exigés par la Cour;

e. présenter aux parties un rapport mensuel sur les réclamations reçues et réglées, et sur les pensionnats indiens concernés par les réclamations;

f. répondre aux demandes de renseignements concernant les réclamations, examiner les réclamations, prendre des décisions relatives aux réclamations, communiquer ses décisions conformément à la présente convention et fournir des renseignements aux demandeurs concernant le processus de réexamen tel que décrit dans le processus de réclamation;

g. communiquer avec les demandeurs en anglais ou en français, selon la préférence du demandeur, et, si un demandeur exprime le désir de communiquer dans une langue autre que l'anglais ou le français, faire de son mieux pour répondre à cette demande;

h. toutes les autres fonctions et responsabilités que la Cour peut lui assigner.

38. Nomination de l'administrateur des réclamations

38.01 L'administrateur des réclamations sera nommé par la Cour sur recommandation des parties.

39. Fonctions de l'examinateur indépendant

39.01 Le rôle de l'examinateur indépendant est de statuer sur toute demande de réexamen présentée par un demandeur conformément au processus de réclamation décrit à l'annexe C. Le ou les examinateurs indépendants seront nommés par la Cour sur recommandation des parties.

40. Coûts du processus de réclamation

40.01 Les coûts du processus de réclamation, y compris ceux de l'administrateur des réclamations et de l'examinateur indépendant, seront payés par le Canada.

41. Ordonnance d'approbation

41.01 Les parties conviennent de demander à la Cour une ordonnance d'approbation des présentes sous une forme convenue par les parties et comprendra notamment une disposition :

a. incorporant par renvoi la présente convention dans son intégralité, y compris toutes les annexes;

b. indiquant et stipulant que l'ordonnance lie tous les membres du groupe des survivants et du groupe des descendants, y compris les personnes frappées d'incapacité;

c. indiquant et stipulant que les réclamations du groupe des survivants et du groupe des descendants énoncés dans la première déclaration modifiée, déposée le 26 juin 2015, sont rejetées, et donnant effet aux quittances et aux clauses connexes énoncées aux articles 42.01 et 43.01 afin de garantir le règlement de toutes les réclamations du groupe des survivants et du groupe des descendants.

42. Règlement des réclamations du groupe des survivants et du groupe des descendants

42.01 L'ordonnance d'approbation demandée à la Cour déclarera que :

a. chaque membre du groupe des survivants ou, s'il est décédé, sa succession (ci-après « le cédant du survivant »), a donné quittance entière et définitive au Canada, ses fonctionnaires, ses agents, ses gestionnaires et ses employés, de toute action, cause d'action, responsabilité en vertu common law, en droit civil

du Québec et découlant de la loi, contrats, réclamations et demandes de quelque nature que ce soit, qu'elle ait été déposée pour le groupe des survivants dans la première déclaration modifiée déposée le 26 juin 2015 dans le cadre de l'action, ou qui aurait pu être déposée par tout cédant individuel du survivant dans le cadre d'une action civile, qu'elle soit connue ou inconnue, pour des dommages, contributions, indemnités, coûts, dépenses et intérêts que ce cédant a détenus, détient ou pourrait détenir du fait de sa fréquentation en qualité d'élève externe dans un pensionnat indien, à tout moment.

b. chaque membre du groupe des descendants ou, s'il est décédé, sa succession (ci-après « le cédant du descendant »), a donné quittance entière et définitive au Canada, ses fonctionnaires, ses agents, ses gestionnaires et ses employés, de toute action, cause d'action, responsabilité en vertu common law, en droit civil du Québec et découlant de la loi, contrats, réclamations et demandes de quelque nature que ce soit, qu'elle ait été déposée pour le groupe des descendants dans la première déclaration modifiée déposée le 26 juin 2015 dans le cadre de l'action, ou qui aurait pu être déposée par tout cédant individuel du descendant dans le cadre d'une action civile, qu'elle soit connue ou inconnue, pour des dommages, contributions, indemnités, coûts, dépenses et intérêts que ce cédant a détenus, détient ou pourrait détenir du fait de la fréquentation d'un membre de sa famille en qualité d'élève externe dans un pensionnat indien, à tout moment.

c. Toutes les causes d'actions ou réclamations formulées par les membres du groupe des survivants et les membres du groupe des descendants, ainsi que leurs demandes de réparation pécuniaire, de mesure de redressement déclaratoire ou autre, dans la première déclaration de réclamation modifiée déposée le 26 juin 2015, sont rejetées d'un commun accord par les parties sans examen de leur bien-fondé, et ne seront pas traitées lors de l'examen des réclamations du groupe des bandes.

d. le Canada peut invoquer les quittances susmentionnées comme pour se défendre dans le cadre de toute action en justice visant à obtenir des indemnités du Canada pour les réclamations du groupe des survivants et du groupe des descendants, telles qu'elles sont énoncées dans la première déclaration modifiée. Il est toutefois entendu que les quittances susmentionnées et l'ordonnance d'approbation ne doivent pas être interprétées comme si elles avaient pour effet de décharger, exclure ou supprimer toute cause d'action ou réclamation que les membres du groupe de la bande pourraient avoir en droit en tant que personnes morales distinctes ou en tant que personne juridique ayant la qualité et l'autorité pour soumettre des réclamations fondées en droit pour la violation des droits collectifs de leurs peuples autochtones respectifs, y compris dans la mesure où de telles causes d'action, réclamations, violations de droits ou manquements à des obligations dues au groupe des bandes sont décrites dans la première déclaration modifiée déposée le 26 juin 2015, même si ces causes d'action, réclamations, violations de droits ou manquements à des obligations sont fondées sur une faute présumée commise à l'égard des membres du groupe des survivants ou des membres du groupe des descendants énoncée ailleurs dans l'un ou l'autre de ces documents.

e. tout cédant de survivant et tout cédant de descendant est réputé convenir que s'il présente une réclamation, une demande ou s'ils engagent une action ou une procédure contre une personne, des personnes ou une personnalité dans laquelle une réclamation pourrait être faite contre le Canada pour des dommages-intérêts, une contribution, une indemnité ou tout autre dédommagement, en vertu d'une loi, de la common law ou du droit civil du Québec, en ce qui concerne les allégations et les faits énoncés dans le cadre de l'action, y compris toute réclamation contre des provinces ou des territoires ou d'autres personnalités juridiques ou groupes, y compris, mais sans s'y limiter, des organismes religieux ou autres qui ont joué un rôle quelconque dans les pensionnats indiens, le cédant d'un survivant ou d'un

descendant limitera expressément sa réclamation de manière à exclure toute forme de responsabilité du Canada.

f. lorsqu'une décision définitive concernant une réclamation est prise dans le cadre du processus de réclamation et conformément à celui-ci, chaque cédant de survivant ou de descendant est également réputé avoir accepté de quittancer les parties, les avocats du groupe, les avocats du Canada, l'administrateur des réclamations, l'examinateur indépendant et toute autre partie participant au processus de réclamation, de toute réclamation découlant ou pouvant découler de l'application du processus de réclamation, y compris, mais sans s'y limiter, de l'insuffisance de l'indemnité reçue.

43. Contrepartie réputée du Canada

43.01 Les obligations et les responsabilités du Canada qui sont prévues par les présentes constituent la contrepartie pour les quittances et autres engagements énoncés dans les présentes et cette contrepartie constitue un règlement complet et final de toute demande dont il est question dans les présentes. Les cédants des survivants et les cédants des descendants n'ont droit qu'aux prestations prévues et aux indemnités payables en vertu des présentes, en tout ou en partie, comme seul recours pour telle action, cause d'action, responsabilité, réclamation ou demande.

HONORAIRES ET DÉBOURS

44. Honoraires et débours des avocats du groupe

44.01 Tous les honoraires et débours des avocats du groupe, ainsi que les honoraires proposés par les représentants des demandeurs, sont soumis à l'accord sur les honoraires, qui doit être examiné et approuvé par la Cour.

44.02 L'approbation de l'accord d'honoraires n'est pas liée à l'approbation par la cour de la présente convention. Le refus de la Cour d'approuver l'accord

d'honoraires, en tout ou en partie, n'aura aucun effet sur l'approbation ou la mise en œuvre de la présente convention.

45. Aucuns autres frais ou débours ne sera facturé

45.01 Les parties reconnaissent que c'est leur intention que tous les paiements aux membres du groupe des survivants en vertu des présentes soient effectués sans aucune déduction à titre d'honoraires ou de débours.

EXPIRATION ET CONDITIONS

46. Expiration de la convention

46.01 La présente convention sera en vigueur tant que toutes les obligations qu'elle contient n'auront pas été remplies et que la Cour ordonne qu'elle soit terminée.

47. Modifications

47.01 Sauf disposition contraire expresse de la présente convention, aucune modification ne sera apportée à celle-ci, y compris aux annexes, à moins que les parties y consentent par écrit et que la Cour l'approuve.

48. Incessibilité

48.01 Aucun montant payé en vertu des présentes ne peut faire l'objet d'une cession, et toute cession est nulle d'une nullité absolue, sauf disposition expresse dans les présentes. Si un élève externe est décédé ou est réputé frappé d'incapacité et que la réclamation a été approuvée, les indemnités dues seront versées à son représentant désigné ou à son représentant personnel, respectivement.

CONFIDENTIALITÉ

49. Confidentialité

49.01 Tout renseignement fourni, créé ou obtenu dans le cadre de la présente convention, qu'il soit écrit ou oral, sera traité de façon confidentielle par les parties et les avocats du groupe, les demandeurs, l'administrateur des réclamations et l'examinateur indépendant et ne sera pas utilisé à d'autres fins que celles du présent règlement, à moins que les parties n'en disposent autrement, que la présente convention ou la législation fédérale, provinciale ou territoriale applicable en matière de protection de la vie privée ne l'autorise ou que la Cour ne l'ordonne.

50. Destruction des renseignements et des documents du demandeur

50.01 L'administrateur des réclamations détruira, dans les deux (2) ans suivant le versement effectif de la totalité de l'indemnité, tous les renseignements et documents relatifs aux demandeurs qu'il a en sa possession, à moins que le demandeur, le représentant désigné ou le représentant personnel ne demande expressément la restitution de ces renseignements au cours de la période de deux (2) ans. Dès réception d'une telle demande, l'administrateur des réclamations transmettra au demandeur les renseignements exigés.

50.02 Dans les deux (2) ans suivant une décision de réexamen, l'examinateur indépendant détruira tous les renseignements et documents du demandeur en sa possession, à moins qu'un demandeur, un représentant désigné ou un représentant personnel ne demande spécifiquement la restitution de ces renseignements au cours de la période de deux (2) ans. Dès réception d'une telle demande, l'examinateur indépendant transmettra au demandeur les renseignements exigés.

50.03 Avant la destruction des documents, l'administrateur des réclamations et l'examinateur indépendant doivent établir une liste indiquant (i) le nom de l'élève externe, (ii) l'année ou les années scolaires où il a fréquenté le ou les pensionnats

et (iii) le ou les pensionnats indiens en raison desquels l'indemnité à la fréquentation d'externat a été versée, et la remettre au Canada. Nonobstant toute autre disposition de la présente convention, cette liste doit être conservée par le Canada de façon strictement confidentielle et ne peut être utilisée que dans le cadre d'une procédure judiciaire ou de règlement, le cas échéant, pour démontrer quelles personnes ont reçu l'indemnité liée à la fréquentation d'externat et pour quelle(s) année(s) scolaire(s) et concernant quel(s) pensionnat(s) indien(s), ce à quoi les parties conviendront sans autre preuve.

51. Confidentialité des négociations

51.01 À moins que les parties n'en conviennent autrement, l'engagement de confidentialité concernant les discussions et toutes les communications, écrites ou orales, faites dans le cadre et en marge des négociations débouchant sur les échanges de lettres d'offre et d'acceptation, et le présent accord restent en vigueur.

COOPÉRATION

52. Coopération avec le Canada

52.01 Dès la signature de la présente convention, les représentants des demandeurs et les avocats du groupe coopéreront avec le Canada et feront de leur mieux pour obtenir l'approbation de la présente convention par la Cour. Ils feront en outre des efforts raisonnables pour obtenir le soutien et la participation des membres du groupe des survivants et des membres du groupe des descendants en ce qui concerne toutes les présentes.

53. Annonces publiques

53.01 À la date convenue, les parties feront des annonces publiques visant à soutenir la présente convention et continueront de s'exprimer publiquement en faveur de celle-ci.

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EN FOI DE QUOI les parties ont signé la présente convention ce ___ jour de mai 2021.

Pour les demandeurs

Waddell Phillips Professional Corporation, par
John K. Phillips
Avocat du groupe

Pour les demandeurs

Peter R. Grant Law Corporation, par
Peter R. Grant
Avocat du groupe

Pour les demandeurs

Diane Soroka Avocate Inc., par
Diane H. Soroka
Avocat du groupe

Pour les défendeurs

Annie Boudreau
Dirigeante principale des finances, des résultats et de l'exécution,
Relations Couronne-Autochtones et Affaires du Nord Canada

Modifié conformément à l'ordonnance du juge Harrington rendue le 3 juin 2015

Dossier de la Cour no T-1542-13

~~PROPOSITION DE~~ RECOURS COLLECTIF

FORMULAIRE 171A – Règle 171

COUR FÉDÉRALE

ENTRE :

LE CHEF SHANE GOTTFRIEDSON, en son nom et au nom de tous les membres des BANDES INDIENNES TK'EMLÚPS TE SECWÉPEMC et TK'EMLÚPS TE SECWÉPEMC,

LE CHEF GARRY FESCHUK, en son nom et au nom de tous les membres des BANDES INDIENNES SECHELT et SECHELT,

VIOLET CATHERINE GOTTFRIEDSON, ~~DOREEN LOUISE SEYMOUR,~~ CHARLOTTE ANNE VICTORINE GILBERT, ~~VICTOR FRASER,~~ DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ~~ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE,~~ DAPHNE PAUL~~,~~ ~~AARON JOE~~ et RITA POULSEN

LES DEMANDEURS

et

Sa Majesté la Reine du chef du Canada, représentée par LE PROCUREUR GÉNÉRAL DU CANADA

LE DÉFENDEUR

PREMIÈRE DÉCLARATION REMODIFIÉE

AU DÉFENDEUR

UNE PROCÉDURE JUDICIAIRE A ÉTÉ INTENTÉE CONTRE VOUS par les demandeurs. Vous trouverez dans les pages suivantes la plainte déposée contre vous.

SI VOUS SOUHAITEZ CONTESTER CETTE PROCÉDURE, vous ou un avocat vous représentant êtes tenu de préparer une défense en utilisant le formulaire 171B établi par les règles fédérales, de la signifier à l'avocat des plaignants ou, si les plaignants n'ont pas d'avocat, de la signifier aux plaignants, et de la déposer, avec preuve de signification, à un bureau local de cette Cour, DANS LES 30 JOURS suivant la signification de cette déclaration, si vous êtes signifié au Canada.

Si vous êtes signifié aux États-Unis, le délai pour signifier et déposer votre défense est de quarante jours. Si vous êtes signifié ailleurs qu'au Canada ou aux États-Unis, le délai de signification et de dépôt de votre défense est de soixante jours.

Vous pouvez demander des copies des règles fédérales, des renseignements sur les bureaux locaux de la Cour ou toute autre information utile à l'administrateur de la Cour à Ottawa (téléphone 613-992-4238) ou auprès de tous les bureaux locaux.

SI VOUS NE CONTESTEZ PAS LA PRÉSENTE PROCÉDURE, un jugement peut être rendu contre vous en votre absence et sans autre avis.

(Date)

Émis par :_____
(Préposé à l'enregistrement)

Adresse du bureau local :_____

À :

Sa Majesté la Reine du chef du Canada,
Le ministre des Affaires indiennes et du Nord canadien, et
Le procureur général du Canada
Ministère de la Justice
900 – 840 Howe Street
Vancouver, B.C. V6Z 2S9

REDRESSEMENT DEMANDÉ

Le groupe des survivants

1. Les représentants des demandeurs du groupe des survivants, en leur propre nom et au nom des membres du groupe des survivants, demandent :

(a) ~~une ordonnance qualifiant cette procédure de recours collectif conformément aux règles fédérales s'appliquant aux recours collectifs et les nommant en tant que représentants des demandeurs du groupe des survivants et de tout sous-groupe de ce groupe;~~

(b) une déclaration selon laquelle le Canada a manqué à ses obligations fiduciaires, constitutionnelles, statutaires et de common law envers les demandeurs et les autres membres du groupe des survivants en ce qui concerne l'objet, l'établissement, le financement, le fonctionnement, la supervision, le contrôle, l'entretien, la fréquentation obligatoire des membres du groupe des survivants et le soutien des pensionnats ~~recensés~~;

(c) une déclaration selon laquelle les membres du groupe des survivants ont des droits ancestraux de parler leurs langues traditionnelles, de s'adonner à leurs coutumes et pratiques religieuses traditionnelles et de se gouverner de leur manière traditionnelle;

(d) une déclaration selon laquelle le Canada a violé les droits linguistiques et culturels (droits ancestraux ou autres) ~~droits ancestraux~~ des membres du groupe des survivants;

(e) une déclaration selon laquelle la politique sur les pensionnats et les pensionnats ~~recensés~~ ont causé des dommages culturels, linguistiques et sociaux et un préjudice irréparable au groupe des survivants;

(f) une déclaration selon laquelle le Canada est responsable envers les représentants des demandeurs du groupe des survivants et les autres membres du groupe des survivants de préjudices causés par le non-respect des obligations fiduciaires, constitutionnelles, statutaires et de common law, ainsi que de droits ancestraux, de souffrances morales infligées intentionnellement, et de violations des conventions et des pactes internationaux, de même que du droit international, en ce qui concerne l'objectif, la création, le financement, le fonctionnement, la supervision, le contrôle et l'entretien, la fréquentation obligatoire par les membres du groupe des survivants ainsi que le soutien des pensionnats indiens ~~recensés~~;

(g) des dommages-intérêts généraux non pécuniaires pour violation d'obligations fiduciaires, d'obligations découlant de la Constitution, de la loi et de la common law, de droits ancestraux et d'infliction intentionnelle de souffrances morales, ainsi que pour violation de conventions et de pactes internationaux, et pour violation du

droit international, négligence et infliction intentionnelle de souffrances morales dont le Canada est responsable;

(h) des dommages-intérêts pécuniaires généraux et des dommages-intérêts spéciaux pour négligence, perte de revenu, perte de capacité lucrative, perte de perspectives économiques, perte de possibilités d'éducation, violation d'obligations fiduciaires, constitutionnelles, statutaires et de common law ainsi que de droits ancestraux et infliction intentionnelle de souffrances morales, des violations de conventions et de pactes internationaux, de même que des violations du droit international, y compris des montants pour couvrir le coût des soins, et pour restaurer, protéger et préserver le patrimoine linguistique et culturel des membres du groupe des survivants dont le Canada est responsable;

(i) des dommages-intérêts exemplaires et punitifs dont le Canada est responsable;

(j) des intérêts antérieurs et postérieurs au jugement;

(k) les frais de la présente action en justice; et

(l) tout autre redressement que cette honorable Cour jugera équitable.

Le groupe des descendants

2. Les représentants des demandeurs du groupe des descendants, en leur propre nom et au nom des membres du groupe des descendants, demandent :

(a) ~~une ordonnance qualifiant cette procédure de recours collectif conformément aux règles fédérales s'appliquant aux recours collectifs et les nommant en tant que représentants des demandeurs du groupe des descendants et de tout sous-groupe de ce groupe;~~

(b) une déclaration selon laquelle le Canada a manqué à ses obligations fiduciaires, constitutionnelles, statutaires et de common law envers les demandeurs et les autres membres du groupe des descendants en ce qui concerne l'objet, l'établissement, le financement, le fonctionnement, la supervision, le contrôle, l'entretien, la fréquentation obligatoire des membres du groupe des survivants et le soutien des pensionnats ~~recensés~~;

(c) une déclaration selon laquelle le groupe des descendants ont des droits ancestraux de parler leurs langues traditionnelles, de s'adonner à leurs coutumes et pratiques religieuses traditionnelles et de se gouverner de leur manière traditionnelle;

(d) une déclaration selon laquelle le Canada a violé les droits linguistiques et culturels (droits ancestraux ou autres) ~~droits ancestraux~~ des membres du groupe des descendants;

(e) une déclaration selon laquelle la politique sur les pensionnats et les pensionnats ~~recensés~~ ont causé des dommages culturels, linguistiques et sociaux et un préjudice irréparable au groupe des descendants;

(f) une déclaration selon laquelle le Canada est responsable envers les demandeurs et les autres membres du groupe des descendants de préjudices causés par le non-respect des obligations fiduciaires, constitutionnelles, statutaires et de common law, ainsi que de droits ancestraux, de violations des conventions et des pactes internationaux, et du droit international, en ce qui concerne l'objectif, la création, le financement, le fonctionnement, la supervision, le contrôle et l'entretien, la fréquentation obligatoire par les membres du groupe des survivants ainsi que le soutien des pensionnats ~~recensés~~;

(g) des dommages-intérêts généraux non pécuniaires pour violation d'obligations fiduciaires, d'obligations découlant de la Constitution, de la loi et de la common law, de droits ancestraux, ainsi que pour violation de conventions et de pactes internationaux, et pour violation du droit international, dont le Canada est responsable;

(h) des dommages-intérêts pécuniaires généraux et des dommages-intérêts spéciaux pour violation d'obligations fiduciaires, constitutionnelles, statutaires et de common law et des droits ancestraux, ainsi que des violations de conventions et de pactes internationaux, de même que des violations du droit international, y compris des montants pour couvrir le coût des soins, et pour restaurer, protéger et préserver le patrimoine linguistique et culturel des membres du groupe des survivants dont le Canada est responsable;

(i) des dommages-intérêts exemplaires et punitifs dont le Canada est responsable;

(j) des intérêts antérieurs et postérieurs au jugement;

(k) les frais de la présente action en justice; et

(l) tout autre redressement que cette honorable Cour jugera équitable;

Le groupe des bandes

3. Les représentants des demandeurs du groupe des bandes demandent :

(a) ~~une Ordonnance qualifiant cette procédure de recours collectif conformément aux règles fédérales s'appliquant aux recours collectifs et les nommant en tant que représentants des demandeurs du groupe des bandes;~~

(b) une déclaration selon laquelle la bande indienne Sechelt (appelée bande shíshálh ou shíshálh) et la bande Tk'emlúps, ainsi que tous les membres du groupe des bandes, ont des droits ancestraux existants, ~~au sens du paragraphe 35(1) de la *Loi constitutionnelle de 1982*~~ de parler leurs langues traditionnelles, de se livrer à leurs coutumes et pratiques religieuses traditionnelles et de se gouverner selon leur mode traditionnel;

(c) une déclaration selon laquelle le Canada a manqué à ses obligations fiduciaires, constitutionnelles, statutaires et de common law, ainsi qu'aux conventions et pactes internationaux et au droit international, envers les membres du groupe des bandes en ce qui concerne l'objet, l'établissement, le financement, le fonctionnement, la supervision, le contrôle, l'entretien, la fréquentation obligatoire des membres du groupe des survivants et le soutien des pensionnats SIRS (pensionnat indien de Sechelt) et KIRS (pensionnat indien de Kamloops) et d'autres pensionnats recensés;

(d) une déclaration selon laquelle la politique sur les pensionnats SIRS et KIRS ainsi que les pensionnats recensés ont causé des dommages culturels, linguistiques et sociaux et un préjudice irréparable au groupe des bandes;

(e) une déclaration selon laquelle le Canada a violé ou viole ~~les droits ancestraux,~~ les droits linguistiques et culturels des membres du groupe des bandes (droits ancestraux ou autres), ainsi que les conventions et les pactes internationaux de même que le droit international, du fait de la création, du financement, le fonctionnement, la supervision, le contrôle et l'entretien, la fréquentation obligatoire par les membres du groupe des survivants ainsi que le soutien des pensionnats recensés;

(f) une déclaration selon laquelle le Canada est responsable envers les membres du groupe des bandes de préjudices causés par le non-respect des obligations fiduciaires, constitutionnelles, statutaires et de common law, ainsi que de droits ancestraux, de violations des conventions et des pactes internationaux, et du droit international, en ce qui concerne l'objectif, la création, le financement, le fonctionnement, la supervision, le contrôle et l'entretien, la fréquentation obligatoire par les membres du groupe des survivants ainsi que le soutien des pensionnats recensés;

(g) des dommages-intérêts pécuniaires et non pécuniaires généraux et des dommages-intérêts spéciaux pour violation d'obligations fiduciaires, constitutionnelles, statutaires et de common law ainsi que de droits ancestraux, des violations de conventions et de pactes internationaux, de même que des violations du droit international, y compris des montants pour couvrir en continu le coût des soins de manière individuelle pour les membres du groupe des bandes, et pour restaurer, ainsi que les coûts de restauration, de protection et de préservation du patrimoine linguistique et culturel des bandes dont le Canada est responsable;

(h) la construction par le Canada de centres de guérison dans les communautés du groupe des bandes;

(i) des dommages-intérêts exemplaires et punitifs dont le Canada est responsable;

(j) des intérêts antérieurs et postérieurs au jugement;

(k) les frais de la présente action en justice; et

(l) tout autre redressement que cette honorable Cour jugera équitable.

DÉFINITIONS

4. Les définitions suivantes s'appliquent aux fins de la présente demande d'indemnisation :

(a) « Autochtone(s) », « Personne(s) autochtone(s) » ou « Enfant(s) autochtone(s) » désigne une ou plusieurs personnes dont les droits sont reconnus et confirmés par l'article 35 de la *Loi constitutionnelle* de 1982;

(b) « Droits ancestraux » désigne une partie ou la totalité des droits ancestraux et des droits issus de traités reconnus et confirmés par l'article 35 de la *Loi constitutionnelle* de 1982;

(c) « Loi » désigne la *Loi sur les Indiens*, L.R.C. de 1985, chapitre I-5 et ses versions antérieures, ainsi que les modifications qui y ont été apportées le cas échéant;

(d) « Agents » désigne les préposés, entrepreneurs, agents, dirigeants et employés du Canada ainsi que les opérateurs, gestionnaires, administrateurs, enseignants et employés de chacun des pensionnats indiens;

(e) « Convention » désigne la convention de règlement relative aux pensionnats indiens datée du 10 mai 2006, conclue par le Canada pour régler les demandes d'indemnisation relatives aux pensionnats indiens, telles qu'elles ont été approuvées dans les ordonnances rendues par les diverses administrations canadiennes;

(f) « Le groupe des bandes » désigne la bande indienne Tk'lúps te Secwépemc et la bande shíshálh et toute autre bande indienne autochtone qui :

(i) a ou avait des membres qui sont ou étaient membres du groupe des survivants, ou dont la communauté abrite un pensionnat; et

(ii) qui est spécifiquement ajoutée à la présente demande d'indemnisation avec un ou plusieurs pensionnats expressément désignés.

(g) « Canada » désigne la défenderesse, Sa Majesté la Reine du chef du Canada, représentée par le Procureur général du Canada;

(h) « Groupe » ou « membres du groupe » désignent tous les membres du groupe des survivants, du groupe des descendants et du groupe des bandes, tels que définis dans les présentes;

(i) « Période du recours » désigne les années allant de 1920 à ~~1979~~1997;

(j) « Préjudice culturel, linguistique et social » désigne les dommages ou les préjudices résultant de la création et de la mise en œuvre des pensionnats et de la politique relative aux pensionnats en matière d'éducation, de gouvernance, d'économie, de culture, de langue, de spiritualité et de coutumes sociales, de pratiques et de mode

de vie, de structures de gouvernance traditionnelles, ainsi que de sécurité et de bien-être communautaires et individuels des Autochtones;

(k) « Groupe des descendants » désigne la première génération de ~~toutes~~ les personnes ~~qui sont~~ des descendants des membres du groupe des survivants ou des personnes qui ont été légalement ou traditionnellement adoptées par un membre du groupe des survivants ou son conjoint;

(l) « Pensionnat(s) recensé(s) » désigne KIRS ou SIRS ~~ou tout autre~~ pensionnat ~~expressément désigné par un membre du groupe des bandes;~~

(m) « KIRS » désigne le pensionnat indien de Kamloops;

(n) « Pensionnats indiens » désigne tous les pensionnats indiens reconnus par la convention;

(o) « Politique sur les pensionnats indiens » désigne la politique du Canada relative à la mise en œuvre des pensionnats indiens;

(p) « SIRS » désigne le pensionnat indien de Sechelt;

(q) « Groupe de survivants » désigne tous les Autochtones qui ont fréquenté en tant qu'élève ou à des fins éducatives, quelle que soit la période un pensionnat indien ~~recensé~~, au cours de la période concernée par le recours collectif, à l'exclusion, pour tout membre du groupe, des périodes pour lesquelles ce membre a reçu une indemnité au titre du paiement d'expérience commune en vertu de la convention de règlement relative aux pensionnats indiens.

LES PARTIES

Les demandeurs

5. La demanderesse, Darlene Matilda Bulpit (née Joe), réside sur les terres de la bande shíshálh en Colombie-Britannique. Darlene Matilda Bulpit est née le 23 août 1948 et a fréquenté le SIRS pendant neuf ans, entre 1954 et 1963. Darlene Matilda Bulpit est proposée comme représentante des demandeurs du groupe des survivants.

6. Le demandeur, Frederick Johnson, réside sur les terres de la bande shíshálh en Colombie-Britannique. Frederick Johnson est né le 21 juillet 1960 et a fréquenté le SIRS pendant

dix ans, entre 1966 et 1976. Frederick Johnson est proposé comme représentant des demandeurs pour le groupe des survivants.

~~7. La demanderesse, Abigail Margaret August (née Joe), réside sur des terres de la bande shíshálh en Colombie-Britannique. Abigail Margaret August est née le 21 août 1954 et a fréquenté le SIRS pendant huit ans, entre 1959 et 1967. Abigail Margaret August est proposée comme représentante des demandeurs du groupe des survivants.~~

~~8. La demanderesse, Shelly Nadine Hoehn (née Joe), réside sur des terres de la bande shíshálh en Colombie-Britannique. Shelly Nadine Hoehn est née le 23 juin 1952 et a fréquenté le SIRS pendant huit ans, entre 1958 et 1966. Shelly Nadine Hoehn est proposée comme représentante des demandeurs du groupe des survivants.~~

9. La demanderesse, Daphne Paul, réside sur les terres de la bande shíshálh en Colombie-Britannique. Daphne Paul est née le 13 janvier 1948 et a fréquenté le SIRS pendant huit ans, entre 1953 et 1961. Daphne Paul est ~~proposée comme~~ représentante des demandeurs pour le groupe des survivants.

10. La demanderesse, Violet Catherine Gottfriedson, réside dans la réserve de la bande indienne Tk'emlúps te Secwépemc en Colombie-Britannique. Violet Catherine Gottfriedson est née le 30 mars 1945 et a fréquenté le KIRS pendant quatre ans, entre 1958 et 1962. Violet Catherine Gottfriedson est proposée comme représentante des demandeurs du groupe des survivants.

~~11. La demanderesse, Doreen Louise Seymour, réside dans la réserve de la bande indienne Tk'emlúps te Secwépemc en Colombie-Britannique. Doreen Louise Seymour est née le 7 septembre 1955 et a fréquenté le KIRS pendant cinq ans, entre 1961 et 1966. Doreen Louise Seymour est proposée comme représentante des demandeurs du groupe des survivants.~~

12. La demanderesse, Charlotte Anne Victorine Gilbert (née Larue), réside à Williams Lake en Colombie-Britannique. Charlotte Anne Victorine Gilbert est née le 24 mai 1952 et a fréquenté le KIRS pendant sept ans, entre 1959 et 1966. Charlotte Anne Victorine Gilbert est proposée comme représentante des demandeurs du groupe des survivants.

~~13. Le demandeur, Victor Fraser (également connu sous le nom de Victor Frezie), réside dans la réserve de la bande indienne Tk'emlúps te Secwépemc, en Colombie-Britannique. Victor Fraser est né le 11 juin 1957 et a fréquenté le SIRS pendant six ans, entre 1962 et 1968. Victor Fraser est proposé comme représentant des demandeurs pour le groupe des survivants.~~

14. La demanderesse, Diena Marie Jules, réside dans la réserve de la bande indienne Tk'emlúps te Secwépemc en Colombie-Britannique. Diena Marie Jules est née le 12 septembre 1955 et a fréquenté le KIRS pendant six ans, entre 1962 et 1968. Diena Marie Jules est ~~proposée comme~~ représentante des demandeurs du groupe des survivants.

~~15. Le demandeur, Aaron Joe, réside sur des terres de la bande shíshálh. Aaron Joe est né le 19 janvier 1972 et est le fils de Valerie Joe, qui a fréquenté le SIRS en tant qu'élève externe. Aaron Joe est proposé comme représentant des demandeurs pour le groupe des descendants.~~

16. La demanderesse, Rita Poulsen, réside sur des terres de la bande shíshálh. Rita Poulsen est née le 8 mars 1974 et est la filles de Randy Joe, qui a fréquenté le SIRS en tant qu'élève externe. Rita Poulsen est ~~proposée comme~~ représentante des demandeurs pour le groupe des descendants.

17. La demanderesse, Amanda Deanne Big Sorrel Horse, réside dans la réserve de la bande indienne Tk'emlúps te Secwépemc. Amanda Deanne Big Sorrel Horse est née le 26 décembre 1974 et est la fille de Jo-Anne Gottfriedson qui a fréquenté le KIRS pendant six ans

entre 1961 et 1967. Amanda Deanne Big Sorrel Horse est ~~proposée comme~~ représentante des demandeurs pour le groupe des descendants.

18. La bande indienne Tk'emlúps te Secwépemc et la bande shíshálh sont des « bandes » au sens de la Loi et elles ~~se proposent~~ toutes deux d'agir à titre de représentantes des demandeurs du groupe des bandes. Les membres du groupe des bandes représentent les intérêts collectifs et l'autorité de chacune de leurs communautés respectives.

19. Les demandeurs individuels ainsi que les membres proposés du groupe des survivants et des descendants sont en grande partie des membres de la bande shíshálh et de la bande indienne Tk'emlúps te Secwépemc, et des membres des Premières nations du Canada ou sont les fils et les filles de membres de ces communautés autochtones. Les demandeurs individuels et les membres du groupe des survivants et des descendants sont des personnes autochtones au sens de *l'article 35 de la Loi constitutionnelle de 1982*.

Le Défendeur

20. Dans cette procédure, le Canada est représenté par le Procureur général du Canada. Le procureur général du Canada représente les intérêts du Canada et du ministre des Affaires autochtones et du Développement du Nord canadien et des ministres qui l'ont précédé, qui étaient responsables des « Indiens » en vertu de l'article 91(24) de la *Loi constitutionnelle de 1867*, et qui étaient, à tous les moments importants, responsables de l'élaboration et de la mise en œuvre de la politique sur les pensionnats, ainsi que du maintien et du fonctionnement du KIRS et du SIRS.

EXPOSÉ DES FAITS

21. Ces dernières années, le Canada a reconnu les conséquences désastreuses de sa politique des pensionnats sur les peuples autochtones du Canada. La politique des pensionnats du Canada a été élaborée dans le but d'éradiquer la culture et l'identité autochtones et d'assimiler les peuples autochtones du Canada à la société euro-canadienne. Par cette politique, le Canada a détruit les fondements de l'identité de générations d'Autochtones et a causé des dommages incommensurables aux personnes et aux communautés.

22. Le bénéficiaire direct de la politique des pensionnats indiens était le Canada, car ses obligations seraient réduites en proportion du nombre, et des générations, d'Autochtones qui ne reconnaîtraient plus leur identité autochtone et réduiraient leurs revendications de droits en vertu de la Loi et des obligations fiduciaires, constitutionnelles, statutaires et de common law du Canada.

23. La politique des pensionnats a également été profitable au Canada, car elle a permis d'affaiblir les demandes d'indemnisation des peuples autochtones en ce qui concerne leurs terres et leurs ressources traditionnelles. Il en a résulté une séparation des peuples autochtones de leurs cultures, de leurs traditions et, en fin de compte, de leurs terres et de leurs ressources. Cela a permis l'exploitation de ces terres et ressources par le Canada, non seulement sans le consentement des peuples autochtones, mais aussi, contrairement à leurs intérêts, à la Constitution du Canada et à la Proclamation royale de 1763.

24. La réalité de cette injustice et les dommages qu'elle a causés sont désormais reconnus par le premier ministre, au nom du Canada, et par le règlement pancanadien des demandes d'indemnisation des personnes ayant *résidé dans* les pensionnats du Canada, dans le cadre de la convention mise en œuvre en 2007. En dépit de la confirmation de la réalité des torts et des préjudices causés, un grand nombre de membres des communautés autochtones du Canada ont été exclus de la convention, non

pas parce qu'ils n'ont pas *fréquenté* les pensionnats et subi des préjudices culturels, linguistiques et sociaux, mais simplement parce qu'ils n'étaient pas *résidents* dans les pensionnats.

25. Cette demande d'indemnisation est faite au nom des membres du groupe des survivants, c'est-à-dire ceux qui ont fréquenté un pensionnat indien ~~recensé~~ pour les préjudices culturels, linguistiques et sociaux résultant de cette fréquentation, ainsi qu'au nom du groupe des descendants, qui sont les descendants de première génération des membres du groupe des survivants, ainsi que du groupe des bandes, qui est constitué des communautés autochtones dans lesquelles se trouvaient les pensionnats indiens ~~recensés~~, ou auxquelles appartiennent leurs membres ~~et dans lesquelles vivent la majorité des membres~~ du groupe des survivants et des descendants.

26. Les demandes d'indemnisation des représentants des demandeurs proposés concernent les préjudices subis à la suite de leur *fréquentation* des pensionnats KIRS et SIRS et à leur exposition à la politique des pensionnats. Elles ne concernent pas les demandes d'indemnisation découlant de leur internat au KIRS ou au SIRS pour lequel une indemnisation spécifique a été versée en vertu de la convention. La présente demande vise à obtenir une indemnisation pour les victimes de cette politique dont les demandes ont été ignorées par le Canada et ont été exclues de l'indemnisation prévue par la convention.

Le système des pensionnats

27. Les pensionnats ont été créés par le Canada avant 1874, pour l'éducation des enfants autochtones. Au début du vingtième siècle, le Canada a conclu des conventions officielles avec diverses organisations religieuses (les « Églises ») pour l'exploitation des pensionnats. En vertu de ces conventions, le Canada contrôlait, réglementait, supervisait et dirigeait tous les aspects du fonctionnement des pensionnats. Les Églises ont assumé le fonctionnement quotidien de

nombreux pensionnats sous le contrôle, la supervision et la direction du Canada, qui leur versait une subvention *par tête*. En 1969, le Canada a pris en main la gestion de ces établissements.

28. À partir de 1920, la politique des pensionnats indiens prévoyait la *fréquentation* obligatoire des pensionnats pour tous les enfants autochtones âgés de 7 à 15 ans. Le Canada a retiré la plupart des enfants autochtones de leur foyer et de leur communauté, puis les a envoyés dans des pensionnats qui se trouvaient souvent très loin de chez eux. Cependant, il arrivait que des enfants autochtones vivent chez eux et dans leur communauté et soient obligés de fréquenter les pensionnats en tant qu'externes et non en tant qu'internes. Cette pratique concernait encore plus d'enfants au cours des dernières années de la politique des pensionnats. Durant leurs années en pensionnat, tous les enfants autochtones étaient confinés et privés de leur héritage, de leurs réseaux de soutien et de leur mode de vie, forcés d'adopter une langue étrangère ainsi qu'une culture qui leur était étrangère, et punis en cas de non-conformité.

29. L'objectif de la politique des pensionnats indiens était l'intégration et l'assimilation complètes des enfants autochtones dans la culture euro-canadienne ainsi que la suppression de leur langue, culture, religion et mode de vie traditionnels. Le Canada a intentionnellement causé les préjudices culturels, linguistiques et sociaux dont ont souffert les peuples et les nations autochtones du Canada. ~~En plus de la cruauté inhérente~~ à la fréquentation forcée par les membres du groupe des survivants dans le cadre de cette ~~même~~ politique des pensionnats, de nombreux enfants fréquentant les pensionnats ont également été victimes d'abus psychologiques, physiques, sexuels et émotionnels, qui se sont poursuivis jusqu'en 1997, date à laquelle le dernier pensionnat a été fermé.

30. Le Canada a fait preuve de déloyauté envers ses peuples autochtones en mettant en œuvre la politique des pensionnats dans son propre intérêt, y compris son intérêt économique, au

détriment et à l'exclusion des intérêts des Autochtones envers lesquels le Canada avait des obligations fiduciaires et constitutionnelles. Si elle réussit, l'éradication intentionnelle de l'identité, de la culture, de la langue ainsi que des pratiques spirituelles et ~~de la religion~~ autochtones, réduirait sur plusieurs générations le nombre de personnes auxquelles le Canada est redevable, parce qu'elles ne s'identifieraient plus comme autochtones et elles seraient moins susceptibles de revendiquer leurs droits en tant qu'autochtones.

Les conséquences de la politique des pensionnats sur les membres du recours collectif

La bande indienne Tk'emlúps

31. Tk'emlúpsemc, « le peuple du confluent », aujourd'hui connu sous le nom de bande indienne Tk'emlúps te Secwépemc, fait partie du peuple du plateau le plus septentrional et des peuples de langue salish de l'intérieur Secwépemc (Shuswap) de la Colombie-Britannique. La bande indienne Tk'emlúps a été établie sur une réserve aujourd'hui adjacente à la ville de Kamloops, où le KIRS a été établi par la suite. La plupart, voire la totalité, des élèves qui ont *fréquenté* le KIRS *en externes* étaient ou sont membres de la bande indienne Tk'emlúps, résidant ou ayant résidé dans la réserve.

32. Le secwepemctsin est la langue des Secwépemc, et c'est l'unique moyen par lequel les connaissances et l'expérience culturelles, écologiques et historiques du peuple Secwépemc sont comprises et transmises de génération en génération. C'est par la langue, les pratiques spirituelles et le passage de la culture et des traditions, y compris les rituels, les tambours, les danses, les chansons et les histoires, que les valeurs et les croyances du peuple Secwépemc sont comprises et transmises. Du point de vue des Secwépemc, tous les aspects du savoir des Secwépemc, y compris

leur culture, leurs traditions, leurs lois et leurs langues, sont fondamentalement et intégralement liés à leurs terres et à leurs ressources.

33. La langue, comme la terre, a été donnée aux Secwépemc par le Créateur pour communiquer avec le peuple et le monde naturel. Cette communication a créé une relation de réciprocité et de coopération entre les Secwépemc et le monde naturel qui leur a permis de survivre et de s'épanouir dans des environnements hostiles. Ces connaissances, transmises oralement à la génération suivante, contenaient les enseignements nécessaires au maintien de la culture, des traditions, des lois et de l'identité des Secwépemc.

34. Pour les Secwépemc, leurs pratiques spirituelles, leurs chants, leurs danses, leurs histoires orales, leurs récits et leurs cérémonies font partie intégrante de leur vie et de leur société. Il est absolument vital de maintenir ces pratiques et ces traditions. Leurs chants, leurs danses, leurs tambours et leurs cérémonies traditionnelles relient les Secwépemc à leur terre et leur rappellent continuellement leurs responsabilités envers la terre, les ressources et le peuple Secwépemc.

35. Les cérémonies et les pratiques spirituelles des Secwépemc, y compris leurs chants, leurs danses, leurs tambours ainsi que le passage des récits et de l'histoire, perpétuent leurs enseignements et leurs lois vitales concernant la récolte des ressources, y compris les plantes médicinales, le gibier et le poisson, de même que la protection et la préservation adéquates et respectueuses des ressources. À titre d'exemple, conformément aux lois Secwépemc, les Secwépemc chantent et prient avant de récolter toute nourriture, tout médicament et toute autre matière provenant de la terre, et font une offrande pour remercier le Créateur ainsi que les esprits pour tout ce qu'ils prennent. Les Secwépemc croient que tous les êtres vivants ont un esprit et qu'il faut leur témoigner le plus grand respect. Ce sont ces croyances vitales et intégrantes ainsi que ces

lois traditionnelles, de même que d'autres éléments de la culture et de l'identité secwépemc, que le Canada a voulu faire disparaître avec la politique des pensionnats.

La bande shíshálh

36. La nation shíshálh, une division des Premières nations salish de la côte, occupait à l'origine la partie sud de la côte sud de la Colombie-Britannique. Le peuple shíshálh a colonisé la région il y a des milliers d'années et a occupé environ 80 sites de villages sur un vaste territoire. Le peuple shíshálh est composé de quatre sous-groupes qui parlent la langue shashishalhem, qui est une langue distincte et unique, bien qu'elle fasse partie de la division salish du littoral de la langue salish.

37. La tradition shíshálh décrit la formation du monde shíshálh (histoire de Spelmulh). Au commencement, les esprits créateurs ont été envoyés par l'Esprit divin pour former le monde. Ils ont creusé des vallées laissant une plage le long de la crique de Porpoise Bay. Plus tard, les transformateurs, un corbeau mâle et un vison femelle, ont ajouté des détails en sculptant des arbres et en formant des bassins d'eau.

38. Le chant, la danse et le tambour font partie intégrante de la culture shíshálh et de ses pratiques spirituelles. Ils permettent d'établir un lien avec la terre et le Créateur et de transmettre l'histoire ainsi que les croyances du peuple. Par le chant et la danse, le peuple shíshálh racontait des histoires, bénissait des événements et pouvait même guérir. Leurs chants, leurs danses et leurs tambours marquent également les événements saisonniers importants qui font partie intégrante du peuple shíshálh. Les traditions comprennent également la fabrication et l'utilisation de masques, de paniers, de parures et d'outils pour la chasse et la pêche. Ce sont ces croyances vitales et intégrantes ainsi que ces lois traditionnelles, de même que d'autres éléments de la culture et de l'identité shíshálh, que le Canada a voulu faire disparaître avec la politique des pensionnats.

Les répercussions des pensionnats ~~recensés~~

39. Pour tous les enfants autochtones qui ont été forcés de fréquenter les pensionnats ~~recensés~~, une discipline stricte a été appliquée dans le cadre de la politique des pensionnats. À l'école, les enfants n'étaient pas autorisés à parler leur langue autochtone, même avec leurs parents, et les membres de ces communautés autochtones étaient donc forcés d'apprendre l'anglais.

40. La culture autochtone était rigoureusement supprimée par les administrateurs de l'école, conformément aux directives du Canada, et notamment à la politique des pensionnats. Au SIRS, les membres du peuple shishalh ~~convertis au catholicisme~~ ont été contraints de brûler ou de donner aux agents du Canada des totems, des insignes, des masques et autres « attirails des guérisseurs » séculaires et d'abandonner leurs potlatchs, leurs danses et leurs festivités hivernales, ainsi que d'autres éléments faisant partie intégrante de la culture et de la société autochtones des peuples shíshálh et Secwépemc.

41. Étant donné que le SIRS se trouvait dans la communauté shíshálh, ~~l'Église et~~ le ~~gouvernement~~ du Canada surveillaient, directement et par l'intermédiaire de leurs agents, les aînés, qui étaient sévèrement punis s'ils pratiquaient leur culture, parlaient leur langue ou la transmettaient aux jeunes générations. En dépit de cette surveillance, les membres du groupe ont essayé, souvent sans succès, de pratiquer, de protéger et de préserver leurs chants, leurs masques, leurs danses et leurs autres pratiques culturelles.

42. Les Tk'emlúps te Secwépemc ont subi un sort similaire en raison de leur voisinage avec le KIRS.

43. Les enfants qui fréquentaient les pensionnats ~~recensés~~ ont ~~été endoctrinés par le christianisme et~~ ont appris à avoir honte de leur identité, de leur culture, de leur spiritualité et de leurs pratiques autochtones. On les qualifiait, entre autres épithètes désobligeantes, de « sales

sauvages » et de « païens » et on leur apprenait à rejeter leur identité. Le mode de vie, les traditions, les cultures et les pratiques spirituelles autochtones des membres du recours collectif ont été supplantés par l'identité euro-canadienne qui leur a été imposée par le Canada dans le cadre de la politique des pensionnats indiens.

44. Cette mise en œuvre de la politique relative aux pensionnats indiens a causé un préjudice supplémentaire aux membres de la classe des survivants des pensionnats ~~recensés~~, à qui l'on avait enseigné à l'école que les enseignements traditionnels de leurs parents, de leurs grands-parents et de leurs aînés n'avaient aucune valeur et, dans certains cas, qu'il s'agissait de pratiques et de croyances « païennes », et qui, en rentrant chez eux à la fin de la journée scolaire rejetaient les enseignements de leurs parents, de leurs grands-parents et de leurs aînés.

45. Les attaques contre leurs traditions, leurs lois, leur langue et leur culture à travers la mise en œuvre de la politique des pensionnats indiens par le Canada, directement ou par l'intermédiaire de ses agents, ont continué à miner les membres individuels du groupe des survivants, causant une perte d'estime de soi, une dépression, une anxiété, des idées suicidaires, des suicides, des maladies physiques sans causes claires, des difficultés à être parents, des difficultés à maintenir des relations positives, l'abus de substances et la violence, entre autres préjudices et pertes, qui ont tous eu des répercussions sur le groupe des descendants.

46. Les membres du groupe des bandes ont perdu, en partie ou en totalité, leur viabilité économique traditionnelle, leur autonomie gouvernementale et leurs lois, leur langue, leur assise territoriale et leurs enseignements fondés sur la terre, leurs pratiques spirituelles traditionnelles de même que leurs pratiques religieuses, ainsi que le sens intégral de leur identité collective.

47. La politique des pensionnats, mise en œuvre par l'intermédiaire des pensionnats ~~recensés~~, a dévasté culturellement, linguistiquement et socialement les communautés du groupe des bandes et a modifié leur mode de vie traditionnel.

Le règlement du Canada avec les anciens internes des pensionnats indiens

48. Depuis la fermeture des pensionnats ~~recensés dans les années 1970~~ jusqu'à la fin des années 1990, les communautés autochtones du Canada ont dû faire face aux préjudices et aux souffrances de leurs membres, conséquence de la politique des pensionnats, sans aucune considération de la part du Canada. À cette époque, les survivants des pensionnats ont commencé à parler de plus en plus ouvertement des conditions horribles et des abus qu'ils ont subis, ainsi que des conséquences dramatiques que cela a eues sur leur vie. De plus, de nombreux survivants se sont suicidés ou ont fait de l'automédication jusqu'à en décéder. Ces décès ont dévasté non seulement les membres du groupe des survivants et du groupe des descendants, mais aussi la vie et la stabilité des communautés représentées par le groupe des bandes.

49. En janvier 1998, le Canada a publié une déclaration de réconciliation, par laquelle il admettait les erreurs de la politique sur les pensionnats indiens et s'en excusait. Le Canada a admis que la politique des pensionnats avait été conçue pour assimiler les Autochtones et qu'il avait eu tort de poursuivre cet objectif. Les demandeurs avancent que la déclaration de réconciliation du Canada constitue une admission par le Canada des faits et des obligations énoncés aux présentes et qu'elle constitue un argument valable pour la demande de dommages-intérêts des demandeurs, en particulier les dommages-intérêts punitifs.

50. La déclaration de réconciliation stipule, en partie, ce qui suit :

Nous ne pouvons malheureusement pas être fiers de la façon dont nous avons traité les Autochtones par le passé. Une attitude fondée sur un sentiment de supériorité raciale et culturelle a conduit à la suppression de la culture et des valeurs autochtones. En tant que pays, nous portons le fardeau des actions passées qui ont eu pour effet d'affaiblir l'identité des peuples autochtones, de faire disparaître leurs langues ainsi que leurs cultures et de rendre illégales leurs pratiques spirituelles. Nous devons admettre les conséquences de ces actions sur les nations autrefois autonomes qui ont été divisées, déstructurées, restreintes ou même détruites par la spoliation des territoires traditionnels, par la réinstallation des Autochtones et par certains articles de la loi sur les Indiens. Nous devons admettre que ces actions ont eu pour résultat de miner les systèmes politiques, économiques et sociaux des peuples et des nations autochtones.

Compte tenu des séquelles historiques, la force et l'endurance des peuples autochtones, qui ont su préserver leur diversité et leur identité historiques, sont remarquables. Le gouvernement du Canada exprime aujourd'hui officiellement à tous les Autochtones du Canada son profond regret pour les actions passées du gouvernement fédéral qui ont conduit à ces pages sombres de l'histoire de nos relations.

Un des volets de notre relation avec les Autochtones qui requiert une attention particulière durant cette période est le système des pensionnats. Ce système a séparé de nombreux enfants de leur famille et de leur communauté et les a empêchés de parler leur propre langue et de connaître leur patrimoine et leur culture. Dans certains cas, il a laissé des séquelles en ce qui concerne la souffrance et le désespoir qui se répercutent encore aujourd'hui dans les communautés autochtones. Malheureusement, certains enfants ont été victimes d'abus physiques et sexuels.

Le gouvernement du Canada reconnaît le rôle qu'il a joué dans la conception et l'administration de ces écoles. Nous tenons à dire aux personnes qui ont vécu le drame des abus physiques et sexuels dans les pensionnats indiens et qui ont porté ce fardeau en croyant que, d'une certaine façon, cela était leur faute, que ce qu'elles ont vécu n'aurait jamais dû se produire. Nous présentons nos plus sincères excuses à ceux d'entre vous qui ont subi ces événements dramatiques dans les pensionnats indiens. En ce qui concerne les séquelles du programme des pensionnats, le gouvernement du Canada propose de travailler avec les Premières nations, les Inuits, les Métis, les Églises et les autres parties intéressées pour résoudre les problèmes de longue date qui doivent être réglés. Nous devons travailler ensemble sur une stratégie permettant d'aider les personnes et les communautés à surmonter les conséquences de cette triste page de notre histoire...

> *La réconciliation est un processus continu. En renouvelant notre partenariat, nous devons veiller à ce que les erreurs qui ont marqué notre relation passée ne se répètent pas. Le gouvernement du Canada reconnaît que les politiques visant à assimiler les Autochtones, hommes et femmes, ne permettent pas de créer une communauté forte...*

51. Le 10 mai 2006 ou vers cette date, le Canada a signé une convention visant à indemniser principalement les personnes ayant *été internes* dans les pensionnats indiens.

52. La convention prévoit deux types d'indemnisation individuelle : le paiement d'expérience commune (« PEC ») pour le fait d'avoir été interne dans un pensionnat, et une indemnisation fondée sur un processus d'évaluation indépendant (« PEI ») pour offrir des indemnités pour certains sévices subis et les préjudices causés par ces sévices.

53. Le PEC consistait en une indemnité pour les anciens *internes* d'un pensionnat d'un montant de 10 000 $ pour la première année scolaire ou partie d'une année scolaire et de 3 000 $ supplémentaires pour chaque année scolaire ou partie d'année scolaire suivante d'*internat*. Le PEC était versé aux internes, car il avait été admis que l'expérience de l'assimilation était préjudiciable et devait faire l'objet d'une indemnisation, indépendamment du fait que l'élève ait subi des violences physiques, sexuelles ou autres pendant son internat. L'autre indemnisation était versée dans le cadre du PEI. Le PEC n'était offert qu'aux anciens internes alors que, dans certains cas, le PEI était offert non seulement aux anciens internes, mais aussi aux autres jeunes qui se trouvaient légalement dans les locaux d'un pensionnat, y compris les anciens externes.

54. La mise en œuvre de la convention marquait la première fois que le Canada acceptait de verser une indemnisation pour les préjudices culturels, linguistiques et sociaux. Le Canada a refusé de verser une indemnité aux membres du groupe des survivants, à savoir les élèves qui ont *fréquenté* les ~~pensionnats recensés ou d'autres~~ pensionnats, mais qui n'étaient pas *internes*.

55. La convention a été approuvée par les cours supérieures provinciales et territoriales de la Colombie-Britannique au Québec, en passant par les Territoires du Nord-Ouest, le Territoire du Yukon et le Nunavut, et la convention a été mise en œuvre à compter du 20 septembre 2007.

56. Le 11 juin 2008, le premier ministre Stephen Harper, a présenté ses excuses (« excuses ») au nom du Canada, reconnaissant ainsi les torts causés par la politique canadienne en matière de pensionnats indiens :

> *Durant plus d'un siècle, les pensionnats indiens ont séparé plus de 150 000 enfants autochtones de leurs familles et de leurs communautés. Dans les années 1870, le gouvernement fédéral, en partie pour respecter son obligation d'éduquer les enfants autochtones, a commencé à jouer un rôle dans le développement et l'administration de ces écoles.* ***Les deux principaux objectifs du système des pensionnats étaient de retirer et d'isoler les enfants de l'influence de leur foyer, de leur famille, de leurs traditions et de leur culture, et de les assimiler à la culture dominante.*** *Ces objectifs reposaient sur l'hypothèse que les cultures et les croyances spirituelles autochtones étaient inférieures et n'avaient pas la même valeur. En fait, certains voulaient, comme il a été dit de façon tristement célèbre,* ***« tuer les Indiens dans l'œuf »****. Aujourd'hui, nous sommes conscients que cette politique d'assimilation était erronée, qu'elle a causé de grands préjudices et qu'elle n'a pas sa place dans notre pays.* ***[souligné]***

57. En présentant ces excuses, le Premier ministre a reconnu certains faits importants concernant la politique des pensionnats indiens et son impact sur les enfants autochtones :

> *Le gouvernement du Canada a mis sur pied un système d'éducation dans lequel de très jeunes enfants étaient souvent retirés de force de leur foyer, parfois emmenés loin de leur communauté. Beaucoup étaient mal nourris, habillés et logés. Tous ont été privés des soins et de l'éducation de leurs parents, grands-parents et communautés. Les langues et les pratiques culturelles des Premières nations, des Inuits et des Métis étaient interdites dans ces écoles. Ce qui est tragique, c'est que certains de ces enfants sont morts pendant qu'ils fréquentaient les pensionnats et que d'autres ne sont jamais rentrés chez eux.*
>
> *Le gouvernement reconnaît maintenant que les conséquences de la politique des pensionnats indiens ont été extrêmement négatives et que*

> *cette politique a eu des répercussions durables et dévastatrices sur la culture, le patrimoine et la langue autochtones.*
>
> *Les conséquences des pensionnats indiens ont contribué aux problèmes sociaux qui existent encore aujourd'hui dans de nombreuses communautés.*
>
> * * *
>
> *Nous sommes conscients aujourd'hui que nous avons eu tort de séparer les enfants de cultures et de traditions riches et vivantes, que cela a créé un vide dans de nombreuses vies et communautés, et nous nous excusons de l'avoir fait. Nous réalisons aujourd'hui qu'en séparant les enfants de leurs familles, nous avons empêché un grand nombre d'entre eux d'élever convenablement leurs propres enfants et avons semé les graines pour les générations suivantes, et nous sommes désolés d'avoir agi ainsi. Nous sommes aujourd'hui conscients que, bien trop souvent, ces institutions ont donné lieu à des abus ou à des négligences et n'étaient pas suffisamment contrôlées, et nous sommes désolés de ne pas avoir su vous protéger. Non seulement vous avez souffert de ces abus pendant votre enfance, mais en devenant parents, vous n'avez pas pu empêcher vos propres enfants de subir la même expérience, et nous en sommes désolés.*
>
> *Le fardeau de cette expérience pèse sur vos épaules depuis bien trop longtemps. Ce fardeau nous incombe en tant que gouvernement et en tant que pays. Aujourd'hui, il n'y a aucune chance qu'au Canada, le genre de mentalités qui ont conduit au système des pensionnats indiens puisse à nouveau exister. Vous essayez depuis longtemps de vous relever de cette expérience et, de manière très concrète, nous nous joignons maintenant à vous dans cette quête. Le gouvernement du Canada présente des excuses sincères aux peuples autochtones de ce pays et leur demande de lui pardonner d'avoir si gravement manqué à ses obligations envers eux.*

58. Malgré les excuses et le fait que le Canada ait reconnu avoir agi injustement, ainsi que l'appel à la reconnaissance des communautés autochtones du Canada et de la *Commission de vérité et de réconciliation* dans son rapport provisoire de février 2012, le fait que le Canada ait exclu le groupe des survivants de la convention témoigne de son manque de considération vis-à-vis des membres du groupe des survivants. Le Canada continue, comme il l'a fait des années 1970 jusqu'en 2006 concernant les « élèves internes », de nier les préjudices subis par les demandeurs individuels et les membres du groupe des survivants, des descendants et des bandes.

Le manquement du Canada à ses obligations envers les membres des recours collectifs

59. Depuis l'élaboration de la politique sur les pensionnats jusqu'à sa mise en œuvre sous forme de fréquentation forcée des pensionnats recensés, le Canada a gravement manqué à ses obligations envers les membres du groupe des survivants et, ce faisant, a détruit les fondements de l'identité individuelle des membres du groupe des survivants, a volé le patrimoine des membres du groupe des descendants et a infligé des pertes incalculables aux membres du groupe des bandes.

60. Les membres du groupe des survivants, les membres du groupe des descendants et les membres du groupe des bandes ont tous souffert du dysfonctionnement familial, de la pénalisation ou de la suppression des cérémonies traditionnelles ainsi que de la perte de la structure de gouvernance héréditaire qui leur permettait de gouverner leurs peuples et leurs terres.

61. Pendant qu'ils fréquentaient le pensionnat recensé, les membres du groupe des survivants étaient extrêmement vulnérables, et le Canada avait envers eux les plus grandes responsabilités fiduciaires, morales, statutaires, constitutionnelles et de common law, y compris, mais sans s'y limiter, l'obligation de protéger les droits autochtones ainsi que leur culture, leur langue et leur manière de vivre. Le Canada n'a pas respecté ces obligations et a manqué en particulier à sa responsabilité d'assurer la sécurité et le bien-être des survivants pendant leur séjour dans les pensionnats recensés.

Les obligations du Canada

62. Le Canada était responsable de l'élaboration et de la mise en œuvre de tous les aspects de la politique relative aux pensionnats indiens, y compris de tous les volets opérationnels et administratifs. Bien que les Églises aient ~~souvent~~ servi d'agents du Canada pour l'aider à réaliser ses objectifs, ces objectifs et la manière dont ils sont réalisés relèvent des obligations du Canada. Le Canada était responsable de :

(a) l'administration de la Loi et des lois qui l'ont précédée ainsi que de toutes les autres lois relatives aux Autochtones et de tous les règlements promulgués en vertu de ces lois et des lois qui les ont précédées au cours de la période visée par le recours;

(b) la gestion, le fonctionnement et l'administration du ministère des Affaires indiennes et du Nord canadien et de ses prédécesseurs et des ministères et départements connexes, ainsi que les décisions prises par ces ministères et services;

(c) la construction, le fonctionnement, l'entretien, la propriété, le financement, l'administration, la supervision, l'inspection et la vérification des pensionnats ~~recensés~~, ainsi que la création, la conception et la mise en œuvre du programme d'éducation des Autochtones qui les fréquentent;

(d) la sélection, le contrôle, la formation, la supervision et la réglementation des personnes responsables des pensionnats ~~recensés~~, y compris leurs employés, préposés, agents et mandataires, ainsi que des soins, de l'éducation, du contrôle et du bien-être des Autochtones qui fréquentent les pensionnats recensés;

(e) la préservation, la valorisation, le respect des droits autochtones et la non-ingérence, y compris le droit de garder et de pratiquer leur culture, leur spiritualité, leur langue et leurs traditions et le droit d'apprendre pleinement leur culture, leur spiritualité, leur langue et leurs traditions auprès de leur famille, de leur famille élargie et de leur communauté; et

(f) la prise en charge et la supervision de tous les membres du groupe des survivants pendant qu'ils fréquentaient les pensionnats recensés au cours de la période concernée par le recours.

63. De plus, le Canada s'est engagé, à chaque occasion importante, à respecter le droit international en ce qui concerne le traitement de son peuple, obligations qui constituent des engagements minimums envers les peuples autochtones du Canada, y compris les groupes de survivants, de descendants et de bandes, et qui ont été violées. Plus particulièrement, les violations commises par le Canada englobent le non-respect des conditions et de l'esprit de :

(a) la *Convention pour la prévention et la répression des crimes de génocide*, 78 U.N.T.S. 277, entrée en vigueur le 12 janvier 1951, et plus particulièrement l'article 2(b), (c) et (e) de cette convention, en procédant de manière intentionnelle à la destruction de la culture des enfants et des communautés autochtones, causant des préjudices culturels, psychologiques, émotionnels et physiques profonds et permanents au groupe;

(b) la *Déclaration des droits de l'enfant* (1959)? Résolution AG 1386 (XIV), 14 N.U. GAOR Supp. (No 16) à 19, N.U. Doc. A/4354 en ne fournissant pas aux enfants

autochtones les moyens nécessaires à leur épanouissement normal, tant sur le plan matériel que spirituel, et en ne leur offrant pas la possibilité de gagner leur vie et de se protéger contre toute forme d'exploitation;

(c) la *Convention sur les droits de l'enfant,* Résolution AG 44/25, annexe, 44 NU GAOR Supp. (No 49) à 167, N.U. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989), et plus particulièrement les articles 29 et 30 de cette convention, en ne fournissant pas aux enfants autochtones une éducation visant à développer le respect de leurs parents, de leur identité culturelle, de leur langue et de leurs valeurs, et en niant le droit des enfants autochtones de jouir de leur propre culture, de professer et de pratiquer leur propre religion et d'utiliser leur propre langue;

(d) le *Pacte international relatif aux droits civils et politiques*, Résolution AG 2200A (XXI), 21 N.U. GAOR Supp. (No 16) à 52, N.U. Doc. A/6316 (1966), 999 U.N.T.S. 171, entrée en vigueur le 23 mars 1976, et plus particulièrement les articles 1 et 27 de cette convention, en portant atteinte aux droits des membres du recours collectif de conserver et de pratiquer leur culture, leur spiritualité, leur langue et leurs traditions, au droit d'apprendre pleinement leur culture, leur spiritualité, leur langue et leurs traditions auprès de leurs familles, de leurs familles élargies et de leurs communautés, et au droit d'enseigner leur culture, leur spiritualité, leur langue et leurs traditions à leurs propres enfants, petits-enfants, familles élargies et communautés.

(e) la *Déclaration américaine des droits et devoirs de l'homme*, OEA (Organisation des États Américains) Résolution XXX, adoptée lors de la neuvième conférence internationale des États américains (1948), reproduite dans les *Basic Documents Pertaining to Human Rights in the Inter-American System (documents généraux relatifs aux droits de l'homme dans le système interaméricain),* OEA/Ser.L.V//II.82 doc 6 rev.1 à 17 (1992), et en particulier l'article XIII, en violant le droit des membres du groupe de participer à la vie culturelle de leur communauté.

(f) la *Déclaration des Nations Unies sur les droits des peuples autochtones,* Résolution AG 61/295, N.U. Doc. A/RES/61/295 (13 sept. 2007), 46 I.L.M. 1013 (2007), entérinée par le Canada le 12 novembre 2010, et plus particulièrement l'article 8, 2(d), qui s'engage à fournir des mécanismes efficaces de réparation pour l'assimilation forcée.

64. Les obligations du Canada en vertu du droit international servent de référence pour les devoirs du Canada en common law, les obligations statutaires, fiduciaires, constitutionnelles et autres, et une violation des obligations internationales susmentionnées est une preuve ou constitue une violation en vertu du droit national.

Violation des obligations fiduciaires et constitutionnelles

65. Le Canada a des obligations constitutionnelles et une relation fiduciaire avec les peuples autochtones du Canada. Le Canada a créé, planifié, établi, mis en place, initié, géré, financé, supervisé, contrôlé et réglementé les pensionnats ~~recensés~~ et a élaboré la politique sur les pensionnats. Par ces actes, et en vertu de la *Loi constitutionnelle de 1867, de la Loi constitutionnelle de 1982*, et des dispositions de la Loi, telle que modifiée, le Canada a assumé le pouvoir et l'obligation d'agir en qualité de fiduciaire en ce qui concerne l'éducation et le bien-être des membres du groupe.

66. Les obligations constitutionnelles du Canada comprennent l'obligation de préserver l'honneur de la Couronne dans toutes ses relations avec les peuples autochtones, y compris les membres du groupe. Cette obligation découle de l'affirmation de la souveraineté de la Couronne dès le premier contact et se poursuit dans le cadre des relations postérieures à la signature des traités. C'est et cela reste une obligation de la Couronne et c'était une obligation de la Couronne à chaque occasion importante. L'honneur de la Couronne est un principe juridique qui exige de la Couronne qu'elle agisse à chaque occasion importante dans ses relations avec les peuples autochtones, depuis le contact jusqu'aux relations post-traités, de la manière la plus honorable possible afin de protéger les intérêts des peuples autochtones.

67. En vertu de ses obligations fiduciaires, le Canada est tenu d'agir en tant que protecteur des droits ancestraux des membres du groupe, y compris la protection et la préservation de leur langue, de leur culture et de leur mode de vie, ainsi que l'obligation de prendre des mesures de réparation pour rétablir la culture, l'histoire et le statut des demandeurs, ou de les aider à le faire. À tout le moins, l'obligation du Canada envers les Autochtones comprenait l'obligation de ne pas réduire délibérément le nombre des bénéficiaires envers lesquels le Canada avait des obligations.

68. Les obligations fiduciaires du Canada et les autres obligations imposées par le mandat constitutionnel assumé par le Canada s'étendent au groupe des descendants parce que l'objectif de la prise en charge de l'éducation du groupe des survivants était d'éradiquer la culture et l'identité de ces enfants autochtones, leur enlevant ainsi leur capacité, à l'âge adulte, de transmettre aux générations suivantes les bases linguistiques, spirituelles, culturelles et comportementales de leur peuple, ainsi que leur capacité d'établir des relations avec leur famille et leur communauté et, en fin de compte, leur capacité de s'identifier comme des Autochtones envers qui le Canada avait des obligations.

69. Les obligations fiduciaires et constitutionnelles du Canada s'étendent à la catégorie des bandes parce que la politique sur les pensionnats avait pour but, et a effectivement eu pour effet, de miner et de chercher à détruire le mode de vie établi et apprécié par ces nations dont les identités étaient et sont considérées comme collectives.

70. Le Canada a agi dans son propre intérêt et à l'encontre des intérêts des enfants autochtones, non seulement en étant déloyal envers les enfants et les communautés autochtones qu'il avait le devoir de protéger, mais en les trahissant en plus. Le Canada a exercé à tort son pouvoir discrétionnaire et son autorité sur les Autochtones, et en particulier sur les enfants, pour son seul bénéfice. Le Canada a appliqué une partie ou la totalité de la politique des pensionnats pour faire disparaître ce qu'il considérait comme le « problème indien ». Plus précisément, le Canada cherchait à se libérer de ses responsabilités morales et financières à l'égard des Autochtones, des dépenses et des inconvénients liés au fait de devoir composer avec des cultures, des langues, des habitudes et des valeurs différentes de l'héritage euro-canadien prédominant au Canada, ainsi que des défis découlant des revendications territoriales.

71. En violation de ses obligations fiduciaires, constitutionnelles, statutaires et de common law envers les groupes de survivants, de descendants et de bandes, le Canada n'a pas réparé, et continue sur la même voie, les préjudices causés par ses agissements abusifs, ses manquements et ses négligences. Plus précisément, le Canada n'a pas pris de mesures adéquates pour réparer les préjudices culturels, linguistiques et sociaux subis par les survivants, les descendants et les membres des bandes, et ce, malgré le fait que le Canada ait reconnu le caractère abusif de la politique des pensionnats indiens depuis 1998.

Violation des droits autochtones

72. Les peuples shíshálh et Tk'emlúps, et de fait tous les membres du groupe des bandes, dont descendent les demandeurs individuels, ont pratiqué des lois, des coutumes et des traditions qui faisaient partie intégrante de leurs sociétés distinctives avant le contact avec les Européens. En particulier, avant le contact avec les Européens, ces nations ont soutenu leurs membres individuels, leurs communautés et leurs cultures distinctives en parlant leurs langues et en pratiquant leurs coutumes et traditions.

73. Durant la période où les membres du groupe des survivants ont fréquenté les pensionnats ~~recensés~~, conformément à la politique sur les pensionnats, on leur a appris à parler anglais, on les a punis pour avoir utilisé leurs langues traditionnelles et on leur a fait honte de leur langue et de leur mode de vie traditionnels. Par conséquent, en raison de leur fréquentation des pensionnats ~~recensés~~, la capacité des membres survivants du recours collectif à parler leurs langues traditionnelles et à pratiquer leur shíshálh, leur Tk'emlúps et d'autres activités spirituelles, religieuses et culturelles a été gravement compromise et, dans certains cas, entièrement perdue. Ces membres du recours collectif se sont vus refuser la capacité de faire valoir et de jouir de leurs

droits ancestraux, tant individuellement que dans le contexte de leur expression collective au sein des bandes, parmi lesquels figurent, sans s'y limiter, certaines particularités :

(a) les activités culturelles, spirituelles et traditionnelles autochtones (shíshálh, Tk'emlúps et autres) ont été perdues ou altérées;

(b) les structures sociales traditionnelles, y compris l'autorité égale des dirigeants masculins et féminins, ont été perdues ou altérées;

(c) les langues shíshálh, tk'emlúps et autres langues autochtones ont été perdues ou altérées;

(d) les compétences parentales traditionnelles des shíshálh, des Tk'emlúps et des Autochtones ont été perdues ou altérées;

(e) les compétences des shíshálh, des Tk'emlúps et des autres Autochtones en matière de cueillette, de récolte, de chasse et de préparation des aliments traditionnels ont été perdues ou altérées; et,

(f) le shíshálh, le Tk'emlúps et les croyances spirituelles autochtones ont été perdus ou altérés.

74. L'ingérence dans les droits ancestraux du groupe des survivants a entraîné la même perte pour leurs descendants et leurs communautés, à savoir les groupes de descendants et de bandes, ce qui était le résultat recherché par le Canada.

75. Le Canada avait, à tout moment important, et continue d'avoir l'obligation de protéger les droits ancestraux des membres des recours collectifs, y compris pour ce qui est de la mise en œuvre de leurs pratiques spirituelles et de la protection traditionnelle de leurs terres et de leurs ressources, ainsi que l'obligation de ne pas miner ou entraver les droits ancestraux des demandeurs individuels et des membres des recours collectifs. Le Canada a manqué à ces obligations, sans justification, à travers sa politique en matière de pensionnats.

Infliction intentionnelle de souffrances morales

76. La conception et la mise en œuvre de la politique des pensionnats en tant que programme d'assimilation visant à éradiquer la culture autochtone constituaient une conduite flagrante, extrême et scandaleuse qui était manifestement calculée pour provoquer les dommages culturels, sociaux et linguistiques, ainsi que les souffrances morales découlant de ces dommages, qui ont été effectivement subis par les membres des groupes de survivants et de descendants.

Négligence donnant lieu à des abus spirituels, ~~physiques, sexuels,~~ émotionnels et mentaux

77. Par l'intermédiaire de ses mandataires, le Canada a fait preuve de négligence et a manqué à ses obligations de diligence envers le groupe des survivants, dont voici quelques exemples :

(a) il a omis de présélectionner et de sélectionner comme il se doit les personnes ~~à qui il a délégué~~ la gestion des pensionnats recensés et qu'il a embauchées directement ou par l'intermédiaire de ses mandataires, de superviser et de contrôler comme il se doit les activités des pensionnats ~~recensés~~ et de protéger les enfants autochtones contre les abus spirituels, ~~physiques, sexuels,~~ émotionnels et mentaux commis dans les pensionnats ~~recensés~~; par conséquent, les membres du groupe des survivants ont subi de tels abus et le Canada en est responsable;

(b) il n'a pas réagi de manière appropriée ou n'a pas réagi du tout à la divulgation des abus commis dans les pensionnats ~~recensés~~ et, en fait, il a couvert ces abus et supprimé les informations relatives à ces abus; et

(c) il n'a pas reconnu les préjudices subis et n'en a pas tenu compte lorsqu'ils se sont produits, afin de prévenir d'autres préjudices et, dans la mesure du possible, d'offrir aux victimes de ces préjudices un traitement adapté.

Responsabilité du fait d'autrui

78. Par l'intermédiaire de ses mandataires, le Canada a violé son obligation de diligence envers le groupe des survivants, ce qui a entraîné des préjudices pour ce groupe, et il est responsable du fait d'autrui pour toutes les violations et tous les abus commis en son nom.

79. De plus, ou à titre subsidiaire, le Canada est responsable du fait d'autrui pour négligence de l'exécution des obligations fiduciaires, constitutionnelles, statutaires et de common law de ses agents.

80. De même, les demandeurs tiennent le Canada pour seul responsable de la création et de la mise en œuvre de la Politique sur les pensionnats indiens et qui plus est :

a. Les demandeurs renoncent expressément à tout droit qu'ils pourraient avoir d'obtenir du Canada, ou de toute autre partie, toute partie des pertes subies par les demandeurs qui pourrait être imputable à la faute ou à la responsabilité d'un tiers et pour laquelle le Canada pourrait raisonnablement être en droit de réclamer à un ou plusieurs tiers une contribution, une indemnité ou une répartition en common law, en équité ou en vertu de la loi sur la *négligence* de la Colombie-Britannique, R.S.B.C. 1996 c 333, telle que modifiée; et

b. Les demandeurs ne chercheront pas à obtenir de toute partie, autre que le Canada, une partie des pertes qui ont été réclamées, ou auraient pu être réclamées, auprès de tiers.

Préjudices

81. En raison de la violation des obligations fiduciaires, constitutionnelles, statutaires et de common law, de l'infliction intentionnelle de souffrances morales et des violations des droits autochtones par le Canada et ses agents, pour lesquels le Canada est responsable du fait d'autrui, les membres du groupe des survivants, y compris les représentants des demandeurs, ont souffert de préjudices et de blessures, notamment :

(a) la perte de la langue, de la culture, de la spiritualité et de l'identité autochtone;

(b) des préjudices émotionnels et psychologiques

(c) l'isolement de leur famille, de leur communauté et de leur Nation

(d) la privation des éléments fondamentaux d'une éducation, y compris l'alphabétisation de base;

(e) une dégradation de la santé mentale et émotionnelle, pouvant aller jusqu'à un handicap permanent;

(f) une incapacité à faire confiance aux autres, à nouer ou à entretenir des relations intimes, à participer à une vie familiale normale ou à maîtriser sa colère;

(g) une tendance à la toxicomanie;

(h) l'isolement de la communauté, de la famille, du conjoint et des enfants;

(i) une altération de la capacité à apprécier et à participer à des activités récréatives, sociales, culturelles, sportives et professionnelles;

(j) une altération de la capacité à fonctionner sur le lieu de travail et une altération permanente de la capacité à gagner un revenu;

(k) la privation de l'éducation et des compétences nécessaires pour obtenir un emploi rémunéré;

(l) la nécessité d'un traitement psychologique, psychiatrique et médical continu pour les maladies et autres troubles résultant de l'expérience des pensionnats;

(m) le dysfonctionnement sexuel;

(n) la dépression, l'anxiété et le dysfonctionnement émotionnel

(o) les tendances suicidaires;

(p) la douleur et la souffrance;

(q) la perte d'estime de soi et les sentiments de dévalorisation, de honte, de peur et de solitude;

(r) les cauchemars, les retours en arrière et les problèmes de sommeil;

(s) la peur, l'humiliation et l'embarras en tant qu'enfant et adulte;

(t) la confusion et la désorientation sexuelles en tant qu'enfant et jeune adulte;

(u) l'incapacité à exprimer ses émotions d'une manière normale et saine;

(v) la perte de la capacité à participer aux pratiques et aux devoirs culturels ou à s'en acquitter;

(w) la perte de la capacité à vivre dans leur communauté et leur nation; et

(x) une douleur et une souffrance émotionnelles et psychologiques constantes et intenses.

82. En conséquence de la violation des obligations fiduciaires, constitutionnelles, statutaires et de common law, ainsi que de l'infliction intentionnelle de dommages et de la violation des droits ancestraux par le Canada et ses agents, pour lesquels le Canada est responsable du fait d'autrui, les membres du groupe des descendants, y compris les représentants des demandeurs, ont subi des dommages et des préjudices, notamment :

(a) leurs relations avec les membres survivants du groupe ont été altérées, endommagées et faussées en raison des expériences des membres survivants du groupe dans les pensionnats ~~rccensés~~; et,

(b) leur culture et leurs langues ont été minées et, dans certains cas, éradiquées par, entre autres, comme il a été mentionné, l'assimilation forcée des membres du groupe des survivants à la culture euro-canadienne par l'intermédiaire des pensionnats ~~rccensés~~.

83. En raison de la violation des obligations fiduciaires, constitutionnelles, statutaires et de common law, et de l'infliction intentionnelle de dommages et de la violation des droits ancestraux par le Canada et ses agents, pour lesquels le Canada est responsable du fait d'autrui, le groupe des bandes a souffert de la perte de la capacité d'exercer pleinement ses droits ancestraux collectivement, y compris le droit d'avoir un gouvernement traditionnel fondé sur leurs propres langues, pratiques spirituelles, lois et pratiques traditionnelles et de voir ces traditions pleinement respectées par les membres des groupes de survivants et de descendants ainsi que les générations suivantes, toutes ces pertes étant directement liées aux pertes individuelles des dommages culturels, linguistiques et sociaux des membres des groupes de survivants et de descendants.

Motifs des dommages-intérêts punitifs et aggravés

84. Le Canada a délibérément planifié l'éradication de la langue, de la religion et de la culture des membres du groupe des survivants et des membres du groupe des descendants, ainsi que la disparition du groupe des bandes. Les actions étaient malveillantes et visaient à causer un préjudice, et compte tenu des circonstances, des dommages-intérêts punitifs et aggravés sont appropriés et nécessaires.

85. Les membres du groupe affirment que le Canada et ses agents étaient parfaitement au courant des nombreux abus physiques, psychologiques, émotionnels, culturels et sexuels dont étaient victimes les membres du groupe des survivants dans les pensionnats ~~rccensés~~.

86. En dépit de cette information, le Canada a maintenu les pensionnats en activité et n'a pris aucune mesure, ou du moins aucune mesure raisonnable, pour protéger les membres survivants du recours collectif contre ces abus et les préjudices graves en résultant. Compte tenu des circonstances, le fait de ne pas avoir agi sur la base de ces informations pour protéger les enfants vulnérables confiés à la garde du Canada équivaut à une insouciance déréglée et téméraire concernant leur sécurité et rend les dommages-intérêts punitifs et aggravés à la fois appropriés et nécessaires.

Fondement juridique de la demande d'indemnisation

87. Les membres du groupe des survivants et des descendants sont des Indiens au sens de la *Loi sur les Indiens*, R.S.C. 1985, c. 1-5. Les membres du groupe des bandes sont des bandes composées d'indiens ainsi définis.

88. Les droits ancestraux des membres du recours collectif existaient et étaient pratiqués à toutes les époques concernées en vertu de la *Loi constitutionnelle de 1982,* article 35, soit l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c 11.

89. À tous les moments importants, le Canada avait une obligation spéciale et constitutionnelle de diligence, de bonne foi, d'honnêteté et de loyauté envers les demandeurs et les membres du groupe en vertu des obligations constitutionnelles du Canada et de l'obligation du Canada d'agir dans l'intérêt supérieur des Autochtones et particulièrement des enfants autochtones qui étaient particulièrement vulnérables. Le Canada a violé ces obligations, causant ainsi un préjudice.

90. Les membres du groupe sont des descendants de peuples autochtones qui ont pratiqué leurs lois, coutumes et traditions respectives qui faisaient partie intégrante de leurs sociétés distinctes avant le contact avec les Européens. Plus précisément, et ce, avant le contact avec les Européens jusqu'à aujourd'hui, les peuples autochtones dont descendent les demandeurs et les

membres du recours collectif ont assuré la pérennité de leur peuple, de leurs communautés et de leur culture distinctive en appliquant leurs lois, coutumes et traditions respectives à l'ensemble de leur mode de vie, y compris la langue, la danse, la musique, les loisirs, l'art, la famille, le mariage et les responsabilités communautaires, ainsi que l'utilisation des ressources.

Constitutionnalité des articles de la *Loi sur les Indiens*

91. Les membres du recours collectif affirment que tous les articles de la Loi et de ses prédécesseurs, tous les règlements adoptés en vertu de la Loi et toutes les autres lois relatives aux Autochtones qui fournissent ou prétendent fournir l'autorité légale pour l'éradication des Autochtones par la destruction de leurs langues, de leur culture, de leurs pratiques, de leurs traditions et de leur mode de vie, violent les articles 25 et 35(1) de la *Loi constitutionnelle* de 1982, les articles 1 et 2 de la *Déclaration canadienne des droits*, L.R.C. 1985, ainsi que les articles 7 et 15 de la *Charte canadienne des droits et libertés* et doivent donc être considérés comme étant sans effet.

92. Le Canada a délibérément planifié l'éradication de la langue, de la spiritualité et de la culture des demandeurs et des membres du groupe.

93. Les actions du Canada étaient délibérées et malveillantes et compte tenu des circonstances, des dommages punitifs, exemplaires et aggravés sont appropriés et nécessaires.

94. Les demandeurs invoquent et se fondent sur les éléments suivants :

> *Loi sur les Cours fédérale*s, L.R.C., 1985, c. F-7, art. 17;
>
> *Règles des Cours fédérales,* DORS/98-106, Partie 5.1 Recours collectifs;
>
> *Loi sur la responsabilité civile de l'État et le contentieux administratif*, L.R.C. 1985, c. C-50, art. 3, 21, 22 et 23;
>
> *Charte canadienne des droits et libertés, art.* 7, 15 et 24;

Loi constitutionnelle de 1982, art. 25 et 35(1),

Loi sur la négligence (Colombie-Britannique), R.S.B.C. 1996, c. 333.

La Déclaration canadienne des droits, L.R.C. 1985, Annexe III, Préambule, art. 1 et 2 :

La Loi sur les Indiens, L.R.C. 1985, art. 2(1), 3, 18(2), 114-122 et ses prédécesseurs.

Traités internationaux :

Convention pour la prévention et la répression des crimes de génocide, 78 U.N.T.S. 277, entrée en vigueur le 12 janvier 1951;

Déclaration des droits de l'enfant (1959), Résolution AG 1386 (XIV), 14 N.U. GAOR Supp. (No 16) à 19, N.U. Doc. A/4354;

C*onvention sur les droits de l'enfant,* Résolution AG 44/25, annexe, 44 NU GAOR Supp. (No 49) à 167, N.U. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989);

Pacte international relatif aux droits civils et politiques, Résolution AG 2200A (XXI), 21 N.U. GAOR Supp. (No 16) à 52, N.U. Doc. A/6316 (1966), 999 U.N.T.S. 171, entrée en vigueur le 23 mars 1976;

Déclaration américaine des droits et devoirs de l'homme, OEA (Organisation des États Américains) Résolution XXX, adoptée lors de la neuvième conférence internationale des États américains (1948), reproduite dans les *Basic Documents Pertaining to Human Rights in the Inter-American System (documents généraux relatifs aux droits de l'homme dans le système interaméricain),* OEA/Ser.L.V//II.82 doc 6 rev.1 à 17 (1992), et

Déclaration des Nations Unies sur les droits des peuples autochtones, Résolution AG 61/295, N.U. Doc. A/RES/61/295 (13 sept. 2007), 46 I.L.M. 1013 (2007), entérinée par le Canada le 12 novembre 2010

Les demandeurs proposent que le procès ait lieu à Vancouver, en Colombie-Britannique.

Le 11 juin 2013

Peter R. Grant, au nom de
tous les avocats des demandeurs

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) Coordonnées et adresse pour la signification
) pour les demandeurs

Federal Court  Cour fédérale

Date : 20150618

Ordre du jour : T-1542-12

Citation : 2015 FC 766

Ottawa, Ontario 18 juin 2015

PRÉSENT : L'honorable juge Harrington

PROPOSITION DE RECOURS COLLECTIF

ENTRE :

LE CHEF SHANE GOTTFRIEDSON, EN SON NOM ET AU NOM DE TOUS LES MEMBRES DE LA BANDE INDIENNE TK'EMLÚPS TE SECWÉPEMC ET DE LA BANDE INDIENNE TK'EMLÚPS TE SECWÉPEMC, LE CHEF GARRY FESCHUK, EN SON NOM ET AU NOM DE TOUS LES MEMBRES DE LA BANDE INDIENNE SECHELTE ET DE LA BANDE INDIENNE SECHELTE, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE ET RITA POULSEN

Les demandeurs

et

SA MAJESTÉ LA REINE DU CHEF DU CANADA

Le défendeur

ORDONNANCE

POUR LES RAISONS INVOQUÉES le 3 juin 2015, publiées sous le numéro 2015 FC 706;

LE TRIBUNAL ORDONNE ce qui suit :

1. L'instance susmentionnée est certifiée en tant que recours collectif aux conditions suivantes :

a. Les groupes sont définis comme suit :

Groupe des survivants : tous les Autochtones qui ont fréquenté en tant qu'élève ou à des fins éducatives, quelle que soit la période un pensionnat indien, au cours de la période concernée par le recours collectif, à l'exclusion, pour tout membre du groupe, des périodes pour lesquelles ce membre a reçu une indemnité au titre du paiement d'expérience commune en vertu de la convention de règlement relative aux pensionnats indiens.

Groupe des descendants : la première génération de toutes les personnes qui sont des descendants des membres du groupe des survivants ou des personnes qui ont été légalement ou traditionnellement adoptées par un membre du groupe des survivants ou son conjoint.

Groupe bandes : la bande indienne Tk'emlúps te Secwépemc et la bande indienne Sechelt et toute autre bande indienne qui :

(i) a ou avait des membres qui sont ou étaient membres du groupe des survivants, ou dont la communauté abrite un pensionnat; et

(ii) qui est spécifiquement ajoutée à la présente demande d'indemnisation avec un ou plusieurs pensionnats expressément désignés.

b. Les représentants des demandeurs sont :

Pour le groupe des survivants :

Violet Catherine Gottfriedson

Charlotte Anne Victorine Gilbert

Diena Marie Jules

Darlene Matilda Bulpit

Frederick Johnson

Daphne Paul

Pour le groupe des descendants :

Amanda Deanne Big Sorrel Horse

Rita Poulsen

Pour le groupe des bandes :

La bande indienne Tk'emlúps te Secwépemc

La bande indienne Sechelt

c. Les demandes d'indemnisation portent sur :

La violation des obligations fiduciaires et constitutionnelles, la violation des droits autochtones, l'infliction intentionnelle de souffrances mentales, la violation des conventions ou des pactes internationaux, la violation du droit international et la

négligence commise par le Canada ou en son nom et pour laquelle le Canada est considéré comme responsable.

d. Le redressement demandé est le suivant :

Par le groupe des survivants :

i. une déclaration selon laquelle le Canada a manqué à ses obligations fiduciaires, constitutionnelles, statutaires et de common law envers les représentants des demandeurs du groupe des survivants et les autres membres du groupe des survivants en ce qui concerne l'objet, l'établissement, le financement, le fonctionnement, la supervision, le contrôle, l'entretien, la fréquentation obligatoire des membres du groupe des survivants et le soutien des pensionnats indiens;

ii. une déclaration selon laquelle les membres du groupe des survivants ont des droits ancestraux de parler leurs langues traditionnelles, de s'adonner à leurs coutumes et pratiques religieuses traditionnelles et de se gouverner de leur manière traditionnelle;

iii. une déclaration selon laquelle le Canada a violé les droits linguistiques et culturels (droits ancestraux ou autres) du groupe des survivants;

iv. une déclaration selon laquelle la politique sur les pensionnats et les pensionnats indiens ont causé des dommages culturels, linguistiques et sociaux et un préjudice irréparable au groupe des survivants;

v. une déclaration selon laquelle le Canada est responsable envers les représentants des demandeurs du groupe des survivants et les autres membres du groupe des survivants de préjudices causés par le non-respect des obligations fiduciaires, constitutionnelles, statutaires et de common law, ainsi que de droits ancestraux, de souffrances morales infligées

intentionnellement, et de violations des conventions et des pactes internationaux, de même que du droit international, en ce qui concerne l'objectif, la création, le financement, le fonctionnement, la supervision, le contrôle et l'entretien, la fréquentation obligatoire par les membres du groupe des survivants ainsi que le soutien des pensionnats indiens;

vi. des dommages-intérêts généraux pour négligence, violation d'obligations fiduciaires, d'obligations découlant de la Constitution, de la loi et de la common law, de droits ancestraux et d'infliction intentionnelle de souffrances morales, ainsi que pour violation de conventions et de pactes internationaux, et pour violation du droit international, négligence et infliction intentionnelle de souffrances morales dont le Canada est responsable;

vii. des dommages-intérêts pécuniaires et des dommages-intérêts spéciaux pour négligence, perte de revenu, perte de capacité lucrative, perte de perspectives économiques, perte de possibilités d'éducation, violation d'obligations fiduciaires, constitutionnelles, statutaires et de common law ainsi que de droits ancestraux et pour infliction intentionnelle de souffrances morales, ainsi que des violations de conventions et de pactes internationaux, de même que des violations du droit international, y compris des montants pour couvrir le coût des soins, et pour restaurer, protéger et préserver le patrimoine linguistique et culturel des membres du groupe des survivants dont le Canada est responsable;

viii. des dommages-intérêts exemplaires et punitifs dont le Canada est responsable; et

ix. des intérêts et coûts antérieurs et postérieurs au jugement.

Par le groupe des descendants :

i. une déclaration selon laquelle le Canada a manqué à ses obligations fiduciaires, constitutionnelles, statutaires et de common law envers les représentants des demandeurs du groupe des descendants et les autres membres du groupe des descendants en ce qui concerne l'objet, l'établissement, le financement, le fonctionnement, la supervision, le contrôle, l'entretien, la fréquentation obligatoire des membres du groupe des survivants et le soutien des pensionnats recensés;

ii. une déclaration selon laquelle le groupe des descendants ont des droits ancestraux de parler leurs langues traditionnelles, de s'adonner à leurs coutumes et pratiques religieuses traditionnelles et de se gouverner de leur manière traditionnelle

iii. une déclaration selon laquelle le Canada a violé les droits linguistiques et culturels (droits ancestraux ou autres) du groupe des descendants;

iv. une déclaration selon laquelle la politique sur les pensionnats et les pensionnats recensés ont causé des dommages culturels, linguistiques et sociaux ainsi qu'un préjudice irréparable au groupe des descendants;

v. une déclaration selon laquelle le Canada est responsable envers les représentants des demandeurs du groupe des descendants et les autres membres du groupe des descendants pour les dommages causés par la violation de ses obligations fiduciaires et constitutionnelles et des droits autochtones, ainsi que par les violations des conventions et pactes internationaux et du droit international, en ce qui concerne l'objectif, la

création, le financement, le fonctionnement, la supervision, le contrôle et l'entretien, de même que la fréquentation obligatoire des pensionnats par les membres du groupe des survivants et le soutien de ces pensionnats;

vi. des dommages-intérêts généraux pour violation des obligations fiduciaires et constitutionnelles et des droits ancestraux, ainsi que des violations des conventions et pactes internationaux, de même que des violations du droit international, dont le Canada est responsable;

vii. des dommages-intérêts pécuniaires et dommages-intérêts spéciaux pour violation des obligations fiduciaires et constitutionnelles et des droits ancestraux, ainsi que des violations de conventions et de pactes internationaux, de même que des violations du droit international, y compris des montants pour couvrir le coût des soins, et pour restaurer, protéger et préserver le patrimoine linguistique et culturel des membres du groupe des survivants dont le Canada est responsable;

viii. des dommages-intérêts exemplaires et punitifs dont le Canada est responsable; et

ix. des intérêts et coûts antérieurs et postérieurs au jugement.

Par le groupe des bandes :

i. une déclaration selon laquelle la bande indienne Sechelt et la bande indienne Tk'emlúps te Secwépemc, ainsi que tous les membres du groupe des bandes ont des droits ancestraux de parler leurs langues traditionnelles, de s'adonner à leurs coutumes et pratiques religieuses traditionnelles et de se gouverner de leur manière traditionnelle;

ii. une déclaration selon laquelle le Canada a manqué à ses obligations fiduciaires, constitutionnelles, statutaires et de common law, ainsi qu'aux conventions et pactes internationaux et au droit international, envers les membres du groupe des bandes en ce qui concerne l'objet, l'établissement, le financement, le fonctionnement, la supervision, le contrôle, l'entretien, la fréquentation obligatoire des membres du groupe des survivants et le soutien des pensionnats SIRS (pensionnat indien de Sechelt) et KIRS (pensionnat indien de Kamloops) et d'autres pensionnats recensés;

iii. une déclaration selon laquelle la politique sur les pensionnats SIRS et KIRS ainsi que les pensionnats recensés ont causé des dommages culturels, linguistiques et sociaux et un préjudice irréparable au groupe des bandes;

iv. une déclaration selon laquelle le Canada a violé ou viole les droits ancestraux, les droits linguistiques et culturels des membres du groupe des bandes (droits ancestraux ou autres), ainsi que les conventions et les pactes internationaux de même que le droit international, du fait de la création, du financement, le fonctionnement, la supervision, le contrôle et l'entretien, la fréquentation obligatoire par les membres du groupe des survivants ainsi que le soutien des pensionnats recensés;

v. une déclaration selon laquelle le Canada est responsable envers les membres du groupe des bandes de préjudices causés par le non-respect des obligations fiduciaires et constitutionnelles ainsi que de droits ancestraux, de même que de violations des conventions et des pactes internationaux, et du droit international, en ce qui concerne l'objectif, la création, le

financement, le fonctionnement, la supervision, le contrôle et l'entretien, la fréquentation obligatoire par les membres du groupe des survivants ainsi que le soutien des pensionnats recensés;

vi. des dommages-intérêts non pécuniaires et pécuniaires ainsi que des dommages-intérêts spéciaux pour violation des obligations fiduciaires et constitutionnelles et des droits ancestraux, ainsi que des violations des conventions et des pactes internationaux, de même que des violations du droit international, y compris des montants pour couvrir en continu le coût des soins de manière individuelle pour les membres du groupe des bandes, et pour restaurer, ainsi que les coûts de restauration, de protection et de préservation du patrimoine linguistique et culturel des bandes dont le Canada est responsable;

vii. La construction et l'entretien de centres de guérison et d'éducation dans les communautés du groupe des bandes, ainsi que d'autres centres ou opérations susceptibles d'atténuer les pertes subies et que cette honorable Cour pourrait juger appropriés et justes;

viii. des dommages-intérêts exemplaires et punitifs dont le Canada est responsable; et

ix. des intérêts et coûts antérieurs et postérieurs au jugement.

e. Les questions communes de droit ou de fait sont les suivantes :

a. Dans le cadre de l'objectif, du fonctionnement ou de la gestion de l'un des pensionnats au cours de la période concernée par le recours collectif, le défendeur a-t-il manqué à une obligation fiduciaire envers les survivants,

les descendants et le groupe de la bande, ou l'un d'entre eux, de ne pas détruire leur langue et leur culture?

b. Dans le cadre de l'objectif, du fonctionnement ou de la gestion de l'un des pensionnats au cours de la période concernée par le recours collectif, le défendeur a-t-il violé les droits culturels ou linguistiques, qu'il s'agisse de droits ancestraux ou autres, du groupe des survivants, des descendants et des bandes, ou de l'un d'entre eux?

c. Dans le cadre de l'objectif, du fonctionnement ou de la gestion de l'un des pensionnats au cours de la période concernée par le recours collectif, le défendeur a-t-il manqué à un devoir de diligence envers le groupe des survivants de les protéger de tout préjudice psychologique pouvant donner lieu à des poursuites judiciaires?

d. Dans le cadre de l'objectif, du fonctionnement ou de la gestion de l'un des pensionnats au cours de la période concernée par le recours collectif, le défendeur a-t-il manqué à un devoir de diligence envers le groupe des survivants de les protéger de tout préjudice psychologique pouvant donner lieu à des poursuites judiciaires?

e. Si la réponse à l'un des points (a)-(d) ci-dessus est positive, la Cour peut-elle faire une évaluation globale des préjudices subis par le groupe dans le cadre du procès sur les questions communes?

f. Si la réponse à l'un des points (a)-(d) ci-dessus est positive, le défendeur s'est-il rendu coupable d'une conduite qui justifie l'attribution de dommages-intérêts punitifs; et

g. Si la réponse au point (f) ci-dessus est positive, quel montant de dommages-intérêts punitifs devrait être accordé?

f. Les définitions suivantes s'appliquent à la présente ordonnance :

a. « Autochtone(s) », « Personne(s) autochtone(s) » ou « Enfant(s) autochtone(s) » désigne une ou plusieurs personnes dont les droits sont reconnus et confirmés par l'article 35 de la *Loi constitutionnelle* de 1982;

b. « Droits ancestraux » désigne une partie ou la totalité des droits ancestraux et des droits issus de traités reconnus et confirmés par l'article 35 de la *Loi constitutionnelle* de *1982*;

c. « Loi » désigne la *Loi sur les Indiens*, L.R.C. de 1985, chapitre I-5 et ses versions antérieures, ainsi que les modifications qui y ont été apportées le cas échéant;

d. « Convention » désigne la convention de règlement relative aux pensionnats indiens datée du 10 mai 2006, conclue par le Canada pour régler les demandes d'indemnisation relatives aux pensionnats indiens, telles qu'elles ont été approuvées dans les ordonnances rendues par les diverses administrations canadiennes;

e. « Canada » désigne la défenderesse, Sa Majesté la Reine;

f. « Période du recours » désigne les années 1920 à 1997;

g. « Préjudice culturel, linguistique et social » désigne les dommages ou les préjudices résultant de la création et de la mise en œuvre des pensionnats et de la politique relative aux pensionnats en matière d'éducation, de gouvernance, d'économie, de culture, de langue, de spiritualité et de coutumes sociales, de pratiques et de mode de vie, de structures de gouvernance traditionnelles, ainsi que de sécurité et de bien-être communautaires et individuels des Autochtones;

h. « Pensionnat(s) recensé(s) » désigne KIRS ou SIRS ou tout autre pensionnat expressément désigné en tant que membre du groupe des bandes;

i. « KIRS » désigne le pensionnat indien de Kamloops;

j. « Pensionnats » désigne tous les pensionnats indiens reconnus en vertu de la convention et figurant à l'annexe A jointe à la présente ordonnance, laquelle annexe peut être modifiée le cas échéant par ordonnance de la Cour;

k. « Politique sur les pensionnats indiens » désigne la politique du Canada relative à la mise en œuvre des pensionnats indiens; et

l. « SIRS » désigne le pensionnat indien de Sechelt.

g. La forme et le contenu des avis aux membres du groupe doivent être approuvés par cette Cour. Les membres du groupe des survivants et des descendants auront jusqu'au 30 octobre 2015 pour se retirer, ou tout autre délai que cette Cour fixera. Les membres

du groupe des bandes auront 6 mois pour décider de participer à partir de la date de publication de l'avis comme indiqué par la Cour, ou tout autre délai fixé par la Cour.

h. L'une ou l'autre des parties peut demander à la Cour de modifier la liste des pensionnats figurant à l'annexe A aux fins de la présente procédure.

« Sean Harrington »
Juge

ANNEXE A
conformément à l'ordonnance du juge Harrington

LISTE DES PENSIONNATS

Pensionnats de la Colombie-Britannique

Ahousaht
Alberni
Cariboo (St. Joseph's, William's Lake)
Christie (Clayoquot, Kakawis)
Coqualeetza de 1924 à 1940
Cranbrook (St. Eugene's, Kootenay)
Kamloops
Île Penelakut
Lejac (Fraser Lake)
Lower Post
St George's (Lytton)
St. Mary's (Mission)
St. Michael's (foyer pour filles d'Alert Bay, foyer pour garçons d'Alert Bay)
Sechelt
St. Paul's (Squamish, North Vancouver)
Port Simpson (Foyer pour filles de Crosby)
Kitimaat
Anahim Lake Dormitory (de septembre 1968 à juin 1977)

Pensionnats de l'Alberta

Assumption (Hay Lake)
Blue Quills (Saddle Lake, Lac la Biche, Sacred Heart)
Crowfoot (Blackfoot, St. Joseph's, Ste. Trinité)
Desmarais (Wabiscaw Lake, St. Martin's, Wabisca Roman Catholic)
Edmonton (Poundmaker, remplacé par Red Deer Industrial)
Ermineskin (Hobbema)
Holy Angels (Fort Chipewyan, École des Saint-Anges)
Fort Vermilion (St. Henry's)
Joussard (St. Bruno's)
Lac La Biche (Notre Dame des Victoires)
Petit lac des Esclaves (St. Peter's)
Morley (Stony/Stoney, a remplacé l'orphelinat McDougall)
Old Sun (Blackfoot)
Sacré-Cœur (Peigan, Brocket)
St. Albert (Youville)
Augustine (Smokey-River)
St. Cyprian (Maison du jubilé de la reine Victoria, Peigan)
St. Joseph's (High River, Dunbow)
St. Mary's (Blood, Immaculée Conception)
St. Paul's (Blood)
Sturgeon Lake (Calais, St. Francis Xavier)
Wabasca (St. John's)
Whitefish Lake (St. Andrew's)
Grouard jusqu'à décembre 1957
Sarcee (St. Barnabas)

Pensionnats de la Saskatchewan

Beauval (Lac la Plonge)
File Hills
Gordon's
Lac La Ronge (voir Prince Albert)
Lebret (Qu'Appelle, Whitecalf, Lycée St. Paul)
Marieval (Cowesess, Crooked Lake)

Muscowequan (Lestock, Touchwood)
Onion Lake Anglican (voir Prince Albert)
Prince Albert (Onion Lake, St. Alban's, All Saints, St. Barnabas, Lac La Ronge)
Regina
Round Lake
St. Anthony's (Onion Lake, Sacred Heart)
St. Michael's (Duck Lake)
St. Philip's
Sturgeon Landing (remplacé par Guy Hill, MB)
Thunderchild (Delmas, St. Henri)
Crowstand
Fort Pelly
Externat fédéral de Cote Improved (de septembre 1928 à juin 1940)

Pensionnats du Manitoba

Assiniboia (Winnipeg)
Birtle
Brandon
Centre de formation professionnelle de Churchill
Cross Lake (St. Joseph's, Norway House)
Dauphin (remplacé par McKay)
Elkhorn (Washakada)
Fort Alexander (Pine Falls)
Guy Hill (Clearwater, The Pas, anciennement Sturgeon Landing, SK)
McKay (The Pas, remplacé par Dauphin)
Norway House
Pine Creek (Campeville)
Portage la Prairie
Sandy Bay
Foyer Notre Dame (Norway House Catholic, foyer de Jack River, remplacé par Jack River Annex à Cross Lake)

Pensionnats de l'Ontario

Bishop Horden Hall (Moose Fort, Moose Factory)

Cecilia Jeffrey (Kenora, Shoal Lake)
Chapleau (St. Joseph's)
Fort Frances (St. Margaret's)
McIntosh (Kenora)
Institut Mohawk
Mount Elgin (Muncey, St. Thomas)
Pelican Lake (Pelican Falls)
Poplar Hill
St. Anne's (Fort Albany)
St. Mary's (Kenora, St. Anthony's)
Shingwauk
École espagnole pour garçons (Charles Garnier, St. Joseph's)
École espagnole pour filles (St. Joseph's, St. Peter's, St. Anne's)
St. Joseph's/Fort William
Lycée de Stirland Lake (Académie de Wahbon Bay) du 1er septembre 1971 au 30 juin 1991
Lycée de Cristal Lake (du 1er septembre 1976 au 30 juin 1986)

Pensionnats du Québec

Amos
Fort George (anglican)
Fort George (catholique romain)
La Tuque
Point Bleue
Sept-Îles
Foyers fédéraux à Great Whale River
Foyers fédéraux à Port Harrison
Foyers fédéraux à George River
Foyer fédéral de Payne Bay (Bellin)
Foyers à Fort George (du 1er septembre 1975 au 30 juin 1978)
Foyers à Mistassini (du 1er septembre 1971 au 30 juin 1978)

Pensionnats de la Nouvelle-Écosse

Shubenacadie

Pensionnats du Nunavut

Chesterfield Inlet (Joseph Bernier, Turquetil Hall)
Foyers fédéraux à Panniqtuug/Pangnirtang
Foyers fédéraux à Broughton Island/Qikiqtarjuaq
Foyers fédéraux à Cape Dorset Kinngait
Foyers fédéraux à Eskimo Point/Arviat
Foyers fédéraux à Igloolik/Iglulik
Foyers fédéraux à Baker Lake/Qamani'tuaq
Foyers fédéraux à Pond Inlet/Mittimatalik
Foyers fédéraux à Cambridge Bay
Foyers fédéraux à Lake Harbour
Foyers fédéraux à Belcher Islands
Foyers fédéraux à Frobisher Bay/Ukkivik
Foyer-tente fédéral à Coppermine

Pensionnats des Territoires du Nord-Ouest

Aklavik (Immaculée Conception)
Aklavik (All Saints)
Fort McPherson (Fleming Hall)
Ford Providence (Sacré-Cœur)
Fort Resolution (St. Joseph's)
Fort Simpson (Bompas Hall)
Fort Simpson (Lapointe Hall)
Fort Smith (Breynat Hall)
HayRiver (St. Peter's)
Inuvik (Grollier Hall)
Inuvik (Stringer Hall)
Yellowknife (Akaitcho Hall)
Fort Smith – Grandin College
Foyer fédéral à Fort Franklin

Pensionnats du Yukon

Carcross (Chooulta)
Yukon Hall (Whitehorse/foyer protestant)

Coudert Hall (foyer Whitehorse/foyer scolaire – remplacé par Yukon Hall)
Mission baptiste de Whitehorse
Pensionnat esquimau de Shingle Point
Foyer de St. Paul's de septembre 1920 à juin 1943

ANNEXE C

PROCESSUS DE RÉCLAMATIONS RELATIF AU PAIEMENT DES INDEMNITÉS LIÉES À LA FRÉQUENTATION D'EXTERNAT

Principes régissant l'administration des réclamations

1. Les principes suivants régissent l'administration des réclamations (« Principes du processus de réclamation ») :

    a. le processus de réclamation doit être rapide, peu coûteux, convivial, sensible aux aspects culturels et tenir compte des traumatismes subis;

    b. le processus de réclamation doit minimiser le fardeau des demandeurs dans la poursuite de leurs réclamations;

    c. le processus de réclamation doit limiter toute probabilité de nouveau traumatisme au cours du processus de réclamation;

    d. l'administrateur des réclamations et l'examinateur indépendant doivent supposer qu'un réclamant agit honnêtement et de bonne foi, sauf preuve raisonnable du contraire;

    e. l'administrateur des réclamations et l'examinateur indépendant tireront toutes les conclusions raisonnables et favorables possibles en faveur du demandeur.

2. Les principes du processus de réclamation ci-dessus doivent être appliqués tout au long du processus de réclamation, y compris lors de tout réexamen.

Critère d'admissibilité

3. Conformément à la convention de règlement, un demandeur a droit au paiement d'une indemnité liée à la fréquentation d'externat et sa réclamation sera approuvée, si le demandeur satisfait aux critères d'admissibilité suivants :

    a. la réclamation concerne un ancien élève externe qui était vivant le 30 mai 2005;

b. la réclamation est faite en raison de la fréquentation par cet élève externe d'un pensionnat indien figurant à l'annexe E pendant l'ensemble ou une partie d'une année scolaire pour laquelle il n'a pas reçu de paiement d'expérience commune en vertu de la CRRPI, n'a pas reçu et ne recevra pas d'indemnité en vertu du règlement McLean, et n'a pas reçu d'indemnité en vertu de tout autre règlement concernant une école figurant à l'annexe K du règlement McLean;

c. la réclamation est remise à l'administrateur des réclamations avant la date limite de réclamation ultime.

Réception de réclamations

4. Pour demander un paiement d'indemnité liée à la fréquentation d'externat, tout demandeur doit remplir un formulaire de réclamation et le remettre à l'administrateur des réclamations avant la date limite des réclamations, par voie électronique ou en copie papier, selon les modalités établies par l'administrateur des réclamations.

5. Nonobstant la date limite de réclamation, un demandeur peut remettre un formulaire de réclamation accompagné d'une réclamation d'extension de la date limite de réclamation à l'administrateur des réclamations après la date limite de réclamation, mais avant la date limite ultime de réclamation. En aucun cas, l'administrateur des réclamations n'acceptera de formulaires de réclamation après la date limite ultime de réclamation, sauf dans les cas spécifiquement prévus par les présentes et par le processus de réclamation successorale décrit à l'annexe D.

6. L'administrateur des réclamations devra fournir au demandeur une confirmation de la réception de la réclamation.

7. L'administrateur des réclamations numérisera toutes les demandes en copie papier et conservera des copies électroniques qui seront utilisées uniquement aux fins prévues par les présentes.

8. L'administrateur des réclamations examinera chaque réclamation afin de s'assurer qu'elle est dûment remplie. En cas d'absence de toute information requise sur le

formulaire de réclamation, le rendant ainsi incomplet, notamment en ce qui concerne une demande d'extension du délai de réclamation, l'administrateur des réclamations doit contacter le demandeur et pour lui demander de fournir les informations manquantes ou de lui remettre à nouveau le formulaire de réclamation. Le demandeur disposera de 60 jours, à compter de la date où l'administrateur des réclamations lui fait parvenir une telle demande, pour remettre à nouveau son formulaire de réclamation, peu importe si la date limite ultime des réclamations est dépassée.

9. L'administrateur des réclamations doit, sans prendre d'autres mesures, rejeter toute réclamation faite à l'égard d'une personne décédée le 29 mai 2005 ou avant.

Informations fournies par le Canada

10. L'administrateur des réclamations fournira au Canada une copie de chaque réclamation pour toute personne qui était vivante le 30 mai 2005. Ces copies ne seront utilisées qu'aux fins prévues par les présentes.

11. Le Canada examinera la réclamation en fonction de toute l'information en sa possession afin de :

    a. établir si la personne en cause dans la réclamation ou l'exécuteur, le représentant ou l'héritier ayant présenté une réclamation à sa place a reçu un paiement d'expérience commune en vertu de la CRRPI pour l'une des années scolaires visées par la réclamation;

    b. établir si la personne en cause dans la réclamation ou l'exécuteur, le représentant ou l'héritier ayant présenté une réclamation s'est vu refusé une demande de paiement d'expérience commune en vertu de la CRRPI pour l'une des années scolaires visées par la réclamation;

    c. établir si la personne ou l'exécuteur, le représentant ou l'héritier ayant présenté une réclamation à sa place a reçu un paiement d'expérience commune en vertu d'un règlement concernant un des pensionnats figurant

à l'annexe K du règlement McLean pour l'une de ces mêmes années scolaires visées par la réclamation;

d. établir si la personne en cause a fréquenté une école ne figurant pas sur la liste 1 ou la liste 2 de l'annexe E pour l'une ou l'autre des années scolaires visées par la réclamation ;

e. examiner toute autre information pouvant être pertinente pour une réclamation relative à une école figurant sur la liste 2 de l'annexe E.

12. Afin de s'assurer que la réclamation n'est pas refusée uniquement parce que le demandeur s'est trompé sur l'année ou les années scolaires au cours desquelles il a fréquenté un pensionnat à titre d'élève externe, le Canada examinera les dossiers de fréquentation du ou des pensionnats indiens visés par la réclamation pour les cinq années scolaires précédant et suivant l'année ou les années scolaires mentionnées dans la réclamation. Si, à la suite de ce processus, il s'avère que la personne en question était un élève externe au cours d'une ou de plusieurs années scolaires non réclamées, cette information sera fournie à l'administrateur des réclamations et la réclamation sera évaluée comme si elle comprenait cette ou ces années scolaires.

13. Le Canada peut transmettre à l'administrateur des réclamations toute information ou tout document confirmant ou infirmant la fréquentation d'un pensionnat à titre d'élève externe de la personne en cause dans les 45 jours suivant la réception d'une réclamation de l'administrateur des réclamations, mais il s'efforcera de le faire le plus rapidement possible afin de ne pas retarder sa décision relative à toute réclamation.

Évaluation par l'administrateur des réclamations

14. Lorsque la réclamation concerne une personne qui s'est vue refuser une demande de paiement d'expérience commune en vertu de la CRRPI pour une des années scolaires mentionnées dans la réclamation au motif qu'elle a fréquenté le ou les pensionnats indiens, mais n'y a pas résidé, peu importe le ou les pensionnats indiens cités dans la réclamation, l'administrateur des réclamations considérera que la réclamation est présumée valide, sous réserve des dispositions ci-dessous.

15. Pour toutes les autres réclamations, l'administrateur des réclamations déterminera d'abord si la réclamation est faite à l'égard d'un élève externe, conformément à la procédure suivante :

    a. lorsque la réclamation concerne un ou plusieurs pensionnats indiens figurant sur la liste 1 de l'annexe E au cours des périodes précisées dans cette liste, et que le formulaire de réclamation indique de façon positive que la réclamation concerne un individu qui a fréquenté le pensionnat en tant qu'élève externe, l'administrateur des réclamations considérera la réclamation comme étant présumée valide, sous réserve des dispositions ci-dessous;

    b. lorsque la réclamation ne concerne qu'un ou plusieurs pensionnats indiens figurant sur la liste 2 de l'annexe E au cours des périodes précisées dans cette liste, et que le demandeur fournit une déclaration solennelle indiquant que l'individu visé par la réclamation était un élève externe et précisant le lieu de résidence de celui-ci pendant la période où cette personne était un élève externe, l'administrateur des réclamations examinera la réclamation et tout renseignement fourni par le Canada en vertu des paragraphes 11 à 13 ci-dessus. À moins que le Canada ait fourni des preuves positives démontrant, selon la prépondérance des probabilités, que la personne n'était pas un élève externe, la réclamation sera présumée valide, sous réserve des dispositions ci-dessous;

    c. lorsque la réclamation ne nomme aucun pensionnat indien figurant à l'annexe E, l'administrateur des réclamations fera tout son possible pour déterminer la possibilité d'une erreur ou d'une erreur de nom dans le nom d'un pensionnat indien, notamment, en contactant le demandeur, le cas échéant. L'administrateur des réclamations doit corriger ces erreurs ou erreurs de nom. Si l'administrateur des réclamations est convaincu que la réclamation ne concerne aucun des pensionnats indiens énumérés à l'annexe E, il doit rejeter la réclamation.

16. L'administrateur des réclamations examinera toute information fournie par le Canada en vertu des paragraphes 11 à 13 ci-dessus ainsi que toute information en sa possession dans le cadre du règlement McLean. Si l'administrateur des réclamations estime qu'il existe des preuves positives démontrant, selon la prépondérance des probabilités, que pour toutes les années scolaires indiquées dans le formulaire de réclamation, la personne en cause ou l'exécuteur, le représentant ou l'héritier ayant présenté une réclamation à sa place :

    a. a reçu un paiement d'expérience commune en vertu de la CRRPI ;

    b. a reçu une indemnité dans le cadre de l'accord de McLean ;

    c. a reçu une indemnité dans le cadre de tout autre règlement concernant une école figurant à l'annexe K du règlement McLean ;

    d. a fréquenté une école qui ne figure pas à l'annexe E ;

    e. ou toute combinaison des alinéas (a), (b), (c), ou (d).

    l'administrateur des réclamations doit rejeter la réclamation.

17. L'administrateur des réclamations informera tout demandeur dont la réclamation est rejetée en lui remettant une lettre en utilisant le moyen de communication choisi par le demandeur :

    a. indiquant clairement les raisons pour lesquelles la réclamation a été rejetée;

    b. dans l'éventualité où le demandeur a le droit de demander un réexamen :

        i. informant le demandeur de son droit de demander un réexamen, de la procédure de demande de réexamen et de tout délai applicable;

        ii. informant le demandeur de son droit d'avoir recours à l'assistance gratuite des avocats du groupe et de son droit d'avoir recours, à ses frais, à l'assistance d'un autre avocat de son choix;

iii. accompagnée des copies de toutes les informations et de tous les documents ayant été pris en compte dans le cadre de la décision de l'administrateur des réclamations de rejeter la réclamation.

Réexamen

18. Un demandeur dont la réclamation est rejetée parce que :

    a. sa réclamation concerne une école dont l'administrateur des réclamations est convaincu qu'elle n'est pas un pensionnat indien figurant à l'Annexe E ;

    b. ou sa réclamation est faite au nom d'une personne décédée le 29 mai 2005 ou à une date antérieure,

    n'a pas le droit de demander un réexamen.

19. Un demandeur dont la réclamation est refusée pour toute autre raison a le droit de demander un réexamen à l'examinateur indépendant. L'avis d'intention de demander un réexamen doit être remis à l'examinateur indépendant dans les 60 jours suivant la date de la décision de l'administrateur des réclamations.

20. Le Canada n'a en aucun cas le droit de demander un réexamen.

21. Les demandeurs qui sollicitent un réexamen ont le droit, sans avoir à engager de frais, d'être représentés par un avocat du groupe aux fins du réexamen, ou de faire appel, à leurs frais, à un autre avocat de leur choix.

22. L'examinateur indépendant fournira au demandeur un accusé de réception concernant l'avis d'intention de demander un réexamen et fournira au Canada une copie de cet avis.

23. L'examinateur indépendant informera le demandeur qu'il a le droit de présenter de nouvelles preuves lors du réexamen. Le demandeur dispose de 60 jours pour présenter toute nouvelle preuve lors du réexamen, moyennant toute autre extension

raisonnable du délai que le réclamant peut demander et que l'examinateur indépendant peut accorder.

24. L'examinateur indépendant fournira au Canada toute nouvelle preuve présentée par le demandeur et le Canada aura le droit de fournir des informations supplémentaires à l'examinateur indépendant qui doit à toute nouvelle preuve fournie dans les 60 jours.

25. L'examinateur indépendant étudiera alors chaque réclamation, notamment les documents justificatifs, *de novo*, et rendra une décision conformément aux principes du processus de réclamation énoncés ci-dessus. L'examinateur indépendant devra en particulier :

    a. présumer qu'un demandeur agit honnêtement et de bonne foi, en l'absence de motifs raisonnables du contraire;

    b. tirer toutes les conclusions raisonnables et favorables possibles en faveur du demandeur.

26. Si l'examinateur indépendant décide que la réclamation doit être acceptée, l'administrateur des réclamations et le demandeur en seront informés, et l'administrateur des réclamations paiera le demandeur sans délai.

27. Si l'examinateur indépendant décide du rejet de la réclamation, il en informera le demandeur en lui adressant une lettre par le moyen de communication de son choix :

    a. indiquant clairement les raisons pour lesquelles la réclamation a été rejetée;

    b. accompagnée des copies de toutes les informations et de tous les documents ayant été pris en compte dans le cadre de la décision de l'examinateur indépendant de rejeter la réclamation.

28. Toutes les demandes de réexamen doivent faire l'objet d'une décision de l'examinateur indépendant dans les 30 jours suivant la réception de tout document de réponse fourni par le Canada ou l'expiration du délai accordé au Canada pour fournir des documents de réponse, selon la première éventualité. Si le demandeur

ne présente pas de nouvelles preuves lors du réexamen, l'examinateur indépendant doit rendre sa décision dans les 30 jours suivant l'expiration du délai accordé au demandeur pour fournir lesdites preuves. Les délais prévus dans cette section peuvent être modifiés par entente entre les avocats du groupe et le Canada, en consultation avec l'examinateur indépendant.

29. La décision de l'examinateur indépendant est définitive et sans appel.

Annexe D

PROCESSUS DE RÉCLAMATIONS SUCCESSORALES RELATIF AU PAIEMENT DES INDEMNITÉS LIÉES À LA FRÉQUENTATION D'EXTERNAT

Lorsqu'il y a un exécuteur, un administrateur ou un liquidateur

1. Le demandeur doit :

    a. remplir le formulaire de réclamations approprié;

    b. fournir la preuve que l'élève externe est décédé;

    c. fournir une preuve de la date du décès de l'élève externe;

    d. fournir la preuve qu'il a été nommé exécuteur, administrateur ou liquidateur.

2. Le formulaire de réclamation doit contenir des dispositions relatives à l'exonération, à l'indemnisation et à l'exonération de responsabilité à l'endroit du Canada, des demandeurs, des avocats du recours collectif, de l'administrateur des réclamations et de l'examinateur indépendant.

3. L'administrateur des réclamations évaluera la réclamation conformément au processus de réclamation.

4. Le paiement de toute réclamation approuvée sera versé à « la succession » de l'élève externe décédé.

Lorsqu'il n'y a pas d'exécuteur, d'administrateur ou de liquidateur

5. Le demandeur doit :

    a. remplir le formulaire de réclamations approprié;

    b. fournir la preuve que l'élève externe est décédé;

    c. fournir une preuve de la date du décès de l'élève externe;

    d. fournir une attestation ou une déclaration selon laquelle l'élève externe n'avait pas de testament et qu'aucun exécuteur, administrateur ou liquidateur n'a été nommé par la Cour;

e. fournir une preuve du lien de parenté avec l'élève externe, qui peut être sous forme de l'attestation ou de la déclaration d'un tiers;

f. fournir une attestation ou une déclaration du demandeur selon laquelle il n'y a pas d'héritier(s) de rang supérieur;

g. dresser la liste de toutes les personnes (le cas échéant) ayant la même priorité en tant qu'héritiers que le demandeur;

h. fournir le consentement écrit de toutes les personnes (le cas échéant) ayant le même rang que le demandeur dans l'ordre de priorité des héritiers afin que le demandeur puisse soumettre une réclamation au nom de l'élève externe décédé.

6. Le formulaire de réclamation doit contenir des dispositions relatives à l'exonération, à l'indemnisation et à l'exonération de responsabilité à l'endroit du Canada, des demandeurs, des avocats du recours collectif, de l'administrateur des réclamations et de l'examinateur indépendant.

7. L'administrateur des réclamations évaluera la réclamation conformément au processus de réclamation. Celui-ci n'effectuera de paiement que pour une réclamation approuvée ou communiquera une réclamation rejetée avec un droit de réexamen conformément aux dispositions ci-dessous. Dans les cas où la réclamation est rejetée sans droit de réexamen, l'administrateur des réclamations informera le demandeur conformément à la procédure normale à laquelle il est sujet.

8. Si l'administrateur des réclamations ne reçoit aucune autre réclamation concernant le même élève externe décédé avant la date limite ultime des réclamations, celui-ci doit :

a. dans le cas d'une réclamation approuvée, payer le demandeur;

b. dans le cas d'une réclamation rejetée, informer le demandeur du rejet de la réclamation conformément au paragraphe 17 du processus de réclamation. Le demandeur peut solliciter un réexamen conformément au processus de réclamation.

9. Si l'administrateur des réclamations reçoit une autre réclamation concernant le même élève externe décédé avant la date limite ultime des réclamations et que le demandeur est l'exécuteur, l'administrateur ou le liquidateur de la succession, l'administrateur des réclamations rejettera la réclamation de tout demandeur qui n'est pas l'exécuteur, l'administrateur ou le liquidateur, sans droit de réexamen.

10. Si une ou plusieurs réclamations supplémentaires concernant le même élève externe décédé sont soumises à l'administrateur des réclamations avant la date limite ultime des réclamations par un demandeur n'étant ni exécuteur testamentaire ni du même rang que le ou les précédents demandeurs dans l'ordre de priorité des héritiers, l'administrateur des réclamations devra communiquer avec le demandeur réputé avoir le dernier rang dans l'ordre de priorité des héritiers afin de s'enquérir si ce dernier conteste l'existence d'un hériter d'un rang supérieur. Si l'existence d'un héritier ayant un rang supérieur est contestée, l'affaire sera renvoyée à l'examinateur indépendant pour qu'il détermine lequel des demandeurs a priorité afin de désigner ce dernier comme représentant légal de l'élève externe défunt. La décision de l'examinateur indépendant est définitive, sans aucun droit d'appel ou d'examen judiciaire. L'examinateur indépendant doit informer l'administrateur des réclamations de sa décision, puis l'administrateur des réclamations doit :

    a. dans le cas d'une réclamation approuvée, payer le représentant désigné;

    b. dans le cas d'une réclamation rejetée, informer le demandeur du rejet de la réclamation conformément au paragraphe 17 du processus de réclamation. Le représentant désigné peut solliciter un réexamen conformément au processus de réclamation.

11. Si une ou plusieurs réclamations supplémentaires concernant le même élève externe décédé sont soumises à l'administrateur des réclamations avant la date limite ultime des réclamations par un demandeur n'étant pas exécuteur testamentaire, mais étant du même rang que le ou les demandeurs précédents dans l'ordre de priorité des héritiers, l'administrateur des réclamations devra rejeter toutes les réclamations et en aviser tous les demandeurs en bonne et due forme. Compte tenu de la date limite de

soumission des réclamations, les demandeurs qui ont soumis des réclamations concurrentes auront alors trois mois pour soumettre une nouvelle réclamation signée par tous les demandeurs précédemment concurrents désignant un représentant légal pour leur compte ainsi que pour tout autre héritier. Dès réception de la nouvelle réclamation, l'administrateur des réclamations doit :

a. dans le cas d'une réclamation approuvée, payer le représentant désigné;

b. dans le cas d'une réclamation rejetée, informer le demandeur du rejet de la réclamation conformément au paragraphe 17 du processus de réclamation. Le représentant désigné peut solliciter un réexamen conformément au processus de réclamation.

Ordre de priorité des héritiers

12. L'ordre de priorité des héritiers correspond à celui prévu par les dispositions de la *Loi sur les Indiens* relatives à la distribution des biens ab intestat; tous les termes ont la même définition que celle qui figure dans la *Loi sur les Indiens*.

13. L'ordre de priorité des héritiers, du premier au dernier, est le suivant :

a. l'époux ou le conjoint de fait survivant;

b. les enfants;

c. les petits-enfants;

d. les parents;

e. les frères et sœurs;

f. les enfants des frères et sœurs.

Annexe E – Liste des pensionnats indiens concernés par le processus réclamation
Liste 1 – Pensionnats avec des élèves externes confirmés

Pensionnat	Emplacement	Date d'ouverture (1er janvier 1920 selon la période visée par le recours collectif ou plus tard, selon le cas)	Date de fermeture de l'école ou de transfert
Pensionnats de la Colombie-Britannique			
Alberni	Port Alberni (réserve Tseshaht)	1er janvier 1920 **Fermetures provisoires :** Du 2 juin 1917 au 1er décembre 1920 Du 21 février 1937 au 23 septembre 1940	31 août 1965
Cariboo (St. Joseph's, William's Lake)	Williams Lake	1er janvier 1920	28 février 1968
Christie (Clayoquot, Kakawis)	Tofino	1er janvier 1920	30 juin 1983
Kamloops	Kamloops (réserve indienne de Kamloops)	1er janvier 1920	31 août 1969
Kuper Island	Île Kuper	1er janvier 1920	31 août 1968
Lejac (Fraser Lake)	Fraser Lake (sur la réserve)	1er janvier 1920	31 août 1976
Lower Post	Lower Post (sur la réserve)	1er septembre 1951	31 août 1968
St. George's (Lytton)	Lytton	1er janvier 1920	31 août 1972
St. Mary's (Mission)	Mission	1er janvier 1920	31 août 1973
Sechelt	Sechelt (sur la réserve)	1er janvier 1920	31 août 1969
St. Paul's (Squamish, North Vancouver)	Squamish, North Vancouver	1er janvier 1920	31 août 1959
Pensionnats de l'Alberta			
Assumption (Hay Lake)	Assumption (Hay Lakes)	1er février 1951	8 septembre 1968

Pensionnat	Emplacement	Date d'ouverture (1er janvier 1920 selon la période visée par le recours collectif ou plus tard, selon le cas)	Date de fermeture de l'école ou de transfert
Blue Quills	Réserve de Saddle Lake (de 1898 à 1931) St. Paul (de 1931 à 1990)	1er janvier 1920	31 janvier 1971
Crowfoot (Blackfoot, St. Joseph's, Ste. Trinité)	Cluny	1er janvier 1920	31 décembre 1968
Desmarais (Wabiscaw Lake, St. Martin's, Wabisca Roman Catholic)	Desmarais, Wabasca/Wabisca	1er janvier 1920	31 août 1964
Ermineskin (Hobbema)	Hobbema (réserve indienne d'Ermineskin)	1er janvier 1920	31 mars 1969
Holy Angels (Fort Chipewyan, École des Saint-Anges)	Fort Chipewyan	1er janvier 1920	31 août 1956
Fort Vermillion (St. Henry's)	Fort Vermillion	1er janvier 1920	31 août 1964
Joussard (St. Bruno's)	Lesser Slave Lake	1920	31 octobre 1969
Morley (Stony/Stoney, a remplacé l'orphelinat McDougall)	Morley (réserve indienne Stony)	1er septembre 1922	31 juillet 1969
Old Sun (Blackfoot)	Gleichen (Blackfoot Reserve)	1er janvier 1920 **Fermetures provisoires :** De 1922 à février 1923 Du 26 juin 1928 au 17 février 1931	30 juin 1971
Sacred Heart (Peigan, Brocket)	Brocket (réserve indienne de Peigan)	1er janvier 1920	30 juin 1961
St. Cyprian (Queen Victoria's Jubliee Home, Peigan)	Brocket (réserve indienne de Peigan)	1er janvier 1920 **Fermeture provisoire :** Du 1er septembre 1953 au 12 octobre 1953	30 juin 1961

Pensionnat	Emplacement	Date d'ouverture (1er janvier 1920 selon la période visée par le recours collectif ou plus tard, selon le cas)	Date de fermeture de l'école ou de transfert
St. Mary's (Blood, Immaculate Conception)	Cardston (réserve indienne Blood)	1920 **Fermeture provisoire :** Du 1er septembre 1965 au 6 janvier 1966	31 août 1969
St. Paul's (Blood)	Cardston (réserve indienne Blood)	1er janvier 1920	31 août 1965
Sturgeon Lake (Calais, St. Francis Xavier)	Calais	1er janvier 1920	31 août 1959
Wabasca (St. John's)	Wabasca Lake	1er janvier 1920	31 août 1965
Whitefish Lake (St. Andrew's)	Whitefish Lake	1er janvier 1920	30 juin 1950
Grouard	West side of Lesser Slave Lake, Grouard	1er janvier 1920	30 septembre 1957
Pensionnats de la Saskatchewan			
Beauval (Lac la Plonge)	Beauval	1er janvier 1920	31 août 1968
File Hills	Balcarres	1er janvier 1920	30 juin 1949
Gordon's	Punnichy (réserve Gordon's)	1er janvier 1920 **Fermetures provisoires :** Du 30 juin 1947 au 14 octobre 1949 Du 25 janvier 1950 au 1er septembre 1953	31 août 1968

Pensionnat	Emplacement	Date d'ouverture (1er janvier 1920 selon la période visée par le recours collectif ou plus tard, selon le cas)	Date de fermeture de l'école ou de transfert
Lebret (Qu'Appelle, Whitecalf, St. Paul's High School)	Lebret	1er janvier 1920 **Fermeture provisoire :** Du 13 novembre 1932 au 29 mai 1936	31 août 1968
Marieval (Cowesess, Crooked Lake)	Réserve Cowesess	1er janvier 1920	31 août 1969
Muscowequan (Lestock, Touchwood)	Lestock	1er janvier 1920	31 août 1968
Prince Albert (Onion Lake Anglican, St. Alban's, All Saints, St. Barnabas, Lac La Ronge)	Onion Lake/Lac La Ronge/Prince Albert	1er janvier 1920	31 août 1968
St. Anthony's (Onion Lake, Sacred Heart)	Onion Lake	1er janvier 1920	31 mars 1969
St. Michael's (Duck Lake)	Duck Lake	1er janvier 1920	31 août 1968
St. Philip's	Kamsack	16 avril 1928	31 août 1968
Pensionnats du Manitoba			
Assiniboia (Winnipeg)	Winnipeg	2 septembre 1958	31 août 1967
Brandon	Brandon	1920 **Fermeture provisoire :** Du 1er juillet 1929 au 18 juillet 1930	31 août 1968
Churchill Vocational Centre	Churchill	9 septembre 1964	30 juin 1973
Cross Lake (St. Joseph's, Norway House)	Cross Lake	1er janvier 1920	30 juin 1969
Fort Alexander (Pine Falls)	Réserve nº 3 de Fort Alexander, à proximité de Pine Falls	1er janvier 1920	1er septembre 1969

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Pensionnat	Emplacement	Date d'ouverture (1er janvier 1920 selon la période visée par le recours collectif ou plus tard, selon le cas)	Date de fermeture de l'école ou de transfert
Guy Hill (Clearwater, the Pas, anciennement Sturgeon Landing, SK)	Clearwater Lake	5 septembre 1952	31 août 1968
Norway House	Norway House	1er janvier 1920 **Fermeture provisoire :** Du 29 mai 1946 au 1er septembre 1954	30 juin 1967
Pine Creek (Camperville)	Camperville	1er janvier 1920	31 août 1969
Portage la Prairie	Portage la Prairie	1er janvier 1920	31 août 1960
Sandy Bay	Sandy Bay Reserve	1er janvier 1920	30 juin 1970
Pensionnats de l'Ontario			
Bishop Horden Hall (Moose Fort, Moose Factory)	Île Moose	1er janvier 1920	31 août 1964
Cecilia Jeffrey (Kenora, Shoal Lake)	Lac Shoal	1er janvier 1920	31 août 1965
Fort Frances (St. Margaret's)	Fort Frances	1er janvier 1920	31 août 1968
McIntosh (Kenora)	McIntosh	27 mai 1925	30 juin 1969
Pelican Lake (Pelican Falls)	Sioux Lookout	1er septembre 1927	31 août 1968
Poplar Hill	Poplar Hill	1er septembre 1962	30 juin 1989
St. Anne's (Fort Albany)	Fort Albany	1er janvier 1920	30 juin 1976
St. Mary's (Kenora, St. Anthony's)	Kenora	1er janvier 1920	31 août 1968
Spanish Boys' School (Charles Garnier, St. Joseph's)	Spanish	1er janvier 1920	30 juin 1958
Spanish Girls' School (St. Joseph's, St. Peter's, St. Anne's)	Spanish	1er janvier 1920	30 juin 1962

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Pensionnat	Emplacement	Date d'ouverture (1er janvier 1920 selon la période visée par le recours collectif ou plus tard, selon le cas)	Date de fermeture de l'école ou de transfert
Pensionnats du Québec			
Fort George (anglican)	Fort George	1er septembre 1933 **Fermeture provisoire :** Du 26 janvier 1943 au 9 juillet 1944	31 août 1971
Fort George (catholique romain)	Fort George	1er septembre 1937	30 juin 1978
Point Bleue	Point Bleue	6 octobre 1960	31 août 1968
Sept-Îles	Sept-Îles	2 septembre 1952	31 août 1969
Pensionnats de la Nouvelle-Écosse			
Shubenacadie	Shubenacadie	1er septembre 1929	30 juin 1967
Pensionnats des Territoires du Nord-Ouest			
Aklavik (Immaculate Conception)	Aklavik	1er juillet 1926	30 juin 1959
Aklavik (All Saints)	Aklavik	1er août 1936	31 août 1959
Fort Providence (Sacred Heart)	Fort Providence	1er janvier 1920	30 juin 1960
Fort Resolution (St. Joseph's)	Fort Resolution	1er janvier 1920	31 décembre 1957
Hay River (St. Peter's)	Hay River	1er janvier 1920	31 août 1937
Pensionnats du Yukon			
Carcross (Chooutla)	Carcross	1er janvier 1920 **Fermeture provisoire :** Du 15 juin 1943 au 1er septembre 1944	30 juin 1969
Whitehorse Baptist Mission	Whitehorse	1er septembre 1947	30 juin 1960
Shingle Point Eskimo Residential School	Shingle Point	16 septembre 1929	31 août 1936

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Liste 2 – Pensionnats où il n'y a pas d'élèves externes connus

Pensionnat	Emplacement	Date d'ouverture (1er janvier 1920 selon la période visée par le recours collectif ou plus tard, selon le cas)	Date de fermeture ou de transfert
Pensionnats de la Colombie-Britannique			
Ahousaht	Ahousaht (réserve Maktosis)	1er janvier 1920	26 janvier 1940
Coqualeetza de 1924 à 1940	Chilliwack	1er janvier 1924	30 juin 1940
Cranbrook (St. Eugene's, Kootenay)	Cranbrook (sur la réserve)	1er janvier 1920	23 juin 1965
St. Michael's (Alert Bay Girls' Home, Alert Bay Boys' Home)	Alert Bay (sur la réserve)	1er janvier 1920	31 août 1960
Pensionnats de l'Alberta			
Edmonton (Poundmaker, anciennement Red Deer Industrial)	St. Albert	1er mars 1924 **Fermetures provisoires :** Du 1er juillet 1946 au 1er octobre 1946 Du 1er juillet 1951 au 5 novembre 1951	31 août 1960
Lesser Slave Lake (St. Peter's)	Lesser Slave Lake	1er janvier 1920	30 juin 1932
St. Albert (Youville)	St. Albert, Youville	1er janvier 1920	30 juin 1948
Sarcee (St. Barnabas)	Sarcee Junction, T'suu Tina (réserve indienne Sarcee)	1er janvier 1920	30 septembre 1921
Pensionnats de la Saskatchewan			
Round Lake	Broadview	1er janvier 1920	31 août 1950
Sturgeon Landing (remplacé par Guy Hill, MB)	Sturgeon Landing	1er septembre 1926	21 octobre 1952
Thunderchild (Delmas, St. Henri)	Delmas	1er janvier 1920	13 janvier 1948
Pensionnats du Manitoba			
Birtle	Birtle	1er janvier 1920	30 juin 1970

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Pensionnat	Emplacement	Date d'ouverture (1er janvier 1920 selon la période visée par le recours collectif ou plus tard, selon le cas)	Date de fermeture ou de transfert
Dauphin (anciennement McKay)	The Pas/Dauphin	Voir McKay ci-dessous	Voir McKay ci-dessous
Elkhorn (Washakada)	Elkhorn	1er janvier 1920 **Fermeture provisoire :** De 1920 au 1er septembre 1923	30 juin 1949
McKay (The Pas, remplacé par Dauphin)	The Pas/Dauphin	1er janvier 1920 **Fermeture provisoire :** Du 19 mars 1933 au 1er septembre 1957	31 août 1968
Pensionnats de l'Ontario			
Chapleau (St. John's)	Chapleau	1er janvier 1920	31 juillet 1948
Mohawk Institute	Brantford	1er janvier 1920	31 août 1968
Mount Elgin (Muncey, St. Thomas)	Muncey	1er janvier 1920	30 juin 1946
Shingwauk	Sault Ste. Marie	1er janvier 1920	30 juin 1970
St. Joseph's/Fort William	Fort William	1er janvier 1920	1er septembre 1968
Stirland Lake High School (Wahbon Bay Academy)	Stirland Lake	1er septembre 1971	30 juin 1991
Cristal Lake High School	Stirland Lake	1er septembre 1976	30 juin 1986
Pensionnats du Québec			
Amos	Amos	1er octobre 1955	31 août 1969
La Tuque	La Tuque	1er septembre 1963	30 juin 1970

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ANNEXE F

PLAN DE LA SOCIÉTÉ DE REVITALISATION POUR LES ÉLÈVES EXTERNES

Les parties ont convenu de procéder au règlement des réclamations du groupe des survivants et du groupe des descendants (« survivants », « descendants ») dans le cadre du recours collectif *Gottfriedson c. Canada*. En vertu de la convention de règlement, les parties ont convenu que le Canada versera 50 millions de dollars pour créer la Société de revitalisation pour les élèves externes (la « société »). Les parties conviennent que la société a pour but de soutenir les survivants et les descendants dans le cadre d'activités et de programmes relatifs à la guérison, au bien-être, à l'éducation, à la langue, à la culture, à l'héritage et à la commémoration.

L'argent sera utilisé par la société pour financer des activités et des programmes au profit des survivants et des descendants ayant pour objectifs de :

a. revitaliser et protéger les langues autochtones des survivants et des descendants;

b. protéger et revitaliser les cultures autochtones des survivants et des descendants;

c. rechercher la guérison et le bien-être des survivants et des descendants;

d. protéger le patrimoine autochtone des survivants et des descendants;

e. promouvoir l'éducation et la commémoration.

Les activités et les programmes ne sauraient faire double emploi à ceux du gouvernement du Canada. Des subventions seront accordées aux survivants et aux descendants pour financer des activités et des programmes destinés à favoriser la guérison et à remédier aux pertes de langues, de culture, de bien-être et de patrimoine que les survivants ont subies lorsqu'ils fréquentaient les pensionnats indiens en tant qu'élèves externes.

La société sera constituée en vertu de la *Societies Act* de la Colombie-Britannique avant la date de mise en œuvre et sera dûment enregistrée auprès de chaque gouvernement au Canada dans la mesure requise par ceux-ci. La société disposera de 5 à

11 administrateurs. L'un de ces administrateurs sera nommé par le gouvernement du Canada, mais ne sera employé par ce dernier. Les parties veilleront à ce que les autres administrateurs assurent une représentation régionale adéquate dans tout le Canada.

La société aura un personnel administratif restreint et fera appel à des consultants financiers pour lui fournir des conseils en matière d'investissement. Une fois les fonds investis, les dépenses de la Société seront financées par les revenus de placement.

Conseil consultatif

Les administrateurs seront encadrés par un conseil consultatif composé de personnes nommées par les administrateurs, qui s'assureront de la représentation régionale, la compréhension et la connaissance de la perte et de la revitalisation des langues, des cultures, du bien-être et du patrimoine autochtones.

Le conseil consultatif donnera son avis aux administrateurs sur toutes les activités des administrateurs quant aux activités de la société, y compris en ce qui concerne l'élaboration et la mise en œuvre d'une politique pour les demandes de financement de la société dans le cadre de celles-ci.

ANNEXE G

ORDONNANCE

LA COUR ORDONNE ce qui suit :

1. L'action susmentionnée est approuvée en tant que recours collectif aux conditions suivantes :

   a. Le groupe (membres du recours collectif) est défini comme suit :

      La bande indienne Tk'emlúps te Secwépemc, la bande indienne de Secheltm et toute autre bande qui :

      (i) a ou avait des membres qui sont ou ont été membres du groupe des survivants, ou dont la communauté abrite un pensionnat indien;

      (ii) est spécifiquement ajoutée à cette réclamation avec un ou plusieurs pensionnats spécifiquement déterminés.

   b. Les représentants demandeurs de ce groupe sont :

      la bande indienne de Tk'emlúps te Secwépemc;

      la bande indienne de Sechelt.

   c. Les réclamations sont fondées sur :

      Des manquements à des obligations fiduciaires et constitutionnelles, la violation de droits ancestraux, des violations de conventions ou de pactes internationaux, des violations du droit international commise par le Canada ou pour son compte dont le Canada est redevable.

   d. Les mesures de redressement demandées par le recours collectif sont les suivantes :

      i. une déclaration portant que la bande indienne de Sechelt et la bande

indienne Tk'emlúps te Secwépemc ainsi que tous les membres du groupe ont des droits ancestraux de parler leurs langues traditionnelles, d'observer leurs coutumes traditionnelles et leurs pratiques religieuses;

ii. une déclaration portant que le Canada avait des obligations fiduciaires, constitutionnelles, d'origine législative et en common law envers les membres du recours collectif, qu'il a manqué à ces obligations et qu'il a violé des conventions et des pactes internationaux ainsi que le droit international, en rapport avec les fins, l'établissement, le financement, le fonctionnement, la supervision, le contrôle, l'entretien et le soutien du PIS, du PIK et d'autres pensionnats indiens déterminés;

iii. une déclaration portant que la politique relative aux pensionnats, le PIK, le PIS et les pensionnats déterminés ont causé des dommages culturels, linguistiques et sociaux et un tort irréparable aux membres du recours collectif;

iv. une déclaration portant que le Canada a violé ou viole les droits linguistiques et culturels (ancestraux ou autres) des membres du recours collectif ainsi que des violations de conventions et de pactes internationaux et des violations du droit international comme conséquence de son établissement, son financement, son administration, sa supervision, son contrôle, son entretien et son soutien de la politique relative aux pensionnats et les pensionnats déterminés et du fait que le Canada a obligé les survivants à les fréquenter;

v. une déclaration portant que le Canada est responsable envers les membres du recours collectif des dommages causés par son manquement à des obligations fiduciaires et constitutionnelles, d'origine législative et en common law, et par sa violation de droits ancestraux ainsi que par des violations de conventions et

de pactes internationaux et des violations du droit international, en rapport avec les fins, l'établissement, le financement, l'administration, la supervision, le contrôle, l'entretien et le soutien des pensionnats déterminés et leur fréquentation obligatoire par les membres du groupe des survivants;

vi. les dommages-intérêts non pécuniaires et pécuniaires et les dommages-intérêts spéciaux dont le Canada est redevable pour manquement à des obligations fiduciaires et constitutionnelles et violation de droits ancestraux ainsi que pour violations de conventions et de pactes internationaux et violations du droit international, y compris des montants pour défrayer le coût de soins en cours et pour restaurer, protéger et préserver le patrimoine linguistique et culturel du groupe;

vii. la construction et l'entretien de centres de guérison et d'éducation au sein des collectivités appartenant au groupe et les autres centres ou activités susceptibles d'atténuer les pertes subies et que la Cour estime indiqués et justes, le cas échéant;

viii. les dommages-intérêts exemplaires et punitifs dont le Canada est redevable;

ix. des intérêts et les dépens avant et après jugement.

e. Les questions communes de fait ou de droit sont les suivantes :

a. Du fait des fins, du fonctionnement ou de la gestion de l'un quelconque des pensionnats durant la période visée par le recours collectif, le défendeur a-t-il manqué à une obligation fiduciaire qu'il avait envers le groupe de ne pas détruire leur langue et leur culture?

b. Du fait des fins, du fonctionnement ou de la gestion de l'un quelconque des pensionnats durant la période visée par le recours collectif, le défendeur a-t-il violé les droits culturels ou les droits linguistiques, ancestraux ou autres, du groupe;

c. Si la réponse à l'une quelconque des questions énoncées ci-dessus aux alinéas a) à b) est oui, la Cour peut-elle procéder à une détermination globale du montant des dommages subis par le groupe dans le cadre du procès relatif aux questions communes?

d. Si la réponse à l'une quelconque des questions énoncées ci-dessus aux alinéas a) à d) est oui, le défendeur s'est-il rendu coupable d'une conduite qui justifie l'octroi de dommages-intérêts punitifs?

e. Si la réponse à la question énoncée ci-dessus à l'alinéa d) est oui, quel montant de dommages-intérêts punitifs devrait être accordé?

f. Les définitions suivantes s'appliquent à la présente ordonnance :

a. « Autochtone(s) » ou « enfants autochtone(s) » Une ou des personnes dont les droits sont reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*.

b. « Droit ancestral » ou « droits ancestraux » Tous les droits ancestraux et issus de traités reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*.

c. « Convention » La Convention de règlement relative aux pensionnats indiens datée du 10 mai 2006 conclue par le Canada pour régler les

réclamations relatives à des pensionnats approuvée dans les ordonnances accordées dans divers ressorts partout au Canada.

d. « Canada » La défenderesse, Sa Majesté la Reine.

e. « Période visée par le recours collectif » La période de 1920 à 1997.

f. « Dommages culturels, linguistiques et sociaux » Le dommage ou le préjudice que la création et la mise en œuvre de pensionnats et l'élaboration et la mise en œuvre de la politique relative aux pensionnats a causé aux coutumes, aux pratiques et au mode de vie éducatifs, gouvernementaux, économiques, culturels, linguistiques, spirituels et sociaux, aux structures de gouvernance traditionnelles ainsi qu'à la sécurité et au bien-être communautaire et individuel des Autochtones.

g. « Pensionnat(s) déteminés(s) » Le PIK et le PIS ou tout autre pensionnat désigné expressément comme membre du groupe des bandes.

h. « PIK » Le pensionnat indien de Kamloops.

i. « Pensionnats » Tous les pensionnats indiens reconnus en vertu de la Convention et énumérés à l'annexe A jointe à la présente ordonnance, laquelle annexe peut être modifiée de temps à autre par ordonnance de la Cour.

j. « Politique relative aux pensionnats » La politique du Canada concernant la mise en œuvre des pensionnats indiens.

k. « Survivants » Tous les autochtones qui ont fréquenté un pensionnat indien en tant qu'élève ou à des fins éducatives pendant une période quelconque au cours de la période visée par le recours collectif, à l'exclusion, pour tout survivant

individuel, des périodes pour lesquelles celui-ci a reçu une indemnité au moyen du paiement d'expérience commune en vertu de la convention de règlement. Pour plus de précision, les survivants sont tous ceux qui étaient membres du groupe de survivants précédemment certifié dans le cadre de cette affaire, dont les réclamations ont été réglées selon les conditions établies par la convention de règlement signée le [DATE] et approuvée par la Cour fédérale le [DATE];

l. « PIS » Le pensionnat indien de Sechelt.

g. Les membres du recours collectif sont les bandes indiennes demanderesses ainsi que les bandes indiennes qui se sont inscrites avant la date limite d'inscription fixée précédemment par la Cour.

h. L'une ou l'autre des parties peut demander à ce tribunal de modifier la liste des pensionnats indiens figurant à l'annexe « A » ci-jointe, aux fins de cette affaire.

Juge

ANNEXE « A »
jointe à l'ordonnance du juge MacDonald

LISTE DES PENSIONNATS

Pensionnats de la Colombie-Britannique

Ahousaht
Alberni
Cariboo (St. Joseph's, William's Lake)
Christie (Clayoquot, Kakawis)
Coqualeetza de 1924 à 1940
Cranbrook (St. Eugene's, Kootenay)
Kamloops
Île Kuper
Lejac (Fraser Lake)
Lower Post
St George's (Lytton)
St. Mary's (Mission)
St. Michael's (Alert Bay Girls' Home, Alert Bay Boys' Home)
Sechelt
St. Paul's (Squamish, North Vancouver)
Port Simpson (Crosby Home for Girls)
Kitimaat
Anahim Lake Dormitory (de septembre 1968 à juin 1977)

Pensionnats de l'Alberta

Assumption (Hay Lake)
Blue Quills (Saddle Lake, Lac la Biche, Sacred Heart)
Crowfoot (Blackfoot, St. Joseph's, Ste. Trinité)
Desmarais (Wabiscaw Lake, St. Martin's, Wabisca Roman Catholic)
Edmonton (Poundmaker, anciennement Red Deer Industrial)
Ermineskin (Hobbema)
Holy Angels (Fort Chipewyan, École des Saint-Anges)
Fort Vermilion (St. Henry's)
Joussard (St. Bruno's)
Lac La Biche (Notre Dame des Victoires)
Lesser Slave Lake (St. Peter's)

Morley (Stony/Stoney, a remplacé l'orphelinat McDougall)
Old Sun (Blackfoot)
Sacred Heart (Peigan, Brocket)
St. Albert (Youville)
St. Augustine (Smokey-River)
St. Cyprian (Queen Victoria's Jubilee Home, Peigan)
St. Joseph's (High River, Dunbow)
St. Mary's (Blood, Immaculate Conception)
St. Paul's (Blood)
Sturgeon Lake (Calais, St. Francis Xavier)
Wabasca (St. John's)
Whitefish Lake (St. Andrew's)
Grouard jusqu'en décembre 1957
Sarcee (St. Barnabas)

Pensionnats de la Saskatchewan

Beauval (Lac la Plonge)
File Hills
Gordon's
Lac La Ronge (voir Prince Albert)
Lebret (Qu'Appelle, Whitecalf, St. Paul's High School)
Marieval (Cowesess, Crooked Lake)
Muscowequan (Lestock, Touchwood)
Onion Lake Anglican (voir Prince Albert)
Prince Albert (Onion Lake, St. Alban's, All Saints, St. Barnabas, Lac La Ronge)
Regina
Round Lake
St. Anthony's (Onion Lake, Sacred Heart)
St. Michael's (Duck Lake)
St. Philip's
Sturgeon Landing (remplacé par Guy Hill, MB)
Thunderchild (Delmas, St. Henri)
Crowstand
Fort Pelly
Cote Improved Federal Day School (septembre 1928 à juin 1940)

Pensionnats du Manitoba

Assiniboia (Winnipeg)

Birtle

Brandon

Churchill Vocational Centre

Cross Lake (St. Joseph's, Norway House)

Dauphin (anciennement McKay)

Elkhorn (Washakada)

Fort Alexander (Pine Falls)

Guy Hill (Clearwater, the Pas, anciennement Sturgeon Landing, SK)

McKay (The Pas, remplacé par Dauphin)

Norway House

Pine Creek (Campeville)

Portage la Prairie

Sandy Bay

Notre Dame Hostel (Norway House Catholic, Jack River Hostel, remplacé par Jack River Annex à Cross Lake)

Pensionnats de l'Ontario

Bishop Horden Hall (Moose Fort, Moose Factory)

Cecilia Jeffrey (Kenora, Shoal Lake)

Chapleau (St. John's)

Fort Frances (St. Margaret's)

McIntosh (Kenora)

Mohawk Institute

Mount Elgin (Muncey, St. Thomas)

Pelican Lake (Pelican Falls)

Poplar Hill

St. Anne's (Fort Albany)

St. Mary's (Kenora, St. Anthony's)

Shingwauk

Spanish Boys' School (Charles Garnier, St. Joseph's)

Spanish Girls' School (St. Joseph's, St. Peter's, St. Anne's)

St. Joseph's/Fort William

Stirland Lake High School (Wahbon Bay Academy) du 1er septembre 1971 au 30 juin 1991
Cristal Lake High School (du 1er septembre 1976 au 30 juin 1986)

Pensionnats du Québec

Amos
Fort George (anglican)
Fort George (catholique romain)
La Tuque
Point Bleue
Sept-Îles
Foyers fédéraux à Great Whale River
Foyers fédéraux à Port Harrison
Foyers fédéraux à George River
Foyer fédéral à Payne Bay (Bellin)
Fort George Hostels (du 1er septembre 1975 au 30 juin 1978)
Mistassini Hostels (du 1er septembre 1971 au 30 juin 1978)

Pensionnats de la Nouvelle-Écosse

Shubenacadie

Pensionnats du Nunavut

Chesterfield Inlet (Joseph Bernier, Turquetil Hall)
Foyers fédéraux à Panniqtuug/Pangnirtang
Foyers fédéraux à Broughton Island/Qikiqtarjuaq
Foyers fédéraux à Cape Dorset Kinngait
Foyers fédéraux à Eskimo Point/Arviat
Foyers fédéraux à Igloolik/Iglulik
Foyers fédéraux à Baker Lake/Qamani'tuaq
Foyers fédéraux à Pond Inlet/Mittimatalik
Foyers fédéraux à Cambridge Bay
Foyers fédéraux à Lake Harbour
Foyers fédéraux à Belcher Islands
Foyers fédéraux à Frobisher Bay/Ukkivik
Federal Tent Hostel à Coppermine

Pensionnats des Territoires du Nord-Ouest

Aklavik (Immaculate Conception)

Aklavik (All Saints)

Fort McPherson (Fleming Hall)

Ford Providence (Sacred Heart)

Fort Resolution (St. Joseph's)

Fort Simpson (Bompas Hall)

Fort Simpson (Lapointe Hall)

Fort Smith (Breynat Hall)

HayRiver (St. Peter's)

Inuvik (Grollier Hall)

Inuvik (Stringer Hall)

Yellowknife (Akaitcho Hall)

Fort Smith -Grandin College

Foyer fédéral à Fort Franklin

Pensionnats du Yukon

Carcross (Chooulta)

Yukon Hall (Whitehorse/Protestant Hostel)

Coudert Hall (Whitehorse Hostel/Student Residence - remplacé par Yukon Hall)

Whitehorse Baptist Mission

Shingle Point Eskimo Residential School

St. Paul's Hostel de septembre 1920 à juin 1943

ANNEXE H

Modifié en vertu de l'ordonnance du Juge McDonald
Fait _____

Dossier nº T-1542-13

RECOURS COLLECTIF

FORMULE 171A - Règle 171

COUR FÉDÉRALE

ENTRE :

CHEF SHANE GOTTFRIEDSON, au nom de la BANDE INDIENNE DE TK'EMLÚPS TE SECWÉPEMC et

CHEF GARRY FESCHUK, au nom de la BANDE INDIENNE DE SECHELT

DEMANDEURS

et

Sa Majesté la Reine du chef du Canada, représentée par LE PROCUREUR GÉNÉRAL DU CANADA

DÉFENDERESSE

DEUXIÈME DÉCLARATION MODIFIÉE

AU DÉFENDEUR

UNE INSTANCE A ÉTÉ INTRODUITE CONTRE VOUS par le demandeur. La cause d'action est exposée dans les pages suivantes.

SI VOUS DÉSIREZ CONTESTER L'INSTANCE, vous-même ou un avocat vous représentant devez préparer une défense selon la formule 171B des Règles des Cours fédérales, la signifier à l'avocat du demandeur ou, si ce dernier n'a pas retenu les services d'un avocat, au demandeur lui-même, et la déposer, accompagnée de la preuve de sa signification, à un bureau local de la Cour, DANS LES TRENTE JOURS suivant la date à laquelle la présente déclaration vous est signifiée, si la signification est faite au Canada.

Si la signification est faite aux États-Unis d'Amérique, vous avez quarante jours pour signifier et déposer votre défense. Si la signification est faite en dehors du Canada et des États-Unis d'Amérique, le délai est de soixante jours.

Des exemplaires des Règles des Cours fédérales ainsi que les renseignements concernant les bureaux locaux de la Cour et autres renseignements utiles peuvent être obtenus, sur demande, de l'administrateur de la Cour, à Ottawa (no de téléphone 613-992-4238), ou à tout bureau local.

SI VOUS NE CONTESTEZ PAS L'INSTANCE, un jugement peut être rendu contre vous en votre absence sans que vous receviez d'autres avis.

(Date)

Délivré par :_____
(Fonctionnaire du greffe)

Adresse du bureau local :_____

À :

Sa Majesté la Reine du chef du Canada,
au ministre des Affaires indiennes et du Nord canadien et
au procureur général du Canada
Ministère de la Justice
900 - 840 Howe Street
Vancouver, B.C. V6Z 2S9

MESURES DE REDRESSEMENT DEMANDÉES

1. Les représentants demandeurs, au nom des collectivités indiennes de Tk'emlúps te Secwépemc et de Sechelt, et au nom des membres du recours collectif, demandent :

(a) une déclaration selon laquelle la bande indienne de Sechelt (désignée sous le nom de bande shíshálh ou shíshálh) et la bande Tk'emlúps, ainsi que tous les membres du groupe des bandes indiennes du recours collectif autorisé par la Cour, ont le droit ancestral de parler leurs langues traditionnelles et de se livrer à leurs coutumes et pratiques religieuses traditionnelles;

(b) une déclaration portant que le Canada avait des obligations fiduciaires, constitutionnelles, d'origine législative et en common law envers les membres du recours collectif, qu'il a manqué à ces obligations et qu'il violé des conventions et des pactes internationaux ainsi que le droit international, en rapport avec les fins, l'établissement, le financement, le fonctionnement, la supervision, le contrôle, l'entretien et le soutien du PIS, du PIK et d'autres pensionnats indiens déterminés;

(c) une déclaration portant que la politique relative aux pensionnats, le PIK, le PIS et les pensionnats déterminés ont causé des dommages culturels, linguistiques et sociaux et un tort irréparable aux membres du recours collectif;

(d) une déclaration portant que le Canada a violé ou viole les droits linguistiques et culturels (ancestraux ou autres) des membres du recours collectif, ainsi que des violations de conventions et de pactes internationaux et des violations du droit international comme conséquence de son établissement, son financement, son administration, sa supervision, son contrôle, son entretien et son soutien de la politique relative aux pensionnats et les pensionnats déterminés et du fait que le Canada a obligé les membres du groupe des survivants à les fréquenter;

(e) une déclaration portant que le Canada est responsable envers les membres du recours collectif des dommages causés par son manquement à des obligations fiduciaires et constitutionnelles, d'origine législative et en common law, et par sa violation de droits ancestraux ainsi que par des violations de conventions et de pactes internationaux et des violations du droit international, en rapport avec les fins, l'établissement, le financement, l'administration, la supervision, le contrôle, l'entretien et le soutien des pensionnats déterminés et leur fréquentation obligatoire par les membres du groupe des survivants;

(f) les dommages-intérêts généraux non pécuniaires et pécuniaires et les dommages-intérêts spéciaux dont le Canada est redevable pour manquement à des obligations fiduciaires, constitutionnelles, d'origine législative et en common law et violation de droits ancestraux, ainsi que pour violations de conventions et de pactes internationaux et violations du droit international, en plus des montants pour rembourser le coût de soins en cours et l'élaboration de plans de bien-être pour les

membres du recours collectif ainsi que les coûts de la restauration, de la protection et de la préservation du patrimoine linguistique et culturel du groupe des bandes;

(g) la construction par le Canada de centres de guérison au sein des collectivités appartenant au groupe ;

(h) les dommages-intérêts exemplaires et punitifs dont le Canada est redevable;

(i) les intérêts avant et après jugement ;

(j) les coûts de la présente action;

(k) toute autre réparation que la Cour pourrait estimer juste.

DÉFINITIONS

2. Les définitions suivantes s'appliquent aux fins de la présente réclamation :

(a) « Autochtone(s) » ou « enfants autochtone(s) » Une ou des personnes dont les droits sont reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*.

(b) « Droit ancestral » ou « droits ancestraux » Tous les droits ancestraux et issus de traités reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*.

(c) « Loi » désigne la *Loi sur les Indiens*, L.R.C. 1985, c I-5 et ses prédécesseures, modifiées le cas échéant ;

(d) « Agents » désigne les fonctionnaires, les sous-traitants, les agents et les employés du Canada ainsi que les exploitants, les gestionnaires, les administrateurs, les enseignants et le personnel de chacun des pensionnats;

(e) « Convention » désigne la convention de règlement relative aux pensionnats indiens datée du 10 mai 2006 conclue par le Canada pour régler les réclamations relatives à des pensionnats approuvée dans les ordonnances accordées dans divers ressorts partout au Canada.

(f) « Groupe » désigne la bande indienne Tk'emlúps te Secwépemc et la bande shíshálh et toute autre bande indienne autochtone qui :

(i) a ou avait des membres qui sont ou ont été membres du groupe des survivants, ou dont la communauté abrite un pensionnat indien;

(ii) est spécifiquement ajouté la présente demande avec un ou plusieurs pensionnats spécifiquement déterminés.

(g) « Canada » La défenderesse, Sa Majesté la Reine du chef du Canada, représentée par le Procureur général du Canada ;

(h) « Période visée par le recours » désigne la période allant de 1920 à 1997 ;

(i) « Dommages culturels, linguistiques et sociaux » Le dommage ou le préjudice que la création et la mise en œuvre de pensionnats et l'élaboration et la mise en œuvre de la politique relative aux pensionnats a causé aux coutumes, aux pratiques et au mode de vie éducatifs, gouvernementaux, économiques, culturels, linguistiques, spirituels et sociaux, aux structures de gouvernance traditionnelles ainsi qu'à la sécurité et au bien-être communautaire et individuel des Autochtones.

(j) « Pensionnat(s) déteminé(s) » désigne le pensionnat PIK et le pensionnat PIS ;

(k) « PIK » Le pensionnat indien de Kamloops.

(l) « Pensionnats » Tous les pensionnats indiens reconnus en vertu de la Convention ;

(m) « Politique relative aux pensionnats » La politique du Canada concernant la mise en œuvre des pensionnats indiens.

(n) « PIS » Le pensionnat indien de Sechelt ;

(o) « Survivants » désigne tous les Autochtones ayant fréquenté un pensionnat en tant qu'élève ou à des fins éducatives pendant une période quelconque au cours de la période visée par le recours collectif, excepté tout membre individuel du recours collectif, des périodes au cours desquelles ce membre du recours collectif a reçu une indemnité au titre de paiement d'expérience commune en vertu de la convention de règlement relative aux pensionnats indiens. Pour plus de précision, les survivants sont tous ceux qui étaient membres du groupe de survivants précédemment certifié dans le cadre de cette affaire, dont les réclamations ont été réglées selon les conditions établies par la convention de règlement signée le [DATE] et approuvée par la Cour fédérale le [DATE].

LES PARTIES

Les demandeurs

3. La bande indienne Tk'emlúps te Secwépemc et la bande shíshálh sont des bandes indiennes autochtones et elles agissent toutes deux en tant que représentants demandeurs du groupe. Les membres du recours collectif représentent les intérêts collectifs et l'autorité de chacune de leurs communautés respectives.

Le défendeur

4. Le Canada est représenté dans cette procédure par le Procureur général du Canada. Le procureur général du Canada représente les intérêts du Canada et du Ministre des Affaires autochtones et du Nord Canada ainsi que des ministres responsables « Indiens » l'ayant précédé en vertu de l'article 91 (24) de la *Loi constitutionnelle* de 1867, et qui étaient, à toutes les époques en cause, responsables de l'élaboration et de la mise en œuvre de la politique relative aux pensionnats, ainsi que de l'entretien et du fonctionnement du PIK et du PIS.

EXPOSÉ DES FAITS

5. Au cours des dernières années, le Canada a reconnu l'impact dévastateur de sa politique relative aux pensionnats sur les peuples autochtones du Canada. La politique relative aux pensionnats du Canada a été conçue afin d'éradiquer la culture et l'identité autochtones et d'assimiler les peuples autochtones du Canada à la société eurocanadienne. Par cette politique, le Canada a sapé les fondements de l'identité de générations de peuples autochtones et a causé des dommages incommensurables aux personnes ainsi qu'aux communautés.

6. Le Canada a directement bénéficié de la politique relative aux pensionnats était le Canada, car ses obligations en ont été allégées, proportionnellement au nombre de générations et d'Autochtones qui ont cessé de reconnaître leur identité autochtone et ainsi moins exercé leurs droits garantis par la Loi et par les obligations fiduciaires et constitutionnelles, d'origine législative et en common law du Canada.

7. Le Canada a également bénéficié de la politique relative aux pensionnats, celle-ci ayant servi à affaiblir les revendications des peuples autochtones sur leurs terres et ressources traditionnelles. Le résultat a été la séparation des peuples autochtones de leurs cultures, de leurs traditions et finalement de leurs terres et de leurs ressources. Cette situation a rendu possible l'exploitation de ces terres et de ces

ressources par le Canada, non seulement sans le consentement des peuples autochtones, mais aussi, contrairement à leurs intérêts, à la Constitution du Canada et à la Proclamation royale de 1763.

8. La vérité de ce tort et les dommages causés ont maintenant été reconnus par le Premier ministre au nom du Canada, et par le règlement pancanadien des réclamations des personnes qui *ont résidé dans* les pensionnats du Canada en vertu de la convention de règlement ayant pris effet en 2007. Malgré la vérité et la reconnaissance du tort et des dommages causés, de nombreux membres des communautés autochtones du Canada ont été exclus de cette convention, non pas parce qu'ils n'ont pas *fréquenté* les pensionnats et subi des dommages culturels, linguistiques et sociaux, mais simplement parce qu'ils n'ont pas *résidé dans* des pensionnats.

9. La présente réclamation est présentée au nom des membres du recours collectif, composé de communautés autochtones au sein desquelles les pensionnats étaient situés, ou dont les membres sont ou étaient des survivants.

Le système de pensionnats

10. Les pensionnats ont été créés par le Canada avant 1874, en vue de l'éducation des enfants autochtones. Dès le début du vingtième siècle, le Canada a commencé à conclure des accords officiels avec diverses organisations religieuses (les « Églises ») pour assurer le fonctionnement des pensionnats. En vertu de ces accords, le Canada contrôlait, réglementait, supervisait et dirigeait tous les aspects du fonctionnement des pensionnats. Les Églises ont assuré le fonctionnement quotidien de nombreux pensionnats sous le contrôle, la supervision et la direction du Canada, pour lesquels le Canada a versé aux Églises une subvention *par personne*. En 1969, le Canada a directement repris le contrôle des opérations.

11. À partir de 1920, la politique des pensionnats prévoit la *fréquentation* obligatoire dans des pensionnats pour tous les enfants autochtones âgés de 7 à 15 ans. Le Canada a retiré la plupart des enfants autochtones de leur foyer et de leur communauté pour les déplacer dans des pensionnats qui se trouvaient souvent très loin. Cependant, dans certains cas, des enfants autochtones vivaient dans leurs foyers et au sein de leurs communautés; ceux-là devaient quand même fréquenter les pensionnats, mais en tant qu'élèves externes et non en tant que pensionnaires. Cette pratique a touché un nombre encore plus grand d'enfants au cours des dernières années de la politique relative aux pensionnats. Une fois dans un pensionnat, tous les enfants autochtones ont été confinés et privés de leur héritage, de leurs réseaux de soutien et de leur mode de vie; forcés d'adopter une langue étrangère et une culture qui leur était étrangère et punis en cas de manquement.

12. L'objectif de la politique relative aux pensionnats était l'intégration et l'assimilation complètes des enfants autochtones dans la culture eurocanadienne ainsi que l'effacement de leur langue, culture, religion et mode de vie traditionnels. Le Canada a voulu causer les dommages culturels, linguistiques et sociaux qui ont porté préjudice aux peuples et aux nations autochtones du Canada.

13. Le Canada a choisi d'être déloyal envers ses peuples autochtones, en mettant en œuvre la politique relative aux pensionnats dans son propre intérêt, notamment son intérêt économique, et au détriment et en ne tenant pas compte des intérêts des personnes autochtones envers lesquels le Canada avait des obligations fiduciaires et constitutionnelles. L'éradication intentionnelle de l'identité, de la culture, de la langue et des pratiques spirituelles autochtones, dans la mesure où elle est réussie, entraîne une réduction des obligations dues par le Canada en proportion du nombre d'individus, sur plusieurs générations, qui ne s'identifieraient plus comme autochtones et qui seraient moins susceptibles de revendiquer leurs droits en tant que personnes autochtones.

Les effets de la politique relative aux pensionnats sur les membres du recours collectif

La bande indienne Tk'emlúps

14. Les Tk'emlúpsemc, « le peuple du confluent », actuellement connus sous le nom de bande indienne Tk'emlúps te Secwépemc, sont des membres du peuple vivant le plus au nord du Plateau et des peuples Salish du continent de langue secwépemc (Shuswap) de la Colombie-Britannique. La bande indienne Tk'emlúps s'est établie sur une réserve actuellement adjacente à la ville de Kamloops, où le PIK a été établi par la suite.

15. Le secwepemctsin est la langue des Secwépemc. Il s'agit de l'unique moyen unique par lequel les connaissances et l'expérience culturelles, écologiques et historiques du peuple Secwépemc sont comprises et transmises entre les générations. C'est à travers la langue, les pratiques spirituelles et le passage de la culture et des traditions, notamment les rituels, le tambour, la danse, les chansons et les histoires, que les valeurs et les croyances du peuple Secwépemc sont comprises et partagées. Selon les Secwépemc, tous les aspects du savoir Secwépemc, notamment leur culture, leurs traditions, leurs lois et leurs langues, sont intégralement et essentiellement liés à leurs terres et à leurs ressources.

16. La langue, tout comme la terre, a été donnée aux Secwépemc par le Créateur afin de permettre la communication avec le peuple et le monde naturel. Cette communication a créé une relation de réciprocité et de coopération entre les Secwépemc et le monde naturel qui leur a permis de survivre et de s'épanouir dans des environnements difficiles. Ce savoir, transmis oralement de génération en génération, contenait les enseignements nécessaires au maintien de la culture, des traditions, des lois et de l'identité secwépemc.

17. Pour les Secwépemc, leurs pratiques spirituelles, leurs chants, leurs danses, leurs histoires orales, leurs récits et leurs cérémonies faisaient partie intégrante de leur vie et de leur société. Il est

absolument vital de conserver ces pratiques et traditions. Leurs chants, leurs danses, leurs percussions et leurs cérémonies traditionnelles relient les Secwépemc à leur terre et leur rappellent continuellement leurs responsabilités envers la terre, les ressources et le peuple Secwépemc.

18. Les cérémonies et pratiques spirituelles des Secwépemc, notamment leurs chants, leurs danses, leurs percussions et la transmission de leurs contes et de leur histoire, perpétuent leurs enseignements vitaux et leurs lois concernant la récolte des ressources, notamment des plantes médicinales, la chasse du gibier et la pêche du poisson, ainsi que la protection et la préservation respectueuses des ressources. Par exemple, conformément aux lois Secwépemc, les Secwépemc chantent et prient avant de récolter toute nourriture, tout médicament et toute autre matière provenant de la terre, et font une offrande pour remercier le Créateur et les esprits pour tout ce qu'ils prennent. Les Secwépemc croient que tous les êtres vivants ont un esprit et qu'il faut leur témoigner le plus grand respect. Ce sont ces croyances vitales et intégrales et ces lois traditionnelles, ainsi que d'autres éléments de la culture et de l'identité secwépemc, que le Canada a cherché à détruire avec la politique relative aux pensionnats.

La bande Shíshálh

19. La nation shíshálh, une branche des Premières nations salish de la côte, occupait à l'origine la partie sud de la côte de la Colombie-Britannique. Le peuple shíshálh s'est installé dans la région il y a des milliers d'années et regroupait environ 80 villages établis sur une vaste étendue de terre. Le peuple shíshálh se compose de quatre sous-groupes qui parlent la langue shashishalhem, qui est une langue distincte et unique, même si elle fait partie de la branche des Salish de la côte des langues salish.

20. La tradition shíshálh décrit la formation du monde shíshálh (l'histoire de Spelmulh). Tout commence par les esprits créateurs, envoyés par l'Esprit divin pour former le monde, ceux-ci ont creusé des vallées laissant une plage le long du bras de la Baie Porpoise. Plus tard, les transformateurs, un corbeau mâle et un vison femelle, ont ajouté des détails en sculptant des arbres et en formant des bassins d'eau.

21. La culture shíshálh comprend des chants, des danses et des percussions qui font partie intégrante de la culture et des pratiques spirituelles de ce peuple; elles constituent un lien avec la terre et le Créateur et permettent la transmission de son histoire et de ses croyances. Le peuple shíshálh avait recours au chant et à la danse pour raconter des histoires, bénir des événements et même à des fins de guérison. Leurs chants, danses et percussions symbolisent également les événements saisonniers majeurs qui font partie intégrante de la vie des Shíshálh. Leurs traditions comprennent également la fabrication et l'utilisation de masques, de paniers, de parures et d'outils pour la chasse et la pêche. Ce sont ces croyances vitales et intégrales et ces lois traditionnelles, ainsi que d'autres éléments de la culture et de l'identité shíshálh, que le Canada a cherché à détruire avec la politique relative aux pensionnats.

L'impact des pensionnats

22. Conformément à la politique relative aux pensionnats, une discipline stricte a été appliquée à tous les enfants autochtones ayant été contraints de fréquenter les pensionnats. À l'école, les enfants n'étaient pas autorisés à parler leur langue autochtone, même à leurs parents. Par conséquent, les membres de ces communautés autochtones étaient contraints d'apprendre l'anglais.

23. Conformément aux directives du Canada, notamment la politique relative aux pensionnats, la culture autochtone était strictement réprimée par les administrateurs de l'école. Au PIS, les membres des shishalh ont été contraints de brûler ou de donner aux agents du Canada des

mâts totémiques, des ornements, des masques et autres « objets chamaniques » et d'abandonner leurs potlatchs, leurs danses et leurs festivités hivernales, ainsi que d'autres éléments faisant partie intégrante de la culture et de la société autochtones des peuples shíshálh et Secwépemc.

24. Étant donné que le PIS était physiquement situé dans la communauté shíshálh, le Canada, à la fois directement et par l'intermédiaire de ses agents, surveillait les aînés et punissait ceux-ci sévèrement lorsqu'ils pratiquaient leur culture, parlaient leur langue ou transmettaient celles-ci aux générations futures. Malgré cette surveillance étroite, les membres du peuple shíshálh ont lutté, souvent sans succès, pour pratiquer, protéger et préserver leurs chansons, leurs masques, leurs danses et leurs autres pratiques culturelles.

25. Les Tk'emlúps te Secwépemc ont subi un sort semblable en raison de leur proximité avec le PIK.

26. On a inculqué aux enfants des pensionnats la honte de leur identité, de leur culture, de leur spiritualité et de leurs pratiques autochtones. On les qualifiait, entre autres épithètes méprisantes, de « sales sauvages » et de « païens » et on leur apprenait même à renoncer à leur identité. Le mode de vie, les traditions, les cultures et les pratiques spirituelles autochtones des membres du recours collectif ont été supplantés par l'identité eurocanadienne qui leur a été imposée par le Canada dans le cadre de la politique relative aux pensionnats.

27. Les membres du recours collectif ont perdu, en tout ou en partie, leur viabilité économique traditionnelle, leur autonomie gouvernementale et leurs lois, leur langue, leur assise territoriale et leurs enseignements fondés sur la terre, leurs pratiques spirituelles et religieuses traditionnelles, ainsi que le sens de leur identité collective.

28. La politique relative aux pensionnats, mise en œuvre par le biais des pensionnats, a dévasté les communautés du groupe sur les plans culturel, linguistique et social tout en modifiant leur mode de vie traditionnel.

Règlement entre le Canada et les anciens élèves pensionnaires

29. Depuis la fermeture des pensionnats jusqu'à la fin des années 1990, les communautés autochtones du Canada ont dû composer avec les dommages et les souffrances de leurs membres à la suite de la politique relative aux pensionnats, sans obtenir aucune reconnaissance de la part du Canada. Au cours de cette période, les survivants des pensionnats ont commencé à parler de plus en plus ouvertement des conditions horribles et des abus qu'ils ont subis, ainsi que de l'impact dramatique que ceux-ci ont eu sur leur vie. Durant ce temps, de nombreux survivants se sont suicidés ou ont se sont automédicamentés au point d'en mourir. Ces décès ont dévasté la vie et la stabilité des communautés représentées par le groupe.

30. En janvier 1998, le Canada a publié une déclaration de réconciliation présentant des excuses et reconnaissant l'échec de la politique relative aux pensionnats. Le Canada a reconnu que la politique relative aux pensionnats avait pour but d'assimiler les peuples autochtones et qu'il avait eu tort de poursuivre cet objectif. Les demandeurs plaident que la déclaration de réconciliation du Canada est une admission par le Canada des faits et des obligations énoncés dans les présentes et qu'elle est pertinente à la demande de dommages-intérêts des Demandeurs, en particulier les dommages-intérêts punitifs.

31. La déclaration de réconciliation affirme, en partie, ce qui suit :

> *Malheureusement, notre histoire en ce qui concerne le traitement des peuples autochtones est bien loin de nous inspirer de la fierté. Des attitudes empreintes de sentiments de supériorité raciale et culturelle ont mené à une*

> *répression de la culture et des valeurs autochtones. En tant que pays, nous sommes hantés par nos actions passées qui ont mené à l'affaiblissement de l'identité des peuples autochtones, à la disparition de leurs langues et de leurs cultures et à l'interdiction de leurs pratiques spirituelles. Nous devons reconnaître les conséquences de ces actes sur les nations qui ont été fragmentées, perturbées, limitées ou même anéanties par la dépossession de leurs territoires traditionnels, par la relocalisation des peuples autochtones et par certaines dispositions de la Loi sur les Indiens. Nous devons reconnaître que ces actions ont eu pour effet d'éroder les régimes politiques, économiques et sociaux des peuples et des nations autochtones.*
>
> *Avec ce passé comme toile de fond, on ne peut que rendre hommage à la force et à l'endurance remarquables des peuples autochtones qui ont préservé leur diversité et leur identité historique. Le gouvernement du Canada adresse aujourd'hui officiellement ses plus profonds regrets à tous les peuples autochtones du Canada à propos des gestes passés du gouvernement fédéral, qui ont contribué aux difficiles passages de l'histoire de nos relations.*
>
> *Un des aspects de nos rapports avec les peuples autochtones durant cette période, le système des écoles résidentielles, mérite une attention particulière. Ce système a séparé de nombreux enfants de leur famille et de leur collectivité et les a empêchés de parler leur propre langue, ainsi que d'apprendre leurs coutumes et leurs cultures. Dans les pires cas, il a laissé des douleurs et des souffrances personnelles qui se font encore sentir aujourd'hui dans les collectivités autochtones. Tragiquement, certains enfants ont été victimes de sévices physiques et sexuels.*
>
> *Le gouvernement reconnaît le rôle qu'il a joué dans l'instauration et l'administration de ces écoles. Particulièrement pour les personnes qui ont subi la tragédie des sévices physiques et sexuels dans des pensionnats, et pour celles qui ont porté ce fardeau en pensant, en quelque sorte, en être responsables, nous devons insister sur le fait que ce qui s'est passé n'était pas de leur faute et que cette situation n'aurait jamais dû se produire. À tous ceux d'entre vous qui ont subi cette tragédie dans les pensionnats, nous exprimons nos regrets les plus sincères. Afin de panser les blessures laissées par le régime des pensionnats, le gouvernement du Canada propose de travailler avec les Premières nations, les Inuits, les Métis, les communautés religieuses et les autres parties concernées pour résoudre les problèmes de longue date auxquels ils ont à faire face. Nous devons travailler ensemble pour trouver une stratégie de guérison en vue d'aider les personnes et les collectivités à affronter les conséquences de cette triste période de notre histoire…*

32. La réconciliation est un processus permanent. En renouvelant notre partenariat, nous devons veiller à ce que les erreurs qui ont marqué notre relation passée ne se reproduisent pas. Le

gouvernement du Canada reconnaît que les politiques visant à assimiler les peuples autochtones, hommes et femmes, n'étaient pas le moyen de bâtir une communauté forte… Le 11 juin 2008, le premier ministre Stephen Harper a présenté, au nom du Canada, des excuses (« Excuses ») reconnaissant les torts causés par la politique relative aux pensionnats indiens du Canada :

> *Pendant plus d'un siècle, les pensionnats indiens ont séparé plus de 150 000 enfants autochtones de leurs familles et de leurs communautés. Dans les années 1870, en partie afin de remplir son obligation d'instruire les enfants autochtones, le gouvernement fédéral a commencé à jouer un rôle dans l'établissement et l'administration de ces écoles.* ***Le système des pensionnats indiens visait deux objectifs principaux : isoler les enfants et les soustraire à l'influence de leurs foyers, de leurs familles, de leurs traditions et de leur culture, et les intégrer par l'assimilation dans la culture dominante.*** *Ces objectifs reposaient sur l'hypothèse que les cultures et les croyances spirituelles des Autochtones étaient inférieures. D'ailleurs, certains cherchaient, selon une expression devenue tristement célèbre,* ***« à tuer l'Indien au sein de l'enfant ».*** *Aujourd'hui, nous reconnaissons que cette politique d'assimilation était erronée, qu'elle a fait beaucoup de mal et qu'elle n'a aucune place dans notre pays.* ***[l'italique et les caractères gras sont de l'auteur]***

33. Dans ses excuses, le premier ministre a reconnu certains faits importants concernant la politique des pensionnats et son impact sur les enfants autochtones :

> *Le gouvernement du Canada a érigé un système d'éducation dans le cadre duquel de très jeunes enfants ont souvent été arrachés à leurs foyers et, dans bien des cas, emmenés loin de leurs communautés. Bon nombre d'entre eux étaient mal nourris, mal vêtus et mal logés. Tous ont été privés des soins et du soutien de leurs parents et des membres de leurs communautés. Les langues et cultures des Premières nations, des Inuits et des Métis étaient interdites dans ces écoles. Malheureusement, certains de ces enfants sont morts en pension et d'autres ne sont jamais retournés chez eux.*
>
> *Le gouvernement reconnaît aujourd'hui que les conséquences de la politique sur les pensionnats indiens ont été très néfastes et que cette politique a causé des dommages durables à la culture, au patrimoine et à la langue autochtones.*
>
> *L'héritage laissé par les pensionnats indiens a contribué à des problèmes sociaux qui persistent dans de nombreuses communautés aujourd'hui.*
>
> * * *

> *Nous reconnaissons maintenant que nous avons eu tort de couper les enfants de leur culture et de leurs traditions riches et vivantes, créant ainsi un vide dans tant de vies et de communautés, et nous nous excusons d'avoir agi ainsi. Nous reconnaissons maintenant qu'en séparant les enfants de leurs familles, nous avons réduit la capacité de nombreux anciens élèves à élever adéquatement leurs propres enfants et avons scellé le sort des générations qui ont suivi, et nous nous excusons d'avoir agi ainsi. Nous reconnaissons maintenant que, beaucoup trop souvent, ces institutions donnaient lieu à des cas de sévices ou de négligence et n'étaient pas contrôlées de manière adéquate, et nous nous excusons de ne pas avoir su vous protéger. En plus d'avoir vous-mêmes subi ces mauvais traitements pendant votre enfance, une fois devenus parents à votre tour, vous avez été impuissants à éviter le même sort à vos enfants, et nous le regrettons.*
>
> *Le fardeau de cette expérience pèse sur vos épaules depuis beaucoup trop longtemps. Ce fardeau nous revient directement, en tant que gouvernement et en tant que pays. Il n'y a pas de place au Canada pour que les attitudes qui ont inspiré le système de pensionnats indiens puissent prévaloir à nouveau. Vous tentez de vous remettre de cette épreuve depuis longtemps, et d'une façon très concrète, nous vous rejoignons maintenant dans ce cheminement. Le gouvernement du Canada présente ses excuses les plus sincères aux peuples autochtones du Canada pour avoir si profondément manqué à son devoir envers eux, et leur demande pardon.*

Le manquement du Canada à ses obligations envers les membres du recours collectif

34. De par l'élaboration de la politique relative aux pensionnats et par son exécution, soit la fréquentation forcée des pensionnats, le Canada a causé des pertes inestimables aux membres du recours collectif.

35. Les membres du recours collectif ont tous été affectés par la répression ou l'élimination de leurs cérémonies traditionnelles et par la perte de la structure de gouvernance héréditaire sur laquelle ils comptaient pour gouverner leurs peuples et leurs terres.

Les obligations du Canada

36. Le Canada était responsable de l'élaboration et de la mise en œuvre de tous les aspects de la politique relative aux pensionnats, notamment tout ce qui avait trait au fonctionnement et à l'administration des pensionnats. Les Églises ont servi d'agents du Canada afin de l'aider à

atteindre ses objectifs; le Canada étant responsable de ces objectifs et des moyens mis en œuvre en vue de leur réalisation. Le Canada était responsable de :

(a) l'administration de la Loi et des lois qui l'ont précédée ainsi que de toutes les autres lois relatives aux Autochtones et de tous les règlements promulgués en vertu de ces lois et de celles qui les ont précédées pendant la période visée par le recours;

(b) la gestion, du fonctionnement et de l'administration du ministère des Affaires indiennes et du Nord canadien et de ses prédécesseurs et des ministères et services connexes, ainsi que les décisions prises par ces ministères et services;

(c) la construction, du fonctionnement, de l'entretien, de la propriété, du financement, de l'administration, de la supervision, de l'inspection et de la vérification des pensionnats ainsi que de la création, la conception et la mise en œuvre du programme d'éducation visant les Autochtones qui les ont fréquentés;

(d) la sélection, du contrôle, de la formation, de la supervision et de la réglementation des exploitants des pensionnats, notamment leurs employés, préposés, agents et mandataires, et de la prise en charge, l'éducation, le contrôle et le bien-être des autochtones qui fréquentaient les pensionnats;

(e) la préservation, de la promotion, de la conservation et l'absence d'interférence avec les droits ancestraux, dont le droit de conserver et pratiquer leur culture, leur spiritualité, leur langue et leurs traditions, ainsi que le droit d'apprendre pleinement leur culture, leur spiritualité, leur langue et leurs traditions auprès de leur famille, de leur famille élargie et de leur communauté;

(f) la prise en charge et la surveillance de tous les survivants pendant qu'ils fréquentaient les pensionnats au cours de la période visée par le recours.

37. De plus, le Canada s'est engagé, pendant toute la période en cause, à respecter le droit international en ce qui concerne le traitement de sa population, ces obligations, qui ont été violées, constituant un engagement minimal envers les peuples autochtones du Canada, dont les membres du recours collectif. Plus spécifiquement, les violations commises par le Canada concernent le non-respect des dispositions et de l'esprit de :

(a) la *Convention pour la prévention et la répression du crime de génocide*, 78 RTNU 277 (entrée en vigueur : 12 janvier 1951), et en particulier l'article 2(b), (c) et (e) de cette convention, en s'engageant dans la destruction intentionnelle de la culture des enfants et des communautés autochtones, causant des blessures culturelles profondes et permanentes au groupe du recours collectif;

(b) la *Déclaration des droits de l'enfant*, Rés AG 1386 (XIV), Doc off AGNU, 14e session, supp n° 16, Doc NU A/4354 (1959) 19 en ne fournissant pas aux enfants autochtones les moyens nécessaires de se développer de façon normale, matériellement et spirituellement, et en ne les mettant pas en mesure de gagner leur vie et de les protéger contre l'exploitation;

(c) la *Convention relative aux Droits de l'enfant*, Rés AG 44/25, annexe, Doc off AGNU, 44e session, supp nº 49, Doc NU A/44/49 (1989) 167; 1577 RTNU 3; 28 ILM 1456 (1989), et en particulier les articles 29 et 30 de cette convention, en ne fournissant pas aux enfants autochtones une éducation visant à inculquer le respect de leurs parents, de leur identité culturelle, de leur langue et de leurs valeurs, et en niant le droit des enfants autochtones d'avoir leur propre vie culturelle, de professer et de pratiquer leur propre religion et d'employer leur propre langue;

(d) le *Pacte international relatif aux droits civils et politiques*, Rés AG 2200A (XXI), Doc off ANGU, 21e session, supp n° 16, Doc NU A/6316 (1966) 52, 999 RTUN 171 (entrée en vigueur : 23 mars 1976), en particulier les articles 1 et 27 de ce pacte, en portant atteinte aux droits des membres du recours collectif de conserver et de pratiquer leur culture, leur spiritualité, leur langue et leurs traditions, au droit d'apprendre pleinement leur culture, leur spiritualité, leur langue et leurs traditions auprès de leur famille, de leur famille élargie et de leur communauté et au droit d'enseigner leur culture, leur spiritualité, leur langue et leurs traditions à leurs propres enfants, petits-enfants, à leurs familles élargies et à leurs communautés;

(e) la *Déclaration américaine des droits et devoirs de l'homme*, Rés OEA XXX, adoptée par la neuvième Conférence internationale des États américains (1948), réimprimée dans les *Documents de base sur les droits de l'homme dans le Système Interaméricain*, OEA/Ser.L.V//II.82 doc 6 rév 1 (1992) 17, et en particulier l'article XIII, en violant le droit des membres du recours collectif de participer à la vie culturelle de leur communauté;

(f) la *Déclaration des Nations Unies sur les droits des peuples autochtones,* Rés AG 61/295, Doc NU A/RES/61/295 (13 sept. 2007), 46 ILM 1013 (2007), signée par le Canada le 12 novembre 2010, et en particulier l'article 8, 2(d), qui l'engage à mettre en place des mécanismes de recours efficaces en cas d'assimilation forcée.

38. En vertu de la présomption de conformité du droit canadien au droit international, une violation des obligations prévues par ce dernier constitue une preuve de la violation du droit interne.

Violation des obligations fiduciaires et constitutionnelles

39. Le Canada a des obligations constitutionnelles et une relation fiduciaire avec les peuples autochtones du Canada. Le Canada a créé, planifié, établi, mis en place, inauguré, exploité, financé, supervisé, contrôlé et réglementé les pensionnats et a établi la politique relative aux

pensionnats. Compte tenu de ces lois, et en vertu de la *Loi constitutionnelle de 1867*, de la *Loi constitutionnelle de 1982* et des dispositions de la Loi, telle que révisée, le Canada avait une obligation fiduciaire envers les membres du recours collectif.

40. Parmi les devoirs constitutionnels du Canada, on peut citer l'obligation de préserver l'honneur de la Couronne dans toutes ses relations avec les peuples autochtones, y compris avec les membres du recours collectif. Cette obligation est née avec l'affirmation de la souveraineté de la Couronne dès le premier contact et se poursuit dans le cadre des relations suivant les traités. Cette obligation est et demeure une obligation de la Couronne et était une obligation de la Couronne lors de toute la période en cause. L'honneur de la Couronne est un principe juridique qui exige que la Couronne agisse en tout temps de la manière la plus honorable possible afin de protéger les intérêts des peuples autochtones dans ses relations avec ceux-ci, depuis le premier contact et après la signature de traités.

41. Les obligations fiduciaires du Canada l'obligeaient à agir en tant que protecteur des droits ancestraux des membres du recours collectif, à savoir la protection et la préservation de leur langue, de leur culture et de leur mode de vie, et l'obligation de prendre des mesures correctives afin de rétablir la culture, l'histoire et le statut des demandeurs, ou de les aider à le faire. À tout le moins, l'obligation du Canada envers les peuples autochtones comprenait l'obligation de ne pas réduire délibérément le nombre de bénéficiaires envers lesquels le Canada avait des obligations.

42. Les obligations fiduciaires et constitutionnelles du Canada s'étendent au recours collectif, car la politique relative aux pensionnats avait pour but de miner et de chercher à détruire le mode de vie de ces nations dont les identités étaient et sont considérées comme collectives.

43. Le Canada a agi dans son propre intérêt et à l'encontre des intérêts des enfants autochtones, non seulement en étant déloyal envers ces enfants et les communautés autochtones,

mais il les a également trahis alors qu'il avait le devoir de protéger. Le Canada a abusé de son pouvoir discrétionnaire et de son autorité sur les peuples autochtones, en particulier sur les enfants, pour son propre bénéfice. La politique relative aux pensionnats indiens a été mise en œuvre par le Canada, en tout ou en partie, pour éradiquer ce que le Canada considérait comme le « problème indien ». En l'espèce, le Canada a cherché à se défaire de ses responsabilités morales et financières envers les peuples autochtones, des dépenses et des inconvénients liés à la cohabitation avec des cultures, des langues, des habitudes et des valeurs différentes de l'héritage eurocanadien prédominant du Canada, et des enjeux découlant des revendications territoriales.

44. Le Canada, en violation de ses obligations fiduciaires, constitutionnelles, légales et de common law à l'égard du groupe de recours collectif, a manqué, et continue de manquer, à réparer adéquatement les dommages causés par ses actes, manquements et omissions. En particulier, le Canada n'a pas pris de mesures adéquates pour réparer les dommages culturels, linguistiques et sociaux subis par les membres du recours collectif, en dépit du fait que le Canada admette depuis 1998 le caractère répréhensible de la politique relative aux pensionnats.

Violation des droits ancestraux

45. Avant leur contact avec les Européens, les peuples shíshálh, Tk'emlúps et tous les membres du recours collectif, disposaient de lois, de coutumes et de traditions faisant partie intégrante de leurs sociétés distinctes. Plus particulièrement, et cela depuis une époque antérieure au contact avec les Européens, ces nations ont soutenu leurs membres, leurs communautés et leurs cultures distinctes en parlant leurs langues et en pratiquant leurs coutumes et leurs traditions.

46. En raison de la politique relative aux pensionnats indiens, les membres du recours collectif se sont vus refuser la possibilité de jouir de leurs droits ancestraux et de les exercer de façon collective au sein de leurs bandes, compte tenu, mais sans s'y limiter, des éléments suivants :

(a) les activités culturelles, spirituelles et traditionnelles shíshálh, tk'emlúps et autochtones ont été perdues ou altérées;

(b) les structures sociales traditionnelles, y compris le partage égal de l'autorité entre les dirigeants masculins et féminins, ont été perdues ou altérées;

(c) les langues shíshálh, tk'emlúps et d'autres langues autochtones ont été perdues ou altérées;

(d) les formes traditionnelles de parentalité shíshálh, Tk'emlúps et d'autres peuples autochtones ont été perdues ou altérées;

(e) le savoir-faire en matière de cueillette, de culture, de chasse et de préparation d'aliments traditionnels shíshálh, Tk'emlúps et d'autres peuples autochtones a été perdu ou altéré;

(f) les croyances spirituelles shíshálh, tk'emlúps autochtones ont été perdues ou altérées ;

47. De tout temps, le Canada avait et continue d'avoir l'obligation de protéger les droits ancestraux des membres du recours collectif, notamment le droit d'exercer leurs pratiques spirituelles et à la protection traditionnelle de leurs terres et de leurs ressources, ainsi que l'obligation de ne pas transgresser ou entraver les droits ancestraux des membres du recours collectif. Par sa politique relative aux pensionnats indiens, le Canada a manqué à ces devoirs, et ce sans justification.

Responsabilité du fait d'autrui

48. Le Canada est responsable du fait d'autrui pour avoir négligé les obligations fiduciaires, constitutionnelles, d'origine législative et en common law de ses agents.

49. De plus, les demandeurs tiennent le Canada pour seul responsable de la création et de la mise en œuvre de la politique relative aux pensionnats indiens et, en outre :

a. les demandeurs renoncent expressément à tout droit qu'ils pourraient avoir de recouvrer du Canada, ou de toute autre partie, toute partie de la perte des demandeurs qui pourrait être attribuable à la faute ou à la responsabilité d'un tiers et pour laquelle le Canada pourrait raisonnablement être en droit de réclamer à un ou plusieurs tiers une contribution, une indemnité ou une répartition en common law, en équité ou en vertu de la *Negligence Act*, RSBC. 1996, c. 333, ainsi modifiée; et

b. Les demandeurs ne chercheront pas à recouvrer d'une tierce partie, autre que le Canada, une partie de leurs pertes réclamées, ou qui auraient pu être réclamées à d'autres tiers.

Dommages

50. En raison de la violation des obligations fiduciaires, constitutionnelles, d'origine législative et en common law, et de la violation des droits autochtones par le Canada et ses agents, pour lesquels le Canada est responsable du fait d'autrui, les membres du groupe du recours collectif se sont vus privés de la possibilité d'exercer pleinement leurs droits autochtones collectivement, notamment le droit d'avoir un gouvernement traditionnel fondé sur leurs propres langues, pratiques spirituelles, lois et pratiques traditionnelles.

Motifs des dommages-intérêts punitifs et majorés

51. Le Canada a délibérément planifié l'éradication de la langue, de la religion et de la culture des membres du recours collectif. Ces actions étaient malveillantes et destinées à causer un préjudice, et dans les circonstances, les dommages-intérêts punitifs et majorés sont appropriés et nécessaires.

Fondement juridique de la réclamation

52. Les membres du recours collectif sont des bandes indiennes autochtones.

53. Les droits ancestraux des membres du recours collectif existaient et étaient exercés en vertu de l'article 35 de la *Loi constitutionnelle de 1982*, soit l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c. 11, pour toute la période concernée par cette dernière.

54. Lors de cette période, le Canada avait envers les demandeurs et les membres du recours collectif une obligation spéciale et constitutionnelle de diligence, de bonne foi, d'honnêteté et de loyauté en vertu des obligations constitutionnelles du Canada et de son obligation d'agir dans l'intérêt supérieur des peuples autochtones et surtout des enfants autochtones particulièrement vulnérables. Le Canada a manqué à ces obligations, causant ainsi un préjudice.

55. Les membres du recours collectif appartiennent à des peuples autochtones qui disposaient de leurs lois, coutumes et traditions respectives, celles-ci faisant partie intégrante de leurs sociétés distinctes avant leur contact avec les Européens. Plus particulièrement, et depuis une époque antérieure au contact avec les Européens jusqu'à aujourd'hui, les peuples autochtones constituant les membres du recours collectif ont assuré la subsistance de leur peuple, de leurs communautés et de leur culture distincte en exerçant leurs lois et en pratiquant leurs coutumes et traditions respectives, parties intégrantes de leur mode de vie, qui comprennent la langue, la danse, la musique, les loisirs, l'art, la famille, le mariage et les responsabilités envers la communauté, ainsi que l'utilisation des ressources.

Constitutionnalité des articles de la *Loi sur les Indiens*

56. Les membres du recours collectif plaident que tout article de la Loi et des lois qui l'ont précédée, tout règlement adopté en vertu de la Loi et toute autre loi relative aux peuples autochtones qui fournit ou prétend fournir l'autorité légale pour l'éradication des peuples autochtones par la destruction de leurs langues, de leur culture, de leurs pratiques, de leurs traditions et de leur mode de vie, est en violation des articles 25 et 35(1) de la *Loi constitutionnelle de 1982*, des articles 1 et 2 de la *Déclaration canadienne des droits*, L.R.C. 1985, ainsi que les articles 7 et 15 de la *Charte canadienne des droits et libertés*, et doivent par conséquent être considérés comme n'ayant aucune force exécutoire.

57. Le Canada a délibérément planifié l'éradication de la langue, de la spiritualité et de la culture des demandeurs et des membres du recours collectif.

58. Les actions du Canada étaient délibérées et malveillantes et, dans ces circonstances, des dommages-intérêts punitifs, exemplaires et majorés sont appropriés et nécessaires.

59. Les demandeurs plaident et s'appuient sur les éléments suivants :

Loi sur les Cours fédérales, LRC., 1985, c. F-7, article 17 ;

Règles des Cours fédérales, DORS/98-106, partie 5.1 Recours collectifs ;

Loi sur la responsabilité civile de l'État et le contentieux administratif, LRC 1985, c. C-50, articles 3, 21, 22, et 23 ;

Charte canadienne des droits et libertés, articles 7, 15 ;

Loi constitutionnelle de 1982, articles 25 et 35(1),

Déclaration canadienne des droits, LRC 1985, app. III, préambule, articles 1 et 2 ;

Loi sur les Indiens, LRC 1985, articles 2(1), 3, 18(2), 114-122 et ses prédécesseures.

Traités internationaux :

Convention pour la prévention et la répression du crime de génocide, 78 RTNU 277 (entrée en vigueur : 12 janvier 1951);

Déclaration des droits de l'enfant, Rés AG 1386 (XIV), Doc off AGNU, 14e session, supp n° 16, Doc NU A/4354 (1959) 19;

Convention relative aux Droits de l'enfant, Rés AG 44/25, annexe, Doc off AGNU, 44e session, supp nº 49, Doc NU A/44/49 (1989) 167; 1577 RTUN 3; 28 ILM 1456 (1989);

Pacte international relatif aux droits civils et politiques, Rés AG 2200A (XXI), Doc off AGNU, 21e session, supp nº 16, Doc NU A/6316 (1966) 52, 999 RTUN 171 (entrée en vigueur : 23 mars 1976);

25

Déclaration américaine des droits et devoirs de l'homme, Rés OEA XXX, adoptée par la neuvième Conférence internationale des États américains (1948), réimprimée dans les *Documents de base sur les droits de l'homme dans le Système Interaméricain*, OEA/Ser.L.V//II.82 doc 6 rév 1 (1992) 17;

Déclaration des Nations Unies sur les droits des peuples autochtones, Rés AG 61/295, Doc off AGNU A/RES/61/295 (13 sept. 2007), 46 ILM 1013 (2007), signée par le Canada le 12 novembre 2010.

Les demandeurs proposent que cette action soit entendue à Vancouver, en Colombie-Britannique.

le 30 avril 2021

Peter R. Grant, au nom de
tous les avocats des demandeurs.

Avocats des demandeurs

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SCHEDULE "C"

Amended Pursuant to the Order of Justice Harrington Made June 3, 2015

Court File No. T-1542-13

~~**PROPOSED**~~ **CLASS PROCEEDING**

FORM 171A - Rule 171

FEDERAL COURT

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, on his own behalf and on behalf of all the members of the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND and the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND,

CHIEF GARRY FESCHUK, on his own behalf and on behalf of all the members of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND,

VIOLET CATHERINE GOTTFRIEDSON, ~~DOREEN LOUISE SEYMOUR,~~ CHARLOTTE ANNE VICTORINE GILBERT, ~~VICTOR FRASER,~~ DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ~~ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE,~~ DAPHNE PAUL~~, AARON JOE~~ and RITA POULSEN

PLAINTIFFS

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

DEFENDANT

FIRST RE-AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiffs' solicitor or, where the plaintiffs do not have a solicitor, serve it on the plaintiffs, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

(Date)

Issued by:_____
(Registry Officer)

Address of local office:_____

TO:

Her Majesty the Queen in Right of Canada,
Minister of Indian Affairs and Northern Development, and
Attorney General of Canada
Department of Justice
900 - 840 Howe Street
Vancouver, B.C. V6Z 2S9

RELIEF SOUGHT

The Survivor Class

1. The Representative Plaintiffs of the Survivor Class, on their own behalf, and on behalf of the members of the Survivor Class, claim:

(a) ~~an Order certifying this proceeding as a Class Proceeding pursuant to the Federal Court Class Proceedings Rules ("CPR") and appointing them as Representative Plaintiffs for the Survivor Class and any appropriate subgroup of that Class~~;

(b) a Declaration that Canada owed and was in breach of fiduciary, constitutionally-mandated, statutory and common law duties to the Plaintiffs and the other Survivor Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the ~~Identified~~ Residential Schools;

(c) a Declaration that members of the Survivor Class have Aboriginal Rights to speak their traditional languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner;

(d) a Declaration that Canada breached the linguistic and cultural rights (Aboriginal Rights or otherwise) ~~Aboriginal Rights~~ of the Survivor Class;

(e) a Declaration that the Residential Schools Policy and the ~~Identified~~ Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Survivor Class;

(f) a Declaration that Canada is liable to the Survivor Class Representative Plaintiffs and other Survivor Class members for the damages caused by its breach of fiduciary, constitutionally-mandated, statutory and common law duties, and Aboriginal Rights and for the intentional infliction of mental distress, as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the ~~Identified~~ Residential Schools;

(g) non-pecuniary general damages for breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights and intentional infliction of mental distress, as well as breaches of International Conventions and Covenants, and breaches of international law,, negligence and intentional infliction of mental distress for which Canada is liable;

(h) pecuniary general damages and special damages for negligence, loss of income, loss of earning potential, loss of economic opportunity, loss of educational opportunities, breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights and and intentional infliction of mental distress, as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the cost of care, and to restore, protect and preserve the linguistic and cultural heritage of the members of the Survivor Class for which Canada is liable;

(i) exemplary and punitive damages for which Canada is liable ;

(j) prejudgment and post-judgment interest;

(k) the costs of this action; and

(l) such further and other relief as this Honourable Court may deem just.

The Descendant Class

2. The Representative Plaintiffs of the Descendant Class, on their own behalf and on behalf of the members of the Descendant Class, claim:

(a) ~~an Order certifying this proceeding as a Class Proceeding pursuant to the CPR and appointing them as Representative Plaintiffs for the Descendant Class and any appropriate subgroup of that Class~~;

(b) a Declaration that Canada owed and was in breach of fiduciary, constitutionally-mandated, statutory and common law duties to the Plaintiffs and the other Descendant Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the ~~Identified~~ Residential Schools;

(c) a Declaration that the Descendant Class have Aboriginal Rights to speak their traditional languages, to engage in their traditional customs and religious practices and to govern themselves in their traditional manner;

(d) a Declaration that Canada breached the linguistic and cultural rights (Aboriginal Rights or otherwise) ~~Aboriginal Rights~~ of the Descendant Class;

(e) a Declaration that the Residential Schools Policy and the ~~Identified~~ Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Descendant Class;

(f) a Declaration that Canada is liable to the Plaintiffs and other Descendant Class members for the damages caused by its breach of fiduciary, constitutionally-

mandated, statutory and common law duties and Aboriginal Rights as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the ~~Identified~~ Residential Schools;

(g) non-pecuniary general damages for breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights as well as breaches of International Conventions and Covenants, and breaches of international law, for which Canada is liable;

(h) pecuniary general damages and special damages for breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the cost of care, and to restore, protect and preserve the linguistic and cultural heritage of the members of the Descendant Class for which Canada is liable;

(i) exemplary and punitive damages for which Canada is liable;

(j) pre-judgment and post-judgment interest;

(k) the costs of this action; and

(l) such further and other relief as this Honourable Court may deem just;

The Band Class

3. The Representative Plaintiffs of the Band Class claim:

(a) ~~an Order certifying this proceeding as a Class Proceeding pursuant to the CPR and appointing them as Representative Plaintiffs for the Band Class~~;

(b) a Declaration that the Sechelt Indian Band (referred to as the shíshálh or shíshálh band) and Tk'emlúps Band, and all members of the Band Class, have ~~existing~~ Aboriginal Rights ~~within the meaning of s. 35(1) of the *Constitution Act, 1982*~~ to speak their traditional languages and engage in their traditional customs and religious practices and to govern themselves in their traditional manner;

(c) a Declaration that Canada owed and was in breach of fiduciary, constitutionally-mandated, statutory and common law duties as well as breaches of International Conventions and Covenants, and breaches of international law, to the Band Class members in relation to the purpose, establishment, funding, operation, supervision, control, maintenance, obligatory attendance of Survivor Class members at, and support of, the SIRS and the KIRS and other Identified Residential Schools;

(d) a Declaration that the Residential Schools Policy and the KIRS, the SIRS and Identified Residential Schools caused Cultural, Linguistic and Social Damage and irreparable harm to the Band Class;

(e) a Declaration that Canada was or is in breach of the Band Class members' linguistic and cultural rights, (Aboriginal Rights or otherwise), as well as breaches of International Conventions and Covenants, and breaches of international law, as a consequence of its establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the Residential Schools Policy, and the Identified Residential Schools; ~~Aboriginal Rights;~~

(f) a Declaration that Canada is liable to the Band Class members for the damages caused by its breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights as well as breaches of International Conventions and Covenants, and breaches of international law, in relation to the purpose, establishment, funding, operation, supervision, control and maintenance, and obligatory attendance of Survivor Class members at and support of the Identified Residential Schools;

(g) non-pecuniary and pecuniary general damages and special damages for breach of fiduciary, constitutionally-mandated, statutory and common law duties and Aboriginal Rights, as well as breaches of International Conventions and Covenants, and breaches of international law, including amounts to cover the ongoing cost of care and development of wellness plans for individual members of the bands in the Band Class, as well as the costs of restoring, protecting and preserving the linguistic and cultural heritage of the Bands for which Canada is liable;

(h) the construction of healing centres in the Band Class communities by Canada;

(i) exemplary and punitive damages for which Canada is liable;

(j) pre-judgment and post-judgment interest;

(k) the costs of this action; and

(l) such further and other relief as this Honourable Court may deem just.

DEFINITIONS

4. The following definitions apply for the purposes of this Claim:

(a) "Aboriginal(s)", "Aboriginal Person(s)" or "Aboriginal Child(ren)" means a person or persons whose rights are recognized and affirmed by the *Constitution Act*, 1982, s. 35;

(b) "Aboriginal Right(s)" means any or all of the aboriginal and treaty rights recognized and affirmed by the *Constitution Act*, 1982, s. 35;

(c) "Act" means the *Indian Act*, R.S.C. 1985, c. I-5 and its predecessors as have been amended from time to time;

(d) "Agents" means the servants, contractors, agents, officers and employees of Canada and the operators, managers, administrators and teachers and staff of each of the Residential Schools;

(e) "Agreement" means the Indian Residential Schools Settlement Agreement dated May 10, 2006 entered into by Canada to settle claims relating to Residential Schools as approved in the orders granted in various jurisdictions across Canada;

(f) "Band Class" means the Tk'emlúps te Secwépemc Indian Band and the shíshálh band and any other Aboriginal Indian Band(s) which:

(i) has or had some members who are or were members of the Survivor Class, or in whose community a Residential School is located; and

(ii) is specifically added to this claim with one or more specifically identified Residential Schools.

(g) "Canada" means the Defendant, Her Majesty the Queen in right of Canada as represented by the Attorney General of Canada;

(h) "Class" or "Class members" means all members of the Survivor Class, Descendant Class and Band Class as defined herein;

(i) "Class Period" means 1920 to ~~1979~~1997;

(j) "Cultural, Linguistic and Social Damage" means the damage or harm caused by the creation and implementation of Residential Schools and Residential Schools Policy to the educational, governmental, economic, cultural, linguistic, spiritual and social customs, practices and way of life, traditional governance structures, as well as to the community and individual security and wellbeing, of Aboriginal Persons;

(k) "Descendant Class" means the first generation of ~~all~~ persons ~~who are~~ descended from Survivor Class members or persons who were legally or traditionally adopted by a Survivor Class Member or their spouse;

(l) "Identified Residential School(s)" means the KIRS or the SIRS ~~or any other~~ Residential School ~~specifically identified by a member of the Band Class~~;

(m) "KIRS" means the Kamloops Indian Residential School;

(n) "Residential Schools" means all Indian Residential Schools recognized under the Agreement;

(o) "Residential Schools Policy" means the policy of Canada with respect to the implementation of Indian Residential Schools;

(p) "SIRS" means the Sechelt Indian Residential School;

(q) "Survivor Class" means all Aboriginal persons who attended as a student or for educational purposes for any period at ~~an Identified~~ Residential School, during the Class Period excluding, for any individual class member, such periods of time for which that class member received compensation by way of the Common Experience Payment under the Indian Residential Schools Settlement Agreement.

THE PARTIES

The Plaintiffs

5. The Plaintiff, Darlene Matilda Bulpit (nee Joe) resides on shíshálh band lands in British Columbia. Darlene Matilda Bulpit was born on August 23, 1948 and attended the SIRS for nine years, between the years 1954 and 1963. Darlene Matilda Bulpit is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

6. The Plaintiff, Frederick Johnson resides on shíshálh band lands in British Columbia. Frederick Johnson was born on July 21, 1960 and attended the SIRS for ten years, between the years 1966 and 1976. Frederick Johnson is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

~~7. The Plaintiff, Abigail Margaret August (nee Joe) resides on shíshálh band lands in British Columbia. Abigail Margaret August was born on August 21, 1954 and attended the SIRS for eight years, between the years 1959 and 1967. Abigail Margaret August is a proposed Representative Plaintiff for the Survivor Class.~~

~~8. The Plaintiff, Shelly Nadine Hoehne (nee Joe) resides on shíshálh band lands in British Columbia. Shelly Nadine Hoehne was born on June 23, 1952 and attended the SIRS for eight years, between the years 1958 and 1966. Shelly Nadine Hoehne is a proposed Representative Plaintiff for the Survivor Class.~~

9. The Plaintiff, Daphne Paul resides on shíshálh band lands in British Columbia. Daphne Paul was born on January 13, 1948 and attended the SIRS for eight years, between the years 1953 and 1961. Daphne Paul is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

10. The Plaintiff, Violet Catherine Gottfriedson resides on the Tk'emlúps te Secwépemc Indian Band reserve in British Columbia. Violet Catherine Gottfriedson was born on March 30, 1945 and attended the KIRS for four years, between the years 1958 and 1962. Violet Catherine Gottfriedson is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

~~11. The Plaintiff, Doreen Louise Seymour resides on the Tk'emlúps te Secwépemc Indian Band reserve in British Columbia. Doreen Louise Seymour was born on September 7, 1955 and attended the KIRS for five years, between the years 1961 and 1966. Doreen Louise Seymour is a proposed Representative Plaintiff for the Survivor Class.~~

12. The Plaintiff, Charlotte Anne Victorine Gilbert (nee Larue) resides in Williams Lake in British Columbia. Charlotte Anne Victorine Gilbert was born on May 24, 1952 and attended the KIRS for seven years, between the years 1959 and 1966. Charlotte Anne Victorine Gilbert is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

~~13. The Plaintiff, Victor Fraser (also known as Victor Frezie) resides on the Tk'emlúps te Secwépemc Indian Band reserve in British Columbia. Victor Fraser was born on June 11, 1957~~

~~and attended the KIRS for six years, between the years 1962 and 1968. Victor Fraser is a proposed Representative Plaintiff for the Survivor Class.~~

14. The Plaintiff, Diena Marie Jules resides on the Tk'emlúps te Secwépemc Indian Band reserve in British Columbia. Diena Marie Jules was born on September 12, 1955 and attended the KIRS for six years, between the years 1962 and 1968. Diena Marie Jules is a ~~proposed~~ Representative Plaintiff for the Survivor Class.

~~15. The Plaintiff, Aaron Joe, resides on shíshálh band lands. Aaron Joe was born on January 19, 1972 and is the son of Valerie Joe, who attended the SIRS as a day scholar. Aaron Joe is a proposed Representative Plaintiff for the Descendant Class.~~

16. The Plaintiff, Rita Poulsen, resides on shíshálh band lands. Rita Poulsen was born on March 8, 1974 and is the daughter of Randy Joe, who attended the SIRS as a day scholar. Rita Poulsen is a ~~proposed~~ Representative Plaintiff for the Descendant Class.

17. The Plaintiff, Amanda Deanne Big Sorrel Horse resides on the Tk'emlúps te Secwépemc Indian Band reserve. Amanda Deanne Big Sorrel Horse was born on December 26, 1974 and is the daughter of Jo-Anne Gottfriedson who attended the KIRS for six years between the years 1961 and 1967. Amanda Deanne Big Sorrel Horse is a ~~proposed~~ Representative Plaintiff for the Descendant Class.

18. The Tk'emlúps te Secwépemc Indian Band and the shíshálh band are "bands" as defined by the Act and they both ~~propose to~~ act as Representative Plaintiffs for the Band Class. The Band Class members represent the collective interests and authority of each of their respective communities.

19. The individual Plaintiffs and the proposed Survivor and Descendant Class members are largely members of the shíshálh band and Tk'emlúps Indian Band, and members of Canada's First Nations and/or are the sons and daughters of members of these Aboriginal collectives. The individual Plaintiffs and Survivor and Descendant Class members are Aboriginal Persons within the meaning of the *Constitution Act, 1982,* s. 35.

The Defendant

20. Canada is represented in this proceeding by the Attorney General of Canada. The Attorney General of Canada represents the interests of Canada and the Minister of Aboriginal Affairs and Northern Development Canada and predecessor Ministers who were responsible for "Indians" under s.91(24) of the *Constitution Act, 1867*, and who were, at all material times, responsible for the formation and implementation of the Residential Schools Policy, and the maintenance and operation of the KIRS and the SIRS.

STATEMENT OF FACTS

21. Over the course of the last several years, Canada has acknowledged the devastating impact of its Residential Schools Policy on Canada's Aboriginal Peoples. Canada's Residential Schools Policy was designed to eradicate Aboriginal culture and identity and assimilate the Aboriginal Peoples of Canada into Euro-Canadian society. Through this policy, Canada ripped away the foundations of identity for generations of Aboriginal People and caused incalculable harm to both individuals and communities.

22. The direct beneficiary of the Residential Schools Policy was Canada as its obligations would be reduced in proportion to the number, and generations, of Aboriginal Persons who would no longer recognize their Aboriginal identity and would reduce their claims to rights

under the Act and Canada's fiduciary, constitutionally-mandated, statutory and common law duties.

23. Canada was also a beneficiary of the Residential Schools Policy, as the policy served to weaken the claims of Aboriginal Peoples to their traditional lands and resources. The result was a severing of Aboriginal People from their cultures, traditions and ultimately their lands and resources. This allowed for exploitation of those lands and resources by Canada, not only without Aboriginal Peoples' consent but also, contrary to their interests, the Constitution of Canada and the Royal Proclamation of 1763.

24. The truth of this wrong and the damage it has wrought has now been acknowledged by the Prime Minister on behalf of Canada, and through the pan-Canadian settlement of the claims of those who *resided at* Canada's Residential Schools by way of the Agreement implemented in 2007. Notwithstanding the truth and acknowledgement of the wrong and the damages caused, many members of Canada's Aboriginal communities were excluded from the Agreement, not because they did not *attend* Residential Schools and suffer Cultural, Linguistic and Social Damage, but simply because they did not *reside at* Residential Schools.

25. This claim is on behalf of the members of the Survivor Class, namely those who attended ~~an Identified~~ a Residential School for the Cultural, Linguistic and Social Damage occasioned by that attendance, as well as on behalf of the Descendant Class, who are the first generation descendants of those within the Survivor Class, and the Band Class, consisting of the Aboriginal communities within which the ~~Identified~~ Residential Schools were situated, or whose members belong to ~~and within which the majority of~~ the Survivor and Descendant Class ~~members live~~.

26. The claims of the ~~proposed~~ Representative Plaintiffs are for the harm done to the Representative Plaintiffs as a result of members of the Survivor Class *attending* the KIRS and the SIRS and being exposed to the operation of the Residential Schools Policy and do not include the claims arising from residing at the KIRS or the SIRS for which specific compensation has been paid under the Agreement. This claim seeks compensation for the victims of that policy whose claims have been ignored by Canada and were excluded from the compensation in the Agreement.

The Residential School System

27. Residential Schools were established by Canada prior to 1874, for the education of Aboriginal Children. Commencing in the early twentieth century, Canada began entering into formal agreements with various religious organizations (the "Churches") for the operation of Residential Schools. Pursuant to these agreements, Canada controlled, regulated, supervised and directed all aspects of the operation of Residential Schools. The Churches assumed the day-to-day operation of many of the Residential Schools under the control, supervision and direction of Canada, for which Canada paid the Churches a *per capita* grant. In 1969, Canada took over operations directly.

28. As of 1920, the Residential Schools Policy included compulsory *attendance* at Residential Schools for all Aboriginal Children aged 7 to 15. Canada removed most Aboriginal Children from their homes and Aboriginal communities and transported them to Residential Schools which were often long distances away. However, in some cases, Aboriginal Children lived in their homes and communities and were similarly required to attend Residential Schools as day students and not residents. This practice applied to even more children in the later years

of the Residential Schools Policy. While at Residential School, all Aboriginal Children were confined and deprived of their heritage, their support networks and their way of life, forced to adopt a foreign language and a culture alien to them and punished for non-compliance.

29. The purpose of the Residential Schools Policy was the complete integration and assimilation of Aboriginal Children into the Euro-Canadian culture and the obliteration of their traditional language, culture, religion and way of life. Canada set out and intended to cause the Cultural, Linguistic and Social Damage which has harmed Canada's Aboriginal Peoples and Nations. ~~In addition to the inherent cruelty of the~~ As a result of Canada's requirements for the forced attendance of the Survivor Class members under the Residential Schools Policy ~~itself~~, many children attending Residential Schools were also subject to spiritual, physical, sexual and emotional abuse, all of which continued until the year 1997, when the last Residential School was closed.

30. Canada chose to be disloyal to its Aboriginal Peoples, implementing the Residential Schools Policy in its own self-interest, including economic self-interest, and to the detriment and exclusion of the interests of the Aboriginal Persons to whom Canada owed fiduciary and constitutionally-mandated duties. The intended eradication of Aboriginal identity, culture, language, and spiritual practices ~~and religion~~, to the extent successful, results in the reduction of the obligations owed by Canada in proportion to the number of individuals, over generations, who would no longer identify as Aboriginal and who would be less likely to make claims to their rights as Aboriginal Persons.

The Effects of the Residential Schools Policy on the Class Members

31. Tk'emlúpsemc, 'the people of the confluence', now known as the Tk'emlúps te Secwépemc Indian Band are members of the northernmost of the Plateau People and of the Interior-Salish Secwépemc (Shuswap) speaking peoples of British Columbia. The Tk'emlúps Indian Band was established on a reserve now adjacent to the City of Kamloops, where the KIRS was subsequently established. Most, if not all, of the students who *attended*, but did not *reside at* the KIRS were or are members of the Tk'emlúps Indian Band, resident or formerly resident on the reserve.

32. Secwepemctsin is the language of the Secwépemc, and it is the unique means by which the cultural, ecological, and historical knowledge and experience of the Secwépemc people is understood and conveyed between generations. It is through language, spiritual practices and passage of culture and traditions including their rituals, drumming, dancing, songs and stories, that the values and beliefs of the Secwépemc people are captured and shared. From the Secwépemc perspective all aspects of Secwépemc knowledge, including their culture, traditions, laws and languages, are vitally and integrally linked to their lands and resources.

33. Language, like the land, was given to the Secwépemc by the Creator for communication to the people and to the natural world. This communication created a reciprocal and cooperative relationship between the Secwépemc and the natural world which enabled them to survive and flourish in harsh environments. This knowledge, passed down to the next generation orally, contained the teachings necessary for the maintenance of Secwépemc culture, traditions, laws and identity.

34. For the Secwépemc, their spiritual practices, songs, dances, oral histories, stories and ceremonies were an integral part of their lives and societies. These practices and traditions are

absolutely vital to maintain. Their songs, dances, drumming and traditional ceremonies connect the Secwépemc to their land and continually remind the Secwépemc of their responsibilities to the land, the resources and to the Secwépemc people.

35. Secwépemc ceremonies and spiritual practices, including their songs, dances, drumming and passage of stories and history, perpetuate their vital teachings and laws relating to the harvest of resources, including medicinal plants, game and fish, and the proper and respectful protection and preservation of resources. For example, in accordance with Secwépemc laws, the Secwépemc sing and pray before harvesting any food, medicines, and other materials from the land, and make an offering to thank the Creator and the spirits for anything they take. The Secwépemc believe that all living things have spirits and must be shown utmost respect. It was these vital, integral beliefs and traditional laws, together with other elements of Secwépemc culture and identity, that Canada sought to destroy with the Residential Schools Policy.

Shíshálh band

36. The shíshálh Nation, a division of the Coast Salish First Nations, originally occupied the southern portion of the lower coast of British Columbia. The shíshálh People settled the area thousands of years ago, and occupied approximately 80 village sites over a vast tract of land. The shíshálh People are made up of four sub-groups that speak the language of Shashishalhem, which is a distinct and unique language, although it is part of the Coast Salish Division of the Salishan Language.

37. Shíshálh tradition describes the formation of the shíshálh world (Spelmulh story). Beginning with the creator spirits, who were sent by the Divine Spirit to form the world, they

carved out valleys leaving a beach along the inlet at Porpoise Bay. Later, the transformers, a male raven and a female mink, added details by carving trees and forming pools of water.

38. The shíshálh culture includes singing, dancing and drumming as an integral part of their culture and spiritual practices, a connection with the land and the Creator and passing on the history and beliefs of the people. Through song and dance the shíshálh People would tell stories, bless events and even bring about healing. Their songs, dances and drumming also signify critical seasonal events that are integral to the shíshálh. Traditions also include making and using masks, baskets, regalia and tools for hunting and fishing. It was these vital, integral beliefs and traditional laws, together with other elements of the shíshálh culture and identity, that Canada sought to destroy with the Residential Schools Policy.

The Impact of the ~~Identified~~ Residential schools

39. For all of the Aboriginal Children who were compelled to attend the ~~Identified~~ Residential Schools, rigid discipline was enforced as per the Residential Schools Policy. While at school, children were not allowed to speak their Aboriginal language, even to their parents, and thus members of these Aboriginal communities were forced to learn English.

40. Aboriginal culture was strictly suppressed by the school administrators in compliance with the policy directives of Canada including the Residential Schools Policy. At the SIRS, ~~converts to Catholicism~~ members of shishalh were forced to burn or give to the agents of Canada centuries-old totem poles, regalia, masks and other "paraphernalia of the medicine men" and to abandon their potlatches, dancing and winter festivities, and other elements integral to the Aboriginal culture and society of the shíshálh and Secwépemc peoples.

41. Because the SIRS was physically located in the shíshálh community, ~~thechurch and~~Canada's ~~government~~ eyes, both directly and through its Agents, were upon the elders and they were punished severely for practising their culture or speaking their language or passing this on to future generations. In the midst of that scrutiny, the Class members struggled, often unsuccessfully, to practice, protect and preserve their songs, masks, dancing or other cultural practices

42. The Tk'emlúps te Secwépemc suffered a similar fate due to their proximity to the KIRS.

43. The children at the ~~Identified~~ Residential Schools were ~~indoctrinated into Christianity, and~~ taught to be ashamed of their Aboriginal identity, culture, spirituality and practices. They were referred to as, amongst other derogatory epithets, "dirty savages" and "heathens" and taught to shun their very identities. The Class members' Aboriginal way of life, traditions, cultures and spiritual practices were supplanted with the Euro-Canadian identity imposed upon them by Canada through the Residential Schools Policy.

44. This implementation of the Residential Schools Policy further damaged the Survivor Class members of the ~~Identified~~ Residential Schools, who returned to their homes at the end of the school day and, having been taught in the school that the traditional teachings of their parents, grandparents and elders were of no value and, in some cases, "heathen" practices and beliefs, would dismiss the teachings of their parents, grandparents and elders.

45. The assault on their traditions, laws, language and culture through the implementation of the Residential Schools Policy by Canada, directly and through its

Agents, has continued to undermine the individual Survivor Class members, causing a loss of self-esteem, depression, anxiety, suicidal ideation, suicide, physical illnesses without clear causes, difficulties in parenting, difficulties in maintaining positive relationships, substance abuse and violence, among other harms and losses, all of which has impacted the Descendant Class.

46. The Band Class members have lost, in whole or in part, their traditional economic viability, self-government and laws, language, land base and land-based teachings, traditional spiritual practices and religious practices, and the integral sense of their collective identity.

47. The Residential Schools Policy, delivered through the ~~Identified~~ Residential Schools, wrought cultural, linguistic and social devastation on the communities of the Band Class and altered their traditional way of life.

Canada's Settlement with Former Residential School Residents

48. From the closure of the ~~Identified~~ Residential Schools ~~in the 1970's~~ until the late 1990's, Canada's Aboriginal communities were left to battle the damages and suffering of their members as a result of the Residential Schools Policy, without any acknowledgement from Canada. During this period, Residential School survivors increasingly began speaking out about the horrible conditions and abuse they suffered, and the dramatic impact it had on their lives. At the same time, many survivors committed suicide or self-medicated to the point of death. The deaths devastated not only the members of the Survivor Class and the Descendant Class, but also the life and stability of the communities represented by the Band Class.

49. In January 1998, Canada issued a Statement of Reconciliation acknowledging and apologizing for the failures of the Residential Schools Policy. Canada admitted that the Residential Schools Policy was designed to assimilate Aboriginal Persons and that it was wrong to pursue that goal. The Plaintiffs plead that the Statement of Reconciliation by Canada is an admission by Canada of the facts and duties set out herein and is relevant to the Plaintiffs' claim for damages, particularly punitive damages.

50. The Statement of Reconciliation stated, in part, as follows:

> *Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We must acknowledge that the results of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.*
>
> *Against the backdrop of these historical legacies, it is a remarkable tribute to the strength and endurance of Aboriginal people that they have maintained their historic diversity and identity. The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the Federal Government which have contributed to these difficult pages in the history of our relationship together.*
>
> *One aspect of our relationship with Aboriginal people over this period that requires particular attention is the Residential School System. This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures. In the worst cases, it left legacies of personal pain and distress that continued to reverberate in Aboriginal communities to this date. Tragically, some children were the victims of physical and sexual abuse.*

> *The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse at Residential Schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at Residential Schools, we are deeply sorry. In dealing with the legacies of the Residential School program, the Government of Canada proposes to work with First Nations, Inuit, Metis people, the Churches and other interested parties to resolve the longstanding issues that must be addressed. We need to work together on a healing strategy to assist individuals and communities in dealing with the consequences of this sad era of our history...*
>
> *Reconciliation is an ongoing process. In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong community...*

51. On or about May 10, 2006, Canada entered into the Agreement to provide compensation primarily to those who *resided at* Residential Schools.

52. The Agreement provides for two types of individualized compensation: the Common Experience Payment ("CEP") for the fact of having resided at a Residential School, and compensation based upon an Independent Assessment Process ("IAP"), to provide compensation for certain abuses suffered and harms these abuses caused.

53. The CEP consisted of compensation for former *residents* of a Residential School in the amount of $10,000 for the first school year or part of a school year and a further $3,000 for each subsequent school year or part of a school year of *residence* at a Residential School. The CEP was payable based upon residence at a Residential School out of a recognition that the experience of assimilation was damaging and worthy of compensation, regardless of whether a student experienced physical, sexual or other abuse while at the Residential School. Compensation for the latter was payable through the IAP. The CEP was available only to former

residents of a Residential School while, in some cases, the IAP was available not only to former residents but also other young people who were lawfully on the premises of a Residential School, including former day students.

54. The implementation of the Agreement represented the first time Canada agreed to pay compensation for Cultural, Linguistic and Social Damage. Canada refused to incorporate compensation for members of the Survivor Class, namely, those students who *attended* the ~~Identified Residential Schools, or other~~ Residential Schools, but who did not *reside* there.

55. The Agreement was approved by provincial and territorial superior courts from British Columbia to Quebec, and including the Northwest Territories, Yukon Territory and Nunavut, and the Agreement was implemented beginning on September 20, 2007.

56. On June 11, 2008, Prime Minister Stephen Harper on behalf of Canada, delivered an apology ("Apology") that acknowledged the harm done by Canada's Residential Schools Policy:

> *For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities. In the 1870's, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools.* ***Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture.*** *These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said,* ***"to kill the Indian in the child".*** *Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.* ***[emphasis added]***

57. In this Apology, the Prime Minister made some important acknowledgments regarding the Residential Schools Policy and its impact on Aboriginal Children:

> *The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities. Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities. First Nations, Inuit and Métis languages and cultural practices were prohibited in these schools. Tragically, some of these children died while attending residential schools and others never returned home.*
>
> *The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language.*
>
> *The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.*
>
> * * *
>
> *We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.*
>
> *The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey. The Government of Canada sincerely apologizes and asks the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.*

58. Notwithstanding the Apology and the acknowledgment of wrongful conduct by Canada, as well as the call for recognition from Canada's Aboriginal communities and from the *Truth and Reconciliation Commission* in its Interim Report of February 2012, the exclusion of

the Survivor Class from the Agreement by Canada reflects Canada's continued failure to members of the Survivor Class. Canada continues, as it did from the 1970s until 2006 with respect to 'residential students', to deny the damage suffered by the individual Plaintiffs and the members of the Survivor, Descendant and Band Classes.

Canada's Breach of Duties to the Class Members

59. From the formation of the Residential Schools Policy to its execution in the form of forced attendance at the ~~Identified~~ Residential Schools, Canada utterly failed the Survivor Class members, and in so doing, destroyed the foundations of the individual identities of the Survivor Class members, stole the heritage of the Descendant Class members and caused incalculable losses to the Band Class members.

60. The Survivor Class members, Descendant Class members and Band Class members have all been affected by family dysfunction, a crippling or elimination of traditional ceremonies, and a loss of the hereditary governance structure which allowed for the ability to govern their peoples and their lands.

61. While attending the ~~Identified~~ Residential School the Survivor Class members were utterly vulnerable, and Canada owed them the highest fiduciary, moral, statutory, constitutionally-mandated and common law duties, which included, but were not limited to, the duty to protect Aboriginal Rights and prevent Cultural, Linguistic and Social Damage. Canada breached these duties, and failed in its special responsibility to ensure the safety and well-being of the Survivor Class while at the ~~Identified~~ Residential Schools.

Canada's Duties

62. Canada was responsible for developing and implementing all aspects of the Residential Schools Policy, including carrying out all operational and administrative aspects of Residential Schools. While the Churches were ~~often~~used as Canada's Agents to assist Canada in carrying out its objectives, those objectives and the manner in which they were carried out were the obligations of Canada. Canada was responsible for:

(a) the administration of the Act and its predecessor statutes as well as all other statutes relating to Aboriginal Persons and all Regulations promulgated under these Acts and their predecessors during the Class Period;

(b) the management, operation and administration of the Department of Indian Affairs and Northern Development and its predecessors and related Ministries and Departments, as well as the decisions taken by those ministries and departments;

(c) the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of the ~~Identified~~ Residential Schools and for the creation, design and implementation of the program of education for Aboriginal Persons in attendance;

(d) the selection, control, training, supervision and regulation of the operators of the ~~Identified~~ Residential Schools, including their employees, servants, officers and agents, and for the care and education, control and well being of Aboriginal Persons attending the ~~Identified~~ Residential Schools;

(e) preserving, promoting, maintaining and not interfering with Aboriginal Rights, including the right to retain and practice their culture, spirituality, language and traditions and the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities; and

(f) the care and supervision of all members of the Survivor Class while they were in attendance at the ~~Identified~~ Residential Schools during the Class Period.

63. Further, Canada has at all material times committed itself to honour international law in relation to the treatment of its people, which obligations form minimum commitments to Canada's Aboriginal Peoples, including the Survivor, Descendant and Band Classes, and which have been breached. In particular, Canada's breaches include the failure to comply with the terms and spirit of:

(a) the *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, entered into force Jan. 12, 1951,, and in particular Article 2(b), (c) and (e) of that convention, by engaging in the intentional destruction of the culture of Aboriginal Children and communities, causing profound and permanent cultural, psychological, emotional and physical injuries to the Class;

(b) the *Declaration of the Rights of the Child* (1959) G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 by failing to provide Aboriginal Children with the means necessary for normal development, both materially and spiritually, and failing to put them in a position to earn a livelihood and protect them against exploitation;

(c) the *Convention on the Rights of the Child*, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989), and in particular Articles 29 and 30 of that convention, by failing to provide Aboriginal Children with education that is directed to the development of respect for their parents, their cultural identities, language and values, and by denying the right of Aboriginal Children to enjoy their own cultures, to profess and practise their own religions and to use their own languages;

(d) the *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, in particular Articles 1 and 27 of that convention, by interfering with Class members' rights to retain and practice their culture, spirituality, language and traditions, the right to fully learn their culture, spirituality, language and traditions from their families, extended families and communities and the right to teach their culture, spirituality, language and traditions to their own children, grandchildren, extended families and communities.

(e) the *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System,* OEA/Ser.L.V//II.82 doc.6 rev.1 at 17 (1992), and in particular Article XIII, by violating Class members' right to take part in the cultural life of their communities.

(f) the *United Nations Declaration on the Rights of Indigenous Peoples,* G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007), endorsed by Canada 12 November 2010, and in particular article 8, 2(d), which commits to the provision of effective mechanisms for redress for forced assimilation.

64. Canada's obligations under international law inform Canada's common law, statutory, fiduciary, constitutionally-mandated and other duties, and a breach of the aforementioned international obligations is evidence of, or constitutes, a breach under domestic law.

Breach of Fiduciary and Constitutionally-Mandated Duties

65. Canada has constitutional obligations to, and a fiduciary relationship with, Aboriginal People in Canada. Canada created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated the ~~Identified~~ Residential Schools and established the Residential Schools Policy. Through these acts, and by virtue of the *Constitution Act 1867*, the *Constitution Act, 1982*, and the provisions of the Act, as amended, Canada assumed the power and obligation to act in a fiduciary capacity with respect to the education and welfare of Class members.

66. Canada's constitutional duties include the obligation to uphold the honour of the Crown in all of its dealings with Aboriginal Peoples, including the Class members. This obligation arose with the Crown's assertion of sovereignty from the time of first contact and continues through post-treaty relationships. This is and remains an obligation of the Crown and was an obligation on the Crown at all material times. The honour of the Crown is a legal principle which requires the Crown to operate at all material times in its relations with Aboriginal Peoples from contact to post-treaty in the most honourable manner to protect the interests of the Aboriginal Peoples.

67. Canada's fiduciary duties obliged Canada to act as a protector of Class members' Aboriginal Rights, including the protection and preservation of their language, culture and their way of life, and the duty to take corrective steps to restore the Plaintiffs' culture, history and status, or assist them to do so. At a minimum, Canada's duty to Aboriginal Persons included the duty not to deliberately reduce the number of the beneficiaries to whom Canada owed its duties.

68. Canada's fiduciary duties and the duties otherwise imposed by the constitutional mandate assumed by Canada extend to the Descendant Class because the purpose of the assumption of control over the Survivor Class education was to eradicate from those Aboriginal Children their culture and identity, thereby removing their ability, as adults, to pass on to succeeding generations the linguistic, spiritual, cultural and behavioural bases of their people, as well as to relate to their families and communities and, ultimately, their ability to identify themselves as Aboriginal Persons to whom Canada owed its duties.

69. The fiduciary and constitutional duties owed by Canada extend to the Band Class because the Residential Schools Policy was intended to, and did, undermine and seek to destroy the way of life established and enjoyed by these Nations whose identities were and are viewed as collective.

70. Canada acted in its own self-interest and contrary to the interests of Aboriginal Children, not only by being disloyal to, but by actually betraying the Aboriginal Children and communities whom it had a duty to protect. Canada wrongfully exercised its discretion and power over Aboriginal People, and in particular children, for its own benefit. The Residential Schools Policy was pursued by Canada, in whole or in part, to eradicate what Canada saw as the "Indian Problem". Namely, Canada sought to relieve itself of its moral and financial responsibilities for Aboriginal People, the expense and inconvenience of dealing with cultures, languages, habits and values different from Canada's predominant Euro-Canadian heritage, and the challenges arising from land claims.

71. In breach of its ongoing fiduciary, constitutionally-mandated, statutory and common law duties to the Survivor, Descendant and Band Classes, Canada failed, and continues to fail, to

adequately remediate the damage caused by its wrongful acts, failures and omissions. In particular, Canada has failed to take adequate measures to ameliorate the Cultural, Linguistic and Social Damage suffered by the Survivor, Descendant and Band Classes, notwithstanding Canada's admission of the wrongfulness of the Residential Schools Policy since 1998.

Breach of Aboriginal Rights

72. The shíshálh and Tk'emlúps people, and indeed all members of the Band Class, from whom the individual Plaintiffs have descended have exercised laws, customs and traditions integral to their distinctive societies prior to contact with Europeans. In particular, and from a time prior to contact with Europeans, these Nations have sustained their individual members, communities and distinctive cultures by speaking their languages and practicing their customs and traditions.

73. During the time when Survivor Class members attended the ~~Identified~~ Residential Schools, in compliance with the Residential Schools Policy, they were taught to speak English, were punished for using their traditional languages and were made ashamed of their traditional language and way of life. Consequently, by reason of the attendance at the ~~Identified~~ Residential Schools, the Survivor Class members' ability to speak their traditional languages and practice their shíshálh, Tk'emlúps, and other, spiritual, religious and cultural activities was seriously impaired and, in some cases, lost entirely. These Class members were denied the ability to exercise and enjoy their Aboriginal Rights, both individually and in the context of their collective expression within the Bands, some particulars of which include, but are not limited to:

(a) shíshálh, Tk'emlúps and other Aboriginal cultural, spiritual and traditional activities have been lost or impaired;

(b) the traditional social structures, including the equal authority of male and female leaders have been lost or impaired;

(c) the shíshálh, Tk'emlúps and other Aboriginal languages have been lost or impaired;

(d) traditional shíshálh, Tk'emlúps and Aboriginal parenting skills have been lost or impaired;

(e) shíshálh, Tk'emlúps and other Aboriginal skills for gathering, harvesting, hunting and preparing traditional foods have been lost or impaired; and,

(f) shíshálh, Tk'emlúps and Aboriginal spiritual beliefs have been lost or impaired.

74. The interference in the Aboriginal Rights of the Survivor Class has resulted in that same loss being suffered by their descendants and communities, namely the Descendant and Band Classes, all of which was the result sought by Canada.

75. Canada had at all material times and continues to have a duty to protect the Class members' Aboriginal Rights, including the exercise of their spiritual practices and traditional protection of their lands and resources, and an obligation not to undermine or interfere with the individual Plaintiffs' and Class members' Aboriginal Rights. Canada has failed in these duties, without justification, through its Residential Schools Policy.

Intentional Infliction of Mental Distress

76. The design and implementation of the Residential Schools Policy as a program of assimilation to eradicate Aboriginal culture constituted flagrant, extreme and outrageous conduct which was plainly calculated to result in the Cultural, Social and Linguistic Damage, and the mental distress arising from that damage, which was actually suffered by the members of the Survivor and Descendant Classes.

Negligence giving rise to Spiritual, ~~Physical, Sexual,~~ Emotional and Mental Abuse

77. Through its Agents, Canada was negligent and in breach of its duties of care to the Survivor Class, particulars of which include, but are not limited to, the following:

(a) it failed to adequately screen and select the individuals ~~to whom it delegated~~ who it hired either directly or through its ~~a~~Agents for the operation of the ~~Identified~~ Residential Schools, to adequately supervise and control the operations of the ~~Identified~~ Residential Schools, and to protect Aboriginal children from spiritual, ~~physical, sexual~~, emotional and mental abuse at the ~~Identified~~ Residential Schools, and as a result, such abuses did occur to Survivor Class members and Canada is liable for such abuses;

(b) it failed to respond appropriately or at all to disclosure of abuses in the ~~Identified~~ Residential Schools, and in fact, covered up such abuse and suppressed information relating to those abuses; and

(c) it failed to recognize and acknowledge harm once it occurred, to prevent additional harm from occurring and to, whenever and to the extent possible, provide appropriate treatment to those who were harmed.

Vicarious Liability

78. Through its Agents, Canada breached its duty of care to the Survivor Class resulting in damages to the Survivor Class and is vicariously liable for all of the breaches and abuses committed on its behalf.

79. Further, or in the alternative, Canada is vicariously liable for the negligent performance of the fiduciary, constitutionally-mandated, statutory and common law duties of its Agents.

80. Additionally, the Plaintiffs hold Canada solely responsible for the creation and implementation of the Residential Schools Policy and, furthermore:

a. The Plaintiffs expressly waive any and all rights they may possess to recover from Canada, or any other party, any portion of the Plaintiffs' loss that may be attributable to the fault or liability of any third-party and for which Canada might reasonably be entitled to claim from any one or more third-party for contribution,

indemnity or an apportionment at common law, in equity, or pursuant to the British Columbia *Negligence Act*, R.S.B.C. 1996, c. 333, as amended; and

b. The Plaintiffs will not seek to recover from any party, other than Canada, any portion of their losses which have been claimed, or could have been claimed, against any third-parties.

Damages

81. As a consequence of the breach of fiduciary, constitutionally-mandated, statutory and common law duties, and the intentional infliction of mental distress and the breaches of Aboriginal Rights by Canada and its Agents, for whom Canada is vicariously liable, the Survivor Class members, including the Representative Plaintiffs, suffered injury and damages including:

(a) loss of language, culture, spirituality, and Aboriginal identity;

(b) emotional and psychological harm;

(c) isolation from their family, community and Nation;

(d) deprivation of the fundamental elements of an education, including basic literacy;

(e) an impairment of mental and emotional health, in some cases amounting to a permanent disability;

(f) an impaired ability to trust other people, to form or sustain intimate relationships, to participate in normal family life, or to control anger;

(g) a propensity to addiction;

(h) alienation from community, family, spouses and children;

(i) an impaired ability to enjoy and participate in recreational, social, cultural, athletic and employment activities;

(j) an impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;

(k) deprivation of education and skills necessary to obtain gainfully employment;

(l) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the Residential School experience;

(m) sexual dysfunction;

(n) depression, anxiety and emotional dysfunction;

(o) suicidal tendencies;

(p) pain and suffering;

(q) loss of self-esteem and feelings of degradation, shame, fear and loneliness;,

(r) nightmares, flashbacks and sleeping problems;

(s) fear, humiliation and embarrassment as a child and adult;

(t) sexual confusion and disorientation as a child and young adult;

(u) impaired ability to express emotions in a normal and healthy manner;

(v) loss of ability to participate in, or fulfill, cultural practices and duties;

(w) loss of ability to live in their community and Nation; and

(x) constant and intense emotional, psychological pain and suffering.

82. As a consequence of the breach of fiduciary, constitutionally-mandated, statutory and common law duties, and the intentional infliction of harm and breach of Aboriginal Rights by Canada and its Agents, for whom Canada is vicariously liable, the Descendant Class members, including the Representative Plaintiffs, suffered injury and damages including:

(a) their relationships with Survivor Class members were impaired, damaged and distorted as a result of the experiences of Survivor Class members in the ~~Identified~~ Residential Schools; and,

(b) their culture and languages were undermined and in some cases eradicated by, amongst other things, as pleaded, the forced assimilation of Survivor Class members into Euro-Canadian culture through the operation of the ~~Identified~~ Residential Schools.

83. As a consequence of the breach of fiduciary, constitutionally-mandated, statutory and common law duties, and the intentional infliction of harm and breach of Aboriginal Rights by Canada and its Agents, for whom Canada is vicariously liable, the Band Class has suffered from the loss of the ability to fully exercise their Aboriginal Rights collectively, including the right to have a traditional government based on their own languages, spiritual practices, traditional laws

and practices and to have those traditions fully respected by the members of the Survivor and Descendant Classes and subsequent generations, all of which flowed directly from the individual losses of the Survivor Class and Descendant Class members' Cultural, Linguistic and Social Damage.

Grounds for Punitive and Aggravated Damages

84. Canada deliberately planned the eradication of the language, religion and culture of Survivor Class members and Descendant Class members, and the destruction of the Band Class. The actions were malicious and intended to cause harm, and in the circumstances punitive and aggravated damages are appropriate and necessary.

85. The Class members plead that Canada and its Agents had specific and complete knowledge of the widespread physical, psychological, emotional, cultural and sexual abuses of Survivor Class members that were occurring at the ~~Identified~~ Residential Schools.

86. Despite this knowledge, Canada continued to operate the Residential Schools and took no steps, or in the alternative no reasonable steps, to protect the Survivor Class members from these abuses and the grievous harms that arose as a result. In the circumstances, the failure to act on that knowledge to protect vulnerable children in Canada's care amounts to a wanton and reckless disregard for their safety and renders punitive and aggravated damages both appropriate and necessary.

Legal Basis of Claim

87. The Survivor and Descendant Class members are Indians as defined by the *Indian Act*, R.S.C. 1985, c. 1-5. The Band Class members are bands made up of Indians so defined.

88. The Class members' Aboriginal Rights existed and were exercised at all relevant times pursuant to the *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

89. At all material times, Canada owed the Plaintiffs and Class members a special and constitutionally-mandated duty of care, good faith, honesty and loyalty pursuant to Canada's constitutional obligations and Canada's duty to act in the best interests of Aboriginal People and especially Aboriginal Children who were particularly vulnerable. Canada breached those duties, causing harm.

90. The Class members descend from Aboriginal Peoples who have exercised their respective laws, customs and traditions integral to their distinctive societies prior to contact with Europeans. In particular, and from a time prior to contact with Europeans to the present, the Aboriginal Peoples from whom the Plaintiffs and Class members descend have sustained their people, communities and distinctive culture by exercising their respective laws, customs and traditions in relation to their entire way of life, including language, dance, music, recreation, art, family, marriage and communal responsibilities, and use of resources.

Constitutionality of Sections of the *Indian Act*

91. The Class members plead that any section of the Act and its predecessors and any Regulation passed under the Act and any other statutes relating to Aboriginal Persons that provide or purport to provide the statutory authority for the eradication of Aboriginal People through the destruction of their languages, culture, practices, traditions and way of life, are in violation of sections 25 and 35(1) of the *Constitution Act* 1982, sections 1 and 2 of the *Canadian*

Bill of Rights, R.S.C. 1985, as well as sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and should therefore be treated as having no force and effect.

92. Canada deliberately planned the eradication of the language, spirituality and culture of the Plaintiffs and Class members.

93. Canada's actions were deliberate and malicious and in the circumstances, punitive, exemplary and aggravated damages are appropriate and necessary.

94. The Plaintiffs plead and rely upon the following:

Federal Courts Act, R.S.C., 1985, c. F-7, s. 17;

Federal Courts Rules, SOR/98-106, Part 5.1 Class Proceedings;

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss. 3, 21, 22, and 23;

Canadian Charter of Rights and Freedoms, ss. 7, 15 and 24;

Constitution Act, 1982, ss. 25 and 35(1),

Negligence Act (British Columbia), R.S.B.C. 1996, c. 333;

The Canadian Bill of Rights, R.S.C. 1985, App. III, Preamble, ss. 1 and 2;

The Indian Act, R.S.C. 1985, ss. 2(1), 3, 18(2), 114-122 and its predecessors.

International Treaties:

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951;

Declaration of the Rights of the Child (1959), G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354;

Convention on the Rights of the Child, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989);

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976;

American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System,* OEA/Ser.L.V//II.82 doc.6 rev.1 at 17 (1992); and

United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007), endorsed by Canada 12 November 2010.

The plaintiffs propose that this action be tried at Vancouver, BC.

June 11th, 2013

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FEDERAL COURT

SOLICITORS OF RECORD

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