Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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 Aboriginal Affairs and Northern Development Canada)

Respondent

-and-

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA

Interested Parties

MEMORANDUM OF FACT AND LAW OF THE COMPLAINANT FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

Robert W. Grant, Q.C.
Anne Levesque
Michael A. Sabet
David P. Taylor

Sébastien Grammond, Ad.E. University of Ottawa
Sarah Clarke, Hensel Barristers

JURISTES POWER | POWER LAW
Suite 1103 - 130 Albert Street
Ottawa, ON K1P 5G4
Tel.: (613) 702-5568 Fax: 1 (888) 404-2227

Counsel for the First Nations Child and Family Caring Society

D. *Monetary Award*

1. Human Rights Damages for Recognition of the Discrimination Experienced by First Nations Children

513. In addition to the broader social objective of eradicating discrimination in the present and the future, human rights remedies must provide victims of discrimination with some measure of recognition of the harm done to them. This recognition can be achieved in a variety of ways. Given several aspects of the complexity and novelty of this case, this Tribunal should heed the Supreme Court of Canada's call to show "flexibility and imagination in the crafting of remedies for infringements of fundamental human rights."[582] First, the individual victims of discrimination, First Nations children, are not complainants in this case. Second, this complaint is a systemic one that addresses a discriminatory program that has affected tens of thousands of First Nations children, if not more. Third, this Tribunal has not received evidence about the precise nature and extent of the harm suffered by each individual child; as this would have been an impossible task for the Commission and the Complainants. Fourth, the harm suffered by First Nations children follows on the heels of, and is intertwined with, other harms suffered by First Nations over time as a result of Canada's colonial policies. These harms cannot be compensated simply by an award of money.

514. Given those constraints, the Caring Society asks this Tribunal to use its power under section 53(3) of the *CHRA* to grant "special compensation" for Canada's wilful and reckless discriminatory conduct with respect to each First Nations child taken in out of home care since 2006. Due to the voluntary and egregious character of Respondent's omission to rectify discrimination against First Nations children, the Caring Society submits that the maximum amount, $20,000 per person, should be awarded. The amount 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. Several aspects of this request are explained below.

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[582] *Communauté urbaine de Montréal* supra note 548 at para 26.

2. Standing

515. Although the Complainants in this case are not "individuals" whose rights under the *CHRA* have been violated, the Caring Society submits that First Nations children who received discriminatory child welfare services are entitled to compensation for the pain and suffering they have experienced.[583] Nothing in the language of section 53(3) prevents this Tribunal from awarding compensation to "victims" who personally experienced discrimination where a complaint is substantiated, even if they did not personally lodge the complaint. In the absence of specific language, the Supreme Court of Canada has held that human rights tribunals and courts cannot limit the meaning of terms meant to advance the purpose of human rights legislation. [584]

516. Moreover, in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, the Supreme Court of Canada cautioned courts not to allow the fundamental rights of a vulnerable population to be violated without recourse due to the vulnerable population's lack of capacity, resources or expertise.[585] On the issue of standing, it wrote that

> Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected.[586]

517. As in *Downtown Eastside*, public interest litigants initiated this case on behalf of a disadvantaged population whose legal rights are at stake. The evidence presented by the Commission and the Complainants clearly established that First Nations children are amongst the most vulnerable segments of Canada's population.[587] The Caring Society submits that the fact that First Nations children do not have the resources or capacity to file individual complaints should not bar them from receiving human rights damages under the CHRA.

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[583] It is noted that the Respondent has not challenged the standing of the Complainants in this complaint.
[584] *Vaid* supra note 62 at para. 81
[585] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 51 [*Downtown Eastside Sex Workers*].
[586] *Downtown Eastside Sex Workers* supra note 585 at para 51.
[587] OAG Report 2011 (CBD, Tab 53, p 23). In her testimony, Dr. Blackstock also described First Nations children as the most vulnerable children in the country: Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 200, lines 19-24). See also *Mactavish J's Reasons* supra note 32 at para 334.

3. Wilful and Reckless Discrimination

518. Section 53(3) of the *CHRA* provides for awards of "Special Compensation" for wilful and reckless conduct, to a maximum of $20,000.00. This Tribunal has held that such damages are justified in cases where a respondent's conduct has been found to be "rash, heedless or wanton."[588] An award under section 53(3) may be likened to an award of exemplary damages and should be governed by similar rules. In particular, an award of exemplary damages does not depend on proof of prejudice. Exemplary damages may be awarded as a stand-alone remedy, even in the absence of compensatory damages.[589]

519. In a decision recently upheld by the Federal Court of Appeal, this Tribunal ordered a respondent to pay the maximum award under this heading due to its failure to take measures to change its discriminatory conduct despite its knowledge of its impact on the complainants. The Tribunal wrote:

> This Tribunal finds that CBSA, by ignoring so many efforts both externally and internally to bring about change with respect to its family status policies of accommodation has deliberately denied protection to those in need of it.[590]

520. The Tribunal also took issue with the fact that the Canada Border Services Agency, the respondent in *Johnstone,* had apologized for similar conduct in the past, yet had done little to remedy the situation. It wrote:

> CBSA, and its organizational predecessor's lack of effort and lack of concern takes many forms over many years including: disregard for the *Brown* decision after writing a letter of apology; developing a model policy and then burying it (some management knew of it, some did not); pursuing arbitrary policies that are unwritten and not universally followed; lack of human rights awareness training even at the senior management level; the proffering of a floodgates argument 5 years after the complaint with the Respondent giving insufficient time and data to its own expert to enable him to provide a helpful expert opinion; and no attempt to inquire of Ms. Johnstone as to her particular circumstances or inform her of

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[588] *Brown v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 24 (CanLII) at para 16.
[589] *De Montigny v Brossard (Succession)*, 2010 SCC 51, [2010] 3 SCR 64.
[590] *Johnstone v Canada Border Service Agency*, 2010 CHRT 20 (CanLII) at para 380.

> options to meet her needs.[591]

521. As was the case in *Johnstone*, the Respondent in this complaint has a long history of discriminatory treatment, despite repeated internal and external efforts to bring about change. According to the evidence before the Tribunal, Canada was formally made aware of its discriminatory treatment as early as 2000, through a report it commissioned entitled the Joint National Policy Review.[592] Amongst other things the NPR found that Directive 20-1, which the Respondent continues to apply in three provinces and the Yukon Territory and which forms the basis of EPFA, was outdated.[593] The report also presented Canada with comparative evidence indicating that First Nations children were receiving lower levels of service when compared to non-First Nations children. Dr. Blackstock explained the findings of the NPR as follows:

> There were significant concerns about the comparability of the funding. The report says that there was 22 percent less funding for First Nations Children and Family Services.[594]

522. The report also raised concerns about the impact of jurisdictional disputes on First Nations children. Dr Blackstock summarized the NPR's finding in that regard in the following manner:

> Given that we had jointly decided, around this table, that the paramount consideration was the child, any differences between or within governments or any inconsistencies of government policy to what is in the best interests of the child needed to be sorted out because, at that point, there was a shared recognition that these inconsistencies of these disputes between governments about who should fund services were getting in the way and were creating denials of service or unequal service or unequal access to service.[595]

523. In a letter dated August 7, 2001, the then Minister of Indian and Northern Affairs, confirmed that he had reviewed the draft final report of the NPR. He went on to state that he hoped to implement the report's recommendations and stated that the argument for additional

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[591] *Johnstone v Canada Border Service Agency*, supra note 590 at para 381.

[592] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 28). The NPR was formed of representatives of the then Department of Indian and Northern Affairs, the Assembly of First Nations and First Nations agencies and was funded by the Respondent.

[593] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 32, lines 18-25).

[594] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol. 2, p 32, lines 21-25). See also *NPR*, June 2000 (CBD, Vol 1, Tab 3, p 14).

[595] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 39, lines 10-21). See also NPR (CBD, Vol 1, Tab 3, p 120).

funding would be "very strong".[596] Despite this, and the creation of an implementation review committee, very few of the NPR's recommendations were actually implemented.[597]

524. In 2004, Canada again undertook an extensive study that made it aware of the discriminatory manner in which it was treating First Nations children. What would become a series of three reports confirmed many of the NPR findings, particularly in relation to the treatment of small agencies, the lack of prevention services, the need for increased investments in capital, and legal expenses and to restore inflation losses, and finally the need to recognize the higher needs of First Nations children and the adverse impact of jurisdictional disputes between different level of government.[598] The last report, *Wen:de: the Journey Continues*, recommended an evidence-informed funding formula for First Nations agencies that would allow for equitable and culturally appropriate services that take into account the greater needs of First Nations children as well as mechanisms to regularly review and update the formula.[599]

525. Canada itself has recognized that its FNCFS Program does not provide equal child welfare services to First Nations children. In 2007, the following text appeared on INAC's own website:

> the current federal funding approach to child and family services has not let First Nations Child and Family Service 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 of First Nations Child and Family Service Agencies to child welfare is required in order to reverse the growth rate of children coming into care, and in order for agencies to meet their mandated responsibilities[600]

526. In addition to this, internal AANDC staff working within the FNCFS Program acknowledged and voiced concerns about the unequal level of services provided to First Nations

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[596] Hon. Robert D Nault, *Letter Regarding the Final NPR Report* (CBD, Vol 6, Tab 76, p 2).
[597] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 89-90, lines 4-25, 1-12). Dr. Blackstock testified that one of the recommendations "moved forward".
[598] These reports are Bridging Econometrics with First Nations Child and Family Services (CBD, Vol 1, Tab 4); *Wen:de: We are coming to the light of day* (CBD, Vol 1, Tab 5); *Wen:de The Journey Continues* (CBD, Vol 1, Tab 6). See Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 121-126).
[599] See Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol. 2, pp. 127-128).
[600] AANDC, *Fact Sheet - First Nations Child and Family Services*, October 2006 (CBD, Vol 4, Tab 38, p 2).

children. An undated internal document described the circumstances for First Nations agencies as "dire."[601] In a paper examining the issue of provincial comparability of the FNCFS Program, Vince Donoghue, former INAC staff, called the level of funding "woefully inadequate."[602] His paper also recognized that the inequitable services available through the FNCFS Program was one of the "important contributing factors" to the disproportionate number of First Nations children in care.[603] One government official testified that child welfare workers are perceived as "baby snatchers" or "bad guys" in many First Nations communities.[604]

527. As in *Johnstone*, external actors also voiced repeated concerned about the Respondent's discriminatory treatment. From 2000 to 2012, Canada received letters from representatives of the provinces of New Brunswick, Nova Scotia, Alberta, Saskatchewan and British Columbia expressing concerns that the FNCFS Program was not comparable to the child welfare services available off-reserve and did not meet the needs of First Nations children.[605] In 2009, the Minister of Children and Family Development and the Minister of Aboriginal Relations and Reconciliation for the Province of British Columbia, wrote to then-INAC Minister Strahl to express their concerns about Direction 20-1 and urged the Respondent to take measures to ensure equity in child welfare services to First Nations children.[606]

528. In 2008, the Auditor General of Canada undertook an extensive review of the FNCFS Program. The key findings of the Auditor General were summarized as follows:

- The funding INAC provides to First Nations child welfare

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[601] *First Nations Child and Family Services (FNCFS): Q's and A's* (CBD, Vol 6, Tab 64, p 1).
[602] Vince Donoghue, *Issue : To ensure that First Nations families and children on reserve have access to provincially comparable Child and Family Services*, September 24, 2010 (CBD, Vol 11 Tab 234, p 2).
[603] *Ibid* (CBD, Vol 11 Tab 234, p 2).
[604] Barbara D'Amico Examination in Chief, March 18, 2014 (Vol 51, p 94, lines 1-13).
[605] Hon. Joanne Crofford, *Letter to the Hon. Andy Scott Regarding Upcoming Amendments to the Child and Family Services Act*, January 17, 2005 (CBD, Vol 10, Tab 207); Hon. Iris Evans, *Letter to the Hon. Robert D. Nault Regarding Federal Funding of Child and Family Services*, March 15, 2000 (CBD, Vol 14, Tab 370); Hon. Iris Evans, *Letter to Hon. Jane Stewart Regarding Delay in Announcing Release of Early Childhood Development Funding for Aboriginal Peoples in Alberta*, March 11, 2003 (CBD, Vol 14, Tab 371); Hon. Heather Forsyth, *Letter to the Hon. Andy Scott Seeking a Federal Commitment to Include Early Intervention Funding in Anticipated On-Reserve Funding Model*, August 19, 2005 (CBD, Vol 14, Tab 373); Hon. Stephanie Cadieux, *Letter to the Hon. Bernard Valcourt and the Hon. Rona Ambrose Regarding the Enhanced Prevention Funding Agreement*, February 5, 2014 (CBD, Tab 416).
[606] Hon. Mary Polak and Hon. George Abbott, *Letter to the Hon. Chuck Strahl Regarding the Implementation of Jordan's Principle*, November 17, 2009 (CBD, Vol 6, Tab 69). The then Minister of Indian and Northern Affairs declined the request for a meeting stating he did not have time in the near future: Hon. Chuck Strahl, *Letter of Reply to the Hon. Mary Polak and the Hon. George Abbott Regarding Jordan's Principle*, January 21, 2010 (CBD, Vol 6, Tab 70).

> agencies for operating child welfare services is not based on the actual cost of delivering those services. It is based on a funding formula that the Department applies nationwide. The formula dates from 1988. It has not been changed to reflect variations in legislation and in child welfare services from province to province, or the actual number of children in care. The use of the formula has led to inequities. Under a new formula the Department has developed to take into account current legislation in Alberta, funding to First Nations agencies in that province for the operations and prevention components of child welfare services will have increased by 74 percent when the formula is fully implemented in 2010.
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> • The Department has not defined key policy requirements related to comparability and cultural appropriateness of services. In addition, it has insufficient assurance that the services provided by First Nations agencies to children on reserves are meeting provincial legislation and standards.
>
> • INAC has not identified and collected the kind of information it would need to determine whether the program that supports child welfare services on reserves is achieving positive outcomes for children. The information the Department collects is mostly for program budget purposes.[607]

529. The Auditor General also noted that Canada had known about the shortcomings of the formula for years.[608] The Standing Committee on Public Accounts, for its part, examined Canada's response to the Auditor General's report regarding the FNCFS Program. In a March 2009 report, the Committee criticized Canada for failing to take measures to remedy the deficiencies identified by the Auditor General the year prior. The report stated:

> The work for the audit on the First Nation Child and Family Services Program was completed on 9 November 2007, and the audit was tabled in Parliament on 6 May 2008. However, the Deputy Minister and Accounting Officer for INAC, Michael Wernick, only provided vague generalities in his opening statement about the Department's actions in response to the audit; though, he did commit to providing a follow-up report to the Committee in April. When asked if he had a concrete and specific action plan to provide to the Committee, Mr. Wernick said "we have an action plan in the sense that we're pursuing these various

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[607] OAG Report 2008 (CBD, Vol 3, Tab 11, p 6).
[608] *Ibid* (CBD, Vol 3, Tab 11, p 21).

> initiatives. That was the undertaking I made at the beginning: that it would be going to my audit committee in the month of April and we'd provide it to the committee. It will go through each recommendation and give more specifics on what we're doing or what we already have done.
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> While the Deputy Minister verbally committed to providing an action plan and follow-up report to the Committee in April, the Committee is very concerned that there is no evidence of an action plan currently in plan, and that it would take too long to finalize an action plan.[609]

530. The Auditor General of British Columbia also brought the inequalities in Canada's FNCFS Program to Canada's attention in 2008. In his report, he confirmed what the Auditor General of Canada had concluded. He wrote:

> Neither government takes policy requirements sufficiently into account when establishing levels of funding for child welfare services. Under federal and provincial policies, Aboriginal children, including First Nations children, should have equitable access to a level and quality of services comparable with those provided to other children. Funding for the services needs to match the requirements of the policies and also support the delivery of services that are culturally appropriate — which is known to take more time and resources. Current funding practices do not lead to equitable funding among Aboriginal and First Nations communities. [610]

531. The report also reiterated the findings of the NPR and the Wen:de reports regarding the perverse outcomes of the inequitable child welfare services provided through the Respondent's FNCFS Program. The report stated:

> The federal funding formula does not limit the options for services a delegated Aboriginal agency may provide; however, in the view of the delegated agencies the amount of funding was insufficient to cover the cost of providing out-of-care options (such as placing a child at risk with extended family). Furthermore, both the National Policy Review in 2000 and the Wen:de report in 2005 concluded that federal funding rates are insufficient to pay for providing services

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[609] House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, pp 3-4).
[610] Office of the Auditor General of British Columbia, Management of Aboriginal Child Protection Services, May 2008 (CBD, Vol 5, Tab 58, p 2).

> comparable with those for non-First Nations children. The unintended consequence was that children were removed from their families (taking the child into care), as the funding for this option was being covered by INAC.[611]

532. The BC Representative for Youth and Children also took issue with Canada's lack of leadership and failure to take an active role in ensuring that the needs of First Nations children are met. She wrote:

> In terms of silence, the absence of any real effort by Aboriginal Affairs and Northern Development Canada (AANDC) to take an active role in fulfilling its fiduciary role to children and youth with special needs or mental health needs living on-reserve is deafening. Even in terms of ensuring that the child welfare system operates – a system it funds and endorses – this investigative report found no concern or leadership by the federal department. That standard is too low given the known risk of harm to girls such as this one.[612]

533. Canada has also been faced with international pressure to address the inequalities in its FNCFS Program. In particular, the United Nations Committee on the Rights of the Child expressed concerns regarding Canada's lack of action following the Auditor General's 2008 report regarding the FNCFS Program and urged the government to address the inequalities in children welfare services available to First Nations children.[613]

534. External child rights experts also called on Canada to put an end to jurisdictional disputes that caused First Nations children to experience delays or to be denied essential government services. In a 2010 report, the New Brunswick Youth and Child Advocate recognized that such disputes were systemic, rather than isolated incidents. The 2010 report stated:

> When one reviews the saga of these lengthy, plodding federal-provincial-First Nations negotiations against the backdrop of rampant rates of teen suicides, Fetal Alcohol Spectrum Disorder, youth incarceration and low scholastic achievement, it is hard to escape the conclusion that what is happening here is a Jordan's

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[611] Office of the Auditor General of British Columbia, Management of Aboriginal Child Protection Services, May 2008 (CBD, Vol 5, Tab 58, p 32).

[612] British Columbia Representative for Children and Youth, *Lost in the Shadows: How a Lack of Help Meant a Loss of Hope for One First Nations Girl*, February 2014 (RBD, R13, Tab 24).

[613] UN Committee on the Rights of the Chid, *Consideration of reports submitted by State parties under article 44 of the Convention – Concluding Observations: Canada*, October 5, 2012 (CBD, Vol 5, Tab 57, p 9, para 42).

> Principle scenario played out on a systemic scale.[614]

535. Canada has provided no reasonable explanation as to why it has failed to take measures to remedy the numerous inequities identified by both internal and external experts and reports since 2000. When asked why Canada continued to determine levels of funding to agencies based on the assumption that only 6% of children were in care, after the Auditor General found that this led to inequities in services, Barbara D'Amico replied that she did not know.[615] Sheilagh Murphy was also questioned about the Auditor General's conclusion that the child welfare services on reserves were not comparable to those provide off-reserve. She simply replied "it's an observation by the Auditor General."[616] On the subject of the flaws identified by the Auditor General regarding EPFA, she testified that she was not sure about the specifics that she was pointed to or whether any changes had been made.[617]

536. Ms. Murphy was also cross-examined regarding the 14-year delay in implementing the recommendations made by the NPR in British Columbia. She provided the following response:

> Yes, B.C. is still waiting for the EPFA. As I said yesterday, we have tried to work with them, we have given -- there are some transitional dollars, but certainly, until you have EPFA, you are not going to be a will to do all of the prevention work that other jurisdictions who have transitioned are undertaking.[618]

4. <u>Amount of "special compensation" damages</u>

537. According to the language of section 53(3), "special compensation" damages are awarded where the discriminatory practice is willful or reckless. It follows logically that the gravity of the willful or reckless character of Canada's conduct is the main factor to be taken into account in order to determine the amount of the award. The foregoing discussion highlights the fact that Canada has known for many years that its funding of First Nations child and family services was inadequate and discriminatory, and yet has taken very few steps to stop the crisis in its FNCFS

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[614] Office of the Ombudsman and Child and Youth Advocate (New-Brunswick), *Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick*, February 2010 (CBD, Vol 5, Tab 60, p 21).
[615] Barbara D'Amico Cross-Examination, March 20, 2014 (Vol 53, p 129, lines 9-10).
[616] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 141, lines 4-5).
[617] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 147, lines 15-19).
[618] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 145, lines 11-19).

system, despite having been urged to do so by a wide array of Canadian and international bodies or officials.

538. Canada's conduct is even more serious when considered in light of the fact that child and family services are an essential public service; inadequacies in this essential public service hampers the development of children and may even put their lives in jeopardy. Moreover, the cultural inadequacy of the FNCFS program breaches Canada's fiduciary duty not to put obstacles to the transmission of First Nations cultures, as noted in the introductory section of this factum. Indeed, in light of the reality that First Nations children are particularly vulnerable to Canada's actions, Canada's failure to rectify its conduct is only the more reckless.

539. As in *Johnstone*, the Respondent in this case has not provided a rational explanation for its continuous failure to respond to internal and external efforts to end the discrimination to which First Naitons children have been subjected in the context of the FNCFS system. Also, much like the respondent in *Johnstone*, the Respondent in this case has apologized for past discriminatory conduct, yet has continuously showed a lack of effort and concern when similar allegations of discrimination have been made against it.[619] In that case, the maximum amount of $20,000 was awarded. In light of the similarities with *Johnstone*, the Caring Society seeks an award granting $20,000 per child in care for the Respondent's willful and reckless discriminatory conduct.

540. It should also be emphasized 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. In that context, it is certainly not unjust or exaggerated to require the federal government pay an amount of $20,000 in respect of each First Nation child taken in care since 2006, that is, one year before the Complaint was filed.

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[619] The Right Hon. Stephen Harper On Behalf of the Government of Canada, *Statement of Apology – to former students of Indian Residential Schools*, June 11, 2008 (CBD, Vol 3, Tab 10). See also Dr. Amy Bombay, Dr. Kim Matheson and Dr. Hymie Anisman, *Expectations Among Aboriginal Peoples in Canada: The Influence of Identity Centrality and Past Perceptions of Discrimination*, 2013 (CBD, Vol 14, Tab 341) where the AFN's expert witness discussed the impact of the apology on perceived discrimination.

5. <u>Award for willful and reckless discrimination to be put into a Trust to provide redress to First Nations children who experienced discrimination</u>

541. Considering the willful and reckless character of Canada's conduct, the Caring Society seeks an award of $20,000 per First Nations child who was in care from February 2006 to the date of the award.[620] The Caring Society asks that these damages be paid into an independent Trust Fund that will ensure that the damages are used to the benefit of First Nations children who have experienced pain and suffering as a result of Canada's discriminatory treatment. In particular, the objective will be to allow First Nations children to access services, such as language and cultural programs, family reunification programs, counselling, health and wellness programs and education programs

542. While conferring individual remedies under 53(2)(e) into a Trust may be an uncommon approach to compensation under the *CHRA*, the Caring Society submits that such a remedy is appropriate and just in light of the unique circumstances of this case, and would give effect to the Supreme Court of Canada's recognition of "the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights."[621] Put simply: the magnitude and multi-faceted nature of the prejudice suffered by First Nations children requires an innovative remedy.

543. 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, 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. A similar approach has also been used in certain class actions where the distribution of money to individual victims is unfeasible or

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[620] The Caring Society seeks compensation for all children who were affected by the Respondent's discriminatory conduct within one year of the filing of its complaint and onwards. An estimation of the number of children involved may be found in CBD, Vol 13, Tab 296.
[621] *Communauté urbaine de Montréal* supra note 548 at para 25.

impractical.[622] Moreover, unlike most human rights complaints, this case involves children. Paying the compensation to which they are entitled into a Trust will help ensure that the award is used in a manner that will redress the harms that these children have suffered and, in light of the intergenerational impacts of such harms, will be of benefit to generations of First Nations children yet to come. As such, the Caring Society submits that conferring the compensation to a Trust is the approach most consistent with the spirit of the CHRA and the objectives of section 53(3).

E. Retaining jurisdiction

544. The Caring Society respectfully requests that the Tribunal retain jurisdiction over this matter until the parties have agreed that the FNCFS Program provides reasonably comparable and culturally appropriate services that take into account the unique needs of First Nations children and that effective mechanisms are in place to prevent the recurrence of discrimination. The Caring Society submits that, given Canada's past inaction when confronted with well-founded allegations of discrimination, the ongoing involvement of the Tribunal is necessary to ensure the full and timely implementation of the Tribunal's orders.

545. In cases where there is evidence that there may be delays or complications in implementing an order, human rights tribunals have accepted to retain jurisdiction over a complaint after issuing an order. In *Ontario (Ministry of Correctional Services)*, for example, the Board initially made an extensive remedial order in 1998 based on a finding of racial discrimination that included amongst other things, the publication of the Board's order and the establishment of a human rights training program. The Board retained jurisdiction "until such time as these orders have been fully complied with so as to consider and decide any dispute that might arise in respect of the implementation of any aspect of them". Four years later, the complainant returned to the Tribunal to seek to enforce aspects of the order that had not been complied with.[623] Likewise, the Ontario Human Rights Tribunal, for example, has ordered its members to monitor the implementation of systemic remedies, such as the development and

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[622] In *Sutherland v Boots Pharmaceutical PLC*, [2002] OJ No 1361 (Ont SCJ) (QL) at para 9, the Ontario Superior Court of Justice approved a class action settlement according to which an aggregate amount was to be distributed to non-profit organizations rather than individuals. See also *Clavel c Productions musicales Donald K Donald Inc*, JE 96-582, [1996] JQ no 208 (CSQ)(QL) at paras 43-45.

[623] *Ontario v McKinnon* supra note 577 at para 10; affirmed [2004] OJ No 5051, 2004 CarswellOnt 5191 (Ont CA).

MONETARY ORDERS

Pursuant to s. 53(3) of the *CHRA*, the Caring Society seeks an order that the Respondent:

1) Pay an amount of $20,000 as damages under section 53(3) of the CHRA, 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 on reserve and in the Yukon Territory that has been taken into out-of-home care since 2006;

2) Provide to the Tribunal and the parties a detailed account of the number of First Nations children taken into out-of-home care on reserve and in the Yukon Territory since 2006; and

3) Pay these damages, plus interest, into a trust fund that:

    a) will be used to the benefit of First Nations children who have experienced pain and suffering as a result of the Respondent's discriminatory treatment;
    b) will provide First Nations children with access to services, such as culture and language programs, family reunification programs, counselling, health and wellness programs and education programs; and
    c) will be administered by a board of seven Trustees appointed jointly by the Complainant, the Commission and the Respondent or, if the latter fail to agree, by the Tribunal.