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 Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

Interested Parties

WRITTEN SUBMISSIONS OF THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA REGARDING COMPENSATION FEBRUARY 21, 2020

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I. Overview

1. On September 6, 2019, the Canadian Human Rights Tribunal (the "**Tribunal**") released its **Compensation Entitlement Order**, finding that Canada's wilful and reckless discrimination in its First Nations Child and Family Services Program ("**FNCFS Program**") and in its flawed implementation of Jordan's Principle represented "worst-case scenario" violations under the *Canadian Human Rights Act* ("***CHRA***"). This discrimination harmed tens of thousands of children and their families. It contributed to the deaths of some children and caused many others to be unnecessarily separated from their families.

2. The **Compensation Entitlement Order** confirmed that discrimination in the FNCFS Program is ongoing and set out the categories of victims, timeframes of eligibility for compensation, and the amount payable per victim ($20,000 for pain and suffering (s. 53(2)(e) of the *CHRA*) and $20,000 for wilful and reckless discrimination (s. 53(3) of the *CHRA*)). The Tribunal further ordered Canada to engage in discussions with the complainants, the First Nations Child and Family Caring Society (the "**Caring Society**") and the Assembly of First Nations ("**AFN**"), and to submit a proposal to the Tribunal regarding a process of compensation on or before December 10, 2019 (the "**Compensation Process**").

3. Immediately upon the release of the Compensation Entitlement Order, the complainants began working on a compensation process to meet their obligations to submit a proposal to the Tribunal on or before December 10, 2019. This included repeatedly inviting Canada to consultation meetings on the compensation process. Canada declined these requests and did not identify representatives for the compensation process until December 10, 2010.[1] Until that time, the complainants worked without Canada's involvement and incurred significant financial expenses in doing so.

4. Instead of immediately engaging in discussions with the Caring Society and the AFN, and allowing the Tribunal to complete its work, Canada commenced a judicial review application on October 4, 2019, with the express purpose of quashing all financial compensation awarded pursuant to the *CHRA* to all children and their families. Simultaneously, Canada brought a

[1] Affidavit of Affidavit of Debra Burke-Lachaine, affirmed February 21, 2020, at Exhibit "A" ("**Burke-Lachaine Affidavit**").

motion to stay the Compensation Entitlement Order, arguing that the discussions regarding the Compensation Process and the important work left to do by the Tribunal should be suspended until the merits of the judicial review application could be adjudicated. The Federal Court denied Canada's stay motion on November 29, 2019.[2]

5. Canada petitioned the Tribunal for an extension on November 25, 2019 arguing that Canada was unable to take a position due to the "care-taker" period surrounding the 43rd General Election.[3] On November 27, 2019, the Tribunal granted an extension of the time to discuss the Compensation Process. The timeline was extended to January 29, 2020.

6. The Caring Society filed Dr. Blackstock's affidavit on December 9, 2019 to advise the Tribunal, and by extension First Nations, potential compensation beneficiaries and the public, of the significant efforts it had taken to comply with the Compensation Entitlement Order.

7. Although it had appointed representatives prior to January 29, 2020 and had taken some initial steps to contribute to the compensation process, Canada requested, and received, a further extension to February 21, 2020. The Caring Society agreed to Canada's requested extension based on its pledge that it would not seek further extensions. The Caring Society continues to hope that all parties will press forward and continue to "[seek] to "do the right thing" […] for the individuals who are entitled to compensation"[4] by completing this important work and discussions required to ensure that the victims would not suffer any further harm as a result of unreasonable delay.[5]

8. Since December 13, 2019, the Caring Society, the AFN and Canada have been working together to develop a framework for the payment of the financial compensation ordered to the victims in this case (the "**Framework**"). The Framework accompanies these submissions, setting out the parameters for a system that will support the technical mechanisms for the distribution of the funds to be paid out, notification to beneficiaries, as well as considerations surrounding

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[2] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada et al*, 2019 FC 1529.
[3] November 25, 2019 letter from Robert Frater, Q.C. to Judy Dubois.
[4] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada et al*, 2019 FC 1529 at para 32.
[5] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada et al*, 2019 FC 1529 at paras 31-33.

needed supports to victims in receipt of the compensation, including mental health supports and financial literacy services.

9. The Caring Society remains concerned regarding the "old mindset" of Indigenous Services Canada ("**ISC**") and Canada's failure to comply with the Tribunal's Compensation Entitlement Order in a timely manner. Despite the two extensions granted by the Tribunal, valuable time has been lost and cabinet has still not provided direction on key aspects of this case.[6]

10. Moreover, the judicial review application remains outstanding. While further procedural steps in the judicial review have yet to be scheduled, Canada has not discontinued its application for judicial review, nor has it accepted that the victims in this case are entitled to the financial compensation as ordered by the Tribunal. Its application for judicial review continues to seek to quash all aspects of the Tribunal's Compensation Entitlement Order.

11. Of note, on December 11, 2019, the House of Commons unanimously passed the following motion:

> 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.[7]

12. Critically, however, despite this unanimous view of the House of Commons, Canada still has not conceded that the discrimination is ongoing. In fact, the Honourable Marc Miller, Minister of Indigenous Services Canada, has made repeated public statements that the discrimination is in

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[6] Burke-Lachaine Affidavit at Exhibit "B": "Numbers can get large. If we don't act now, conceivably in the future we can have litigation which can be equally large – if not larger […]. These are a series of discussions that I'll have with cabinet colleagues and with government."

[7] Canada, Parliament, *House of Commons Debates*, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279.

the past,[8] and has been reported as referring to the discrimination as a "historical wrong".[9] This raises serious doubt about Canada's commitment to end its discriminatory practices and protect other children and families from the harmful effects of its wilful and reckless discrimination. One cannot remedy discrimination if one does not acknowledge its existence.

13. However, some progress has been made. The Caring Society is of the view that the Framework submitted to the Tribunal provides a basis for the distribution of the funds when considered in tandem with the Caring Society's submissions on this matter.

14. The purpose of these submissions is to address three (3) issues on which there is no consensus: (i) the "age of maturity" at which victims may remove their compensation from being held in trust; (ii) whether the estate of a victim (child or parent (or care-giving grandparent)) who died prior to the Compensation Process taking effect is entitled to receive compensation; and (iii) whether the Tribunal's Compensation Entitlement Order should be extended to include a child who was in care on January 1, 2006 (but removed before that date).[10]

15. The Caring Society's position on each issue is as follows: (i) the "age of maturity" at which victims may withdraw their compensation from being held in trust should be 25 years of age, with a mechanism to allow that young persons aged 18-25 access to the compensation in order to attend post-secondary educational programs (including vocational training programs) and for compassionate reasons; (ii) compensation ought to be paid to the estate of each victim of Canada's discrimination who passed away prior to the Compensation Process being implemented; and (iii)

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[8] Canada, Parliament, *House of Commons Debates*, 43rd Parl, 1st Sess, Vol 149, No 6 (December 12, 2019) at 345 and 346 (Hon M Miller); Canada, Parliament, *House of Commons Debates*, 43rd Parl, 1st Sess, Vol 149, No 9 (January 28, 2020) at 588 (Hon M Miller); Canada, Parliament, *House of Commons Debates*, 43rd Parl, 1st Sess, Vol 149, No 14 (February 4, 2020) at 905 (Hon M Miller).

[9] Burke-Lachaine Affidavit at Exhibit "C": "Indigenous Services Minister Marc Miller said the Trudeau government has a solid track record dealing with historical wrongs inflicted on Indigenous children by Ottawa's historic policies through class-action settlements [emphasis added]."

[10] The Caring Society urges use of the word "removal" as opposed to "apprehension, as it is a more accurate reflection of the diversity of legal mechanisms by which First Nations children may have been taken into care. For this reason, the parties have agreed in the Compensation Framework that a "necessary/unnecessary removal" includes children removed from their families under legal mechanisms such as kinship and various custody agreements pursuant to child and family services legislation in the province/territory, entered into between child and family services officials and the parent(s) or caregiving grandparent(s) (see Article 3.2(a)(a)).

a child who was in care on January 1, 2006 (but removed before that date) ought to qualify as entitled to compensation.

II. The Caring Society's Goals for the Compensation Process

16. In preparing for discussions with Canada, the Caring Society set specific criteria for a Compensation Process that would serve to locate beneficiaries and to distribute compensation:

a. The process should begin with Canada disclosing the nature and extent of data in its possession that can assist in identifying beneficiaries;

b. First Nations Child and Family Services Agencies and provincial child welfare entities that receive funding through the FNCFS Program should be guided by a taxonomy guide, as amended to reflect any future orders by the Tribunal, for locating beneficiaries, developed with relevant expertise;

c. The Compensation Process should be publicized by a Notice Plan containing accommodations for persons with disabilities, in marginalized circumstances, with varying literacy levels in English and French, and for children and youth;

d. As recommended by Youth in Care Canada, mental health and financial literacy supports should be provided throughout the entire Compensation Process;

e. In order to protect beneficiaries from financial exploitation, until beneficiaries reach a certain age, compensation monies should be held in trust on their behalf via an independent mechanism agreed approved by the Tribunal; and

f. All efforts should be taken to ensure that compensation payments are tax-free and do not encroach on other benefits, such as post-secondary education, social assistance, disability support and post-majority care.

III. Further class action filed in Federal Court

17. As the Tribunal noted in its Compensation Entitlement Order at paragraphs 45, 50, 61, and 205, a proposed class action has been filed before the Federal Court of Canada in *Moushoom et al v Canada (Attorney General)* (Federal Court Registry No. T-402-19). A second proposed class

action has been filed before the Federal Court of Canada in *Assembly of First Nations et al v Canada (Attorney General)* (Federal Court Registry No. T-141-20).

18. The Caring Society's position is that the impact of any proposed class proceeding currently filed or to follow is as the Tribunal held at paragraph 206 of its Compensation Entitlement Order:

> 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.[11]

19. In other words, the Tribunal has exclusive jurisdiction over the *CHRA*; there is no cause of action at common law for discrimination as defined under the *CHRA*.[12] The Federal Court cannot order systemic remedies or financial compensation to redress the victims' pain and suffering and deter a respondent, such as Canada, for its wilful and reckless breaches of the *CHRA*. Only the Tribunal can do this. As such, it is crucial that the Tribunal remains seized of the Compensation Process and all other outstanding matters required to achieve substantive equality for First Nations children, youth and their families.

IV. The Work Undertaken by the Caring Society

20. Immediately upon receiving the Compensation Entitlement Order, the Caring Society made significant efforts to engage Canada in discussions regarding the Compensation Process. The Caring Society, both through Dr. Blackstock's work (including writing directly to the Prime Minister) and through communications by counsel, attempted to bring Canada to the table to address the issues identified by the Tribunal.[13] It was not until December 10, 2019, that Canada appointed two representatives to engage in the discussions regarding the Compensation Process ordered pursuant to the Compensation Entitlement Order.[14]

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[11] 2019 CHRT 39, at para. 206.
[12] *Seneca College v. Bhadauria,* [1981] 2 SCR 181.
[13] Affidavit of Dr. Cindy Blackstock, affirmed December 8, 2019, ("**Blackstock Affidavit**") at paras. 7-11, 14-15, 17-23 and at Exhibits "2" to "6".
[14] Burke-Lachaine Affidavit, at Exhibit "A".

21. Notwithstanding Canada's failure to engage, the Caring Society immediately took steps to ensure that it would be ready to discuss the Compensation Process with Canada and to make submissions to the Tribunal on or before its December 10, 2019 deadline. The Caring Society, with the AFN, worked diligently to prepare a Compensation Process proposal for the Tribunal's consideration in order to meet the December 10, 2019 deadline.[15]

22. The Caring Society is a small not-for-profit organization. Taking the necessary steps to meet the deadline set by the Tribunal required it to devote significant staff hours and financial resources to this objective.[16] However, the Caring Society understands that prompt distribution of compensation to victims through a needs-sensitive and evidence-informed process is in the best interests of those harmed by Canada's past and ongoing wilful and reckless discrimination and therefore it has taken significant efforts to assist the Tribunal with the Compensation Process.[17] The Caring Society is also committed to complying with all of the Tribunal's orders.

23. The Caring Society contacted and corresponded with multiple experts in the field, including but not limited to the National Council of Child Advocates, the Directors of Child Welfare, UNICEF Canada, provincial and territorial deputy ministers of social services, the Director of the National Centre for Truth and Reconciliation, and the National Advisory Committee on First Nations Child Welfare.[18] The Caring Society has also considered how to accommodate beneficiaries with disabilities and, in consultation with AFN, retained SLIAO Translation Services to create, record and edit a video recording of a summary of the Compensation Entitlement Order in American Sign Language and Langue des signes du Quebec.[19]

24. The Caring Society also facilitated research into compensation payments to the estates of victims who have passed away since the commencement of the Complaint, as discussed below.[20] Moreover, the Caring Society has engaged with service providers to ensure all persons who wish

[15] Blackstock Affidavit, at paras. 24-25.
[16] Blackstock Affidavit at para. 29.
[17] Blackstock Affidavit, at paras. 25 and 29.
[18] Blackstock Affidavit, at paras. 31-34 and 42-47.
[19] Blackstock Affidavit at paras, 51-52.
[20] Blackstock Affidavit, at paras. 52.

to can access reliable and cost-free financial advice regarding the payment of compensation, if required.[21]

25. The Caring Society invited the principal investigators in the Canadian Incident Study on Reported Child Abuse and Neglect, Professor Barbara Fallon of the University of Toronto and Professor Nico Trocmé from McGill University, requesting that they assist in structuring data questions to identify the victims who are entitled to compensation. Dr. Fallon and Dr. Trocmé, along with the aid of three research assistants, prepared a final report that includes a taxonomy of compensation categories and proposed questions that will provide significant assistance in identifying persons who will receive compensation.[22] Canada and the parties have agreed to use this taxonomy for the purposes of the Framework.

26. The Caring Society also contacted Dr. Sidney J. Segalowitz, an expert in neuroscience and child development, to gain expert advice regarding how long the financial compensation should be held in trust based on advances in brain science and child development.[23] Dr. Segalowitz is a professor at Brock University's Psychology Department, the Director of the Cognitive Neuroscience Laboratory and the Director of the Jack and Nora Walker Centre for Lifespan Development Research. As described in more detail below, upon reviewing the robust body of research regarding brain anatomy and function, Dr. Segalowitz is of the opinion that the age of 18 does not represent a transition to full adulthood; instead, there is a growing consensus that the period from 18 to 25 years constitutes 'emerging adulthood' and that the *average* age at which brain development in a healthy individual nears completion is approximately 25 years.[24]

27. Finally, and most importantly, the Caring Society entered into an agreement with Youth in Care Canada ("**YICC**"), a national charitable organization for youth in care and formerly in care across Canada, to organize a national consultation of First Nations youth in care regarding the Compensation Process and produce an independent report reflecting their recommendations and views. Pursuant to this agreement, the Caring Society provided funding to YICC in the

[21] Blackstock Affidavit, at paras. 39 and 52.
[22] Blackstock Affidavit, at paras. 40-41, Exhibit 12.
[23] Blackstock Affidavit, at para. 50.
[24] Affidavit of Sidney Segalowitz, affirmed January 8, 2020 (the "**Segalowitz Affidavit**"), at paras. 9-10, Exhibit B: *When does the adolescent brain reach adult maturity* by Sidney J. Segalowitz (the "**Segalowitz Expert Report**").

amount of approximately $67,000.00 to organize and hold a consultation with 15-20 First Nations youth on October 25, 2019. The Caring Society also arranged for Naiomi Metallic, a lawyer and a professor who holds the Chancellor's Chair in Aboriginal Law and Policy at Dalhousie University, to explain the Compensation Entitlement Order to the YICC participants and answer their questions.[25]

28. The reflections and recommendations of First Nations young people attending the YICC gathering are set out in their report entitled *Justice, Equity and Culture: The First-Ever YICC Gathering of First Nations Youth Advisors.*[26] This report includes vital information that has significantly shaped the Caring Society's contributions to the Compensation Process Framework, including the following broad considerations, which are fully explored in the report:

- there must be safety around compensation;
- there must be mental health supports and navigational assistance to help youth apply for compensation;
- there must be continued support after compensation;
- there must be restitution for children and youth who have died while in care or due to their experiences in the child welfare system; and
- financial training for youth receiving compensation should be offered[27]

29. Overall, the Caring Society has, in conjunction with the AFN, worked steadily since the issuance of the Compensation Entitlement Order to ensure that the Framework presented considers the lived experiences of the victims in this case, the harm they have suffered and the potential challenges that a beneficiary may experience when the compensation is distributed.

V. The "Age of a Maturity" is 25 for the Purposes of Distribution

30. The Tribunal has indicated that compensation should be paid directly to the victims. However, the Tribunal has also been clear that child victims should not receive financial compensation directly in their hands. At paragraphs 260 and 261 the Tribunal held as follows:

[25] Blackstock Affidavit, at para. 36.
[26] Blackstock Affidavit, at para. 37, Exhibit 11.
[27] Blackstock Affidavit, Exhibit 11, at paras. 9-10.

> […] 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.
>
> 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.[28]

31. The Framework Agreement suggests that where the beneficiary is a child, compensation shall be paid into a trust fund, though Canada, the AFN and the Caring Society continue to discuss the precise terms of the mechanism.

32. There is no question that the victims in this case have suffered significant harm. This has been recognized by the Tribunal on multiple occasions and summarized at paragraph 155 of the Compensation Entitlement Order. In the same decision, the Tribunal also stated as follows:

> 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 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 of this case.[29]

33. In addition to the adverse impacts and suffering they have experienced as a result of Canada's wilful and reckless discriminatory conduct, the child victims in this case face inherent vulnerabilities. The unique stages of children's development predispose them to making different kinds of decisions than adults. This raises different kinds of concerns regarding the significant and long-lasting negative effects of the discriminatory adverse impacts, as well as the types of decisions a child may make upon receipt of $40,000. Indeed, children are a "highly

[28] 2019 CHRT 39, at paras. 260-261.
[29] 2019 CHRT 39, at paras. 13 and 147.

vulnerable group" and many of our societal structures are built to reflect this reality and protect children from making decisions they are not ready to make.[30]

34. The provincial/territorial age of majority (ranging from 18 to 19) is recognized as a presumed transition for child/youth to adult. These ages were fixed in the early 1970s.[31] However, these ages are not grounded in any particular evidence. Indeed, as a 1969 report of the Ontario Law Reform Commission noted, at common law the age of majority was set at 21, finding that "[a]n examination of the historical background of the age of majority […] does, however, reveal that the present age of twenty-one is not based on some ultimate truth or the collective wisdom of the past."[32]

35. Taking the 1969 Ontario Law Commission Report as representative of thinking of the age, it is clear that lowering the age of majority from 21 to 18 or 19 was done with reference to the needs and circumstances of young people generally. The particular needs and circumstances of vulnerable groups, such as the child victims in this case, were not considered. Indeed, the Law Reform Commission recognized that, to some extent, its decision was an arbitrary one:

> The Commission has concluded that the age of majority should be reduced to eighteen. It realizes there will be those who disagree. Some will say that the age should remain the same and others that nineteen or twenty would be more appropriate.
>
> The choice of an age is bound to some extent to be arbitrary. There are three factors which led the Commission to choose eighteen. First, it is their judgment that most young men and women of that age are capable of managing their own affairs.

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[30] *Canadian Foundation of Children, Youth and the Law v. Canada (A.G.)*, 2004 SCC 4, at paras. 56, 58; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, at para. 81; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, at para. 17.

[31] *Age of Majority Act*, R.S.B.C. 1996, c. 7 (age of majority set at 19 since 1970); *Age of Majority Act*, R.S.A. 2000, c. A-6 (age of majority set at 18 since 1971); *The Age of Majority Act*, R.S.S. 1978, c. A-6 (age of majority set at 18 since 1972); *The Age of Majority Act*, C.C.S.M. c. A7 (age of majority set at 18 since 1970); *Age of Majority and Accountability Act*, R.S.O. 1990, c. A.7 (age of majority set at 18 since 1971); *An Act to again amend the Civil Code*, S.Q. 1971, c. 85 (age of majority set at 18 since 1971); *Age of Majority Act*, R.S.N.B. 2011, c. 103 (age of majority set at 19 since 1972); *Age of Majority Act*, R.S.N.S. 1989, c. 4 (age of majority set at 19 since 1971); *Age of Majority Act*, R.S.P.E.I. 1988, c. A-8 (age of majority set at 18 since 1972); *Age of Majority Act*, S.N.L. 1995, c. A-4.2 (age of majority set at 19); *Age of Majority Act*, R.S.Y. 2002, c. 2 (age of majority set at 19 since 1972).

[32] *Report on the Age of Majority and Related Matters*, Ontario Law Reform Commission Report, 1969, at p. 7.

> Second, in practice, they do manage their own affairs. Third, they wish to be independent and participate in society as adults.[33]

36. The current age of majority presumptions, applicable to all individuals regardless of their particular needs and circumstances, is based on our collective understanding and acceptance that once a youth transitions to "adulthood" they are less impulsive and susceptible to negative peer pressure, has the capacity to comprehend more complex concepts, consequences and the parameters of risk. It is generally presumed that adults have a greater sense of planning for the future, strategizing for contingencies and assessing options and outcomes.

37. As Lord Scarman said in his concurring reasons in *Gillick v West Norfolk and Wisbech Area Health Authority* in 1985 (adopted by the Supreme Court of Canada in 2009 in *A.C. v. Manitoba (Director of Child and Family Services)*:

> The law relating to parent and child is concerned with the problems of 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…[34]

38. The research in the areas of child development and brain anatomy and function supports the view that "nature knows only a continuous process". The research strongly suggests that this "age of transition" is actually closer to 25 years. The expert opinion proffered by Dr. Segalowitz underlines the evidence leading to this conclusion:

- the mental functions most associated with adult maturity involve emotional self-regulation and complex cognitive functions involving attention, memory and inhibitory control;[35]

- risk-taking is often considered a primary issue of concern. The differences in brain maturity and activation patterns during adolescents (12 to 18 years) compared with adulthood are often embedded in discussions of risk-taking behaviours. While adolescents and young adults are capable of undertaking careful reasoning about risk, the predominant thinking in the field is that they are less likely to reason carefully when they find themselves in a societal context, very often associated with higher emotion valence;[36]

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[33] *Report on the Age of Majority and Related Matters*, Ontario Law Reform Commission Report, 1969, at p 26.
[34] *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para. 51, citing *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3 All E.R.402 at 421 per Scarman L.J. (H.L.).
[35] Segalowitz Expert Report, p. 9.
[36] Segalowitz Expert Report, p. 10.

- there is an abundance of data documenting increased risk-taking during adolescence, especially in the presence of peers;[37]

- while impulsivity and sensation-seeking behaviours do decrease gradually through adolescence, there is relatively little drop off up to age 22-25, with a major drop in the 26-30 years range;[38]

- early life experiences are very important, especially when they put the developing child and youth at risk by compromising brain growth in regions related to emotion self-regulation and cognitive information processing. […] This happens in situations involving chronic stress, poor nutrition, aspects of air and water pollution, pre-and post-natal drug exposure, traumatic brain injury and post-traumatic stress disorder ("**PTSD**"). Poverty is also central to these considerations;[39] and

- when negative factors, such as strong and chronic stress, are present during periods of rapid development change, this puts at risk the individual's mental health trajectory.[40]

39. Dr. Segalowitz presents the "bottom line" from the research as follows:

> There is a 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.[41]

40. Dr. Segalowitz's affidavit evidences the significant advances in scientific knowledge on child development and the transition to adulthood that has emerged since provincial ages of majority were set in the early 1970s. For instance, the Ontario Law Reform Commission noted in its 1969 report that:

> The evaluation of emotional development is very difficult, and an almost hopeless task if one wishes to compare the young of today with the young of yesteryear. The British Medical Association could only conclude that "certainly from the physical aspect and very probably from the psychological aspect, the adolescent of today matures earlier than in previous generations.
>
> The attainment of emotional maturity is a continuous process, of which adolescence is only a phase. A person is more emotionally mature at thirty than he was at twenty-one. He will be more emotionally mature at twenty-one than at eighteen. On the

[37] Segalowitz Expert Report, p. 10.
[38] Segalowitz Expert Report, p. 11.
[39] Segalowitz Expert Report, p. 12.
[40] Segalowitz Expert Report, p. 12.
[41] Segalowitz Expert Report, p. 4.

> other hand, he will normally have passed through the adolescent phase at eighteen. At that age he has the emotional maturity of a young adult.[42]

41. The egregious nature of the harm and adverse impacts experienced by the child victims in this case, coupled with the strong evidentiary basis in relation to child and youth brain anatomy and function proffered by Dr. Segalowitz, present only one fair and logical result: for the purposes of Compensation Process, the Tribunal ought to order that the financial compensation shall remain in a trust until the child reaches the age of 25 with a provision for victims aged 18-25 to access funds for post-secondary education (including vocational training) upon confirmation of registration with a licensed post-secondary provider or for compelling compassionate reasons (such as young adults with terminal illnesses).

VI. Victims Who Have Passed Away Since the Commencement of the Complaint

42. All victims of Canada's discriminatory conduct, including those who have passed away, ought to receive compensation. Sadly, some children, parents and grandparents have died waiting for the Complaint to be resolved and for the Compensation Process to unfold.

43. Canada's litigation strategy is responsible for much of the delay in these proceedings writ large and with respect to compensation in particular. Canada took multiple steps to attempt to defeat the Complaint on technical grounds, before the Commission, the Tribunal, the Federal Court, and the Federal Court of Appeal. Moreover, once the Complaint was finally before the Tribunal for adjudication on the merits, Canada improperly withheld over 90,000 documents creating further delays in the hearings.[43] Overall, Canada's litigation strategy was focused on protecting itself instead of on remediating its discriminatory FNCFCS Program and implementation of Jordan's Principle. Consequently, Canada should not benefit from its delay tactics simply because a victim, particularly a child, has passed away while waiting for justice.

44. Broadly speaking, 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

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[42] *Report on the Age of Majority and Related Matters*, Ontario Law Reform Commission Report, 1969, at pp. 23-24.
[43] *FNCFCSC et al v AGC*, 2013 CHRT 16; *FNCFCSC et al v AGC*, 2019 CHRT 1.

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 sanctioned for its wilful and reckless discriminatory conduct.

45. There are no provisions in the *CHRA* that prohibit the Tribunal from adjudicating a complaint in the event that a complainant dies before a decision is reached. The Supreme Court of Canada has held 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 [emphasis added]."[44]

46. The Tribunal has determined as fact that the victims in this case experienced pain and suffering as a result of Canada's discrimination.[45] The fact that certain victims passed away after (or in some cases, as a result of) experiencing that pain and suffering does not alter this finding. There is no basis to conclude that these victims did not experience "pain and suffering" when they were alive. In the absence of clear language prohibiting compensation to those who have passed away, there is no principled reason not to award compensation for the pain and suffering that the Tribunal found to occurred.

47. Similarly, there are no provisions in the *CHRA* that prohibit the Tribunal from awarding financial compensation for wilful or reckless discrimination. Financial compensation for wilful and reckless discrimination "is intended to provide a deterrent and discourage those who deliberately discriminate."[46] The focus of the analysis is on the respondent's specific conduct and deliberate, purposeful and wilful steps taken by the respondent to harm the victim. Put simply, it would be perverse and contrary to the objectives of the *CHRA* to allow Canada to benefit from the death of a victim it has harmed. Canada must be deterred from engaging and continuing to engage in discrimination against First Nations children. That is the purpose of compensation under s. 53(3).

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[44] *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667 at para. 81.
[45] 2019 CHRT 39 at para. 223.
[46] *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at para. 155, var'd on other grounds 2014 FCA 110.

48. The Tribunal has also ordered compensation to a deceased victim. In *Stevenson v. Canadian National Railway Company*[47], the parties reached an agreement in principle on settlement of the complaint. However, the complainant died before the settlement could be finalized. The respondent then brought a motion to dismiss the proceeding, arguing that as a matter of common law, the complaint terminated with the complainant's death. The Tribunal rejected this argument. It found that the common law maxim "*actio personalis moritur cum persona*" did not apply to statutory claims under the *CHRA*. A key consideration for the Tribunal was that human rights complaints are not only about redressing grievances between private individuals, but also have a significant public interest component. Allowing the common law maxim to apply to human rights claims would in effect override the purpose and objective of the *CHRA*, namely, to remove discrimination in Canada.[48]

49. At the provincial level, the Ontario Board of Inquiry (the "**Board**") in *Barber v. Sears Canada Inc. (No.2)* found that it had jurisdiction to continue with a complaint, even though the complainant had died.[49] The Board determined that "…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."[50] 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."[51]

50. Similar conclusions were drawn in two additional cases heard at the Board at around this time: *Allum v. Hollyburn Properties Management Inc.*[52] and *Baptiste v. Napanee and District Rod and*

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[47] *Stevenson v. Canadian National Railway Company*, 2001 CanLII 38288 (CHRT) ("***Stevenson***").
[48] *Ibid* at paras. 32-36; Although the Tribunal in *Stevenson* allowed the complaint to continue, it did not specifically comment on whether compensation for pain and suffering, or for wilful and reckless discrimination, could be awarded to a complainant's estate. There is no further decision cited on the merits. See also *Canada (Attorney General) v Morgan* (1991) 21 C.H.R.R. D/87 (F.C.A.) at para. 49 where Marceau J. (dissenting on other grounds) writes "[a] strict tort or contract analogy should not be employed [in human rights law], since what is in question is not a common law action but a statutory remedy of a unique nature".
[49] (1993), 22 C.H.R.R. D/409 (ON BOI), Book of Authorities of the First Nations Child and Family Caring Society of Canada ("**Caring Society BOA**"), Tab 3.
[50] *Barber v. Sears Inc. (No. 2)* (1993), 22 C.H.R.R. D/409, at para. 18 (ON BOI), Caring Society BOA, Tab 3.
[51] *Barber v. Sears Inc. (No. 3)*(1994), 22 C.H.R.R. D/415 at para. 98 (ON BOI), Caring Society BOA, Tab 4.
[52] (1991), 15 C.H.R.R. D/171 (BC HRC), Caring Society BOA, Tab 1.

Gun Club.[53] In both cases, the Board ordered payment of compensation to the complainant's estate for the discrimination and humiliation at the hands of the respondents.

51. More recently, the Human Rights Tribunal of Ontario (the "**HRTO**") in *Clark v. Toshack Brothers (Prescott) Ltd.* supported the assertion that the death of a complainant does not terminate a proceeding under the Ontario *Human Rights Code* and does not oust the HRTO's jurisdiction to hear the complaint.[54] Similar to this Tribunal's reasoning in *Stevenson*, the HRTO noted that hearing complaints under the Ontario *Human Rights Code* serves both private interests of individuals and the public interest, both of which are crucial considerations in support of continuing a proceeding even after the death of a complainant.[55]

52. Similar conclusions were drawn in the case of *Morrison v. Ontario Speed Skating Association*.[56] Here, the complainant filed a complaint alleging discrimination in employment and died a few weeks later. The respondent brought a motion to dismiss the proceeding. The HRTO rejected the motion, finding that common law principles relating to abatement on death do not apply to statutory claims under the Ontario *Human Rights Code*.[57]

53. Additionally, two recent decisions of the Human Rights Tribunal of Alberta accepted that complaints may continue after the death of the complainant: *Eheler v. L.L. Enterprises Ltd* ("***Eheler***")[58] and *Echavarria et al. v. Chief of Police of the Edmonton Police Service*.[59] Similar to the Caring Society's analysis of the *CHRA* above, the decision in *Eheler* was based on the finding that the *Alberta Human Rights Act* does not prohibit claims proceeding in the absence of the complainant, and therefore, consistent with a broad and purposive interpretation of the legislation, the Human Rights Tribunal of Alberta did not apply any such restrictions.[60]

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[53] (1993), 19 C.H.R.R. D/246 (ON BOI), Caring Society BOA, Tab 2.
[54] 2003 HRTO 27 at para. 13.
[55] *Ibid* at para. 14.
[56] 2010 HRTO 1058.
[57] *Ibid* at para. 40.
[58] 2013 AHRC 5 at paras. 5-7 ("***Eheler***").
[59] 2016 AHRC 5 at paras. 9-11.
[60] *Eheler*, supra note 12 at para 5.

(i) Differentiation from Claims under the Canadian Charter of Rights and Freedoms

54. Canada is incorrectly conflating principles of compensation for human rights violations with those applied in cases of breaches under the *Canadian Charter of Rights and Freedoms* (the "***Charter***"). Compensation under the *CHRA* and damages under the *Charter* are based on fundamentally differing principles. As addressed below, unlike under the *CHRA*, which contains specific remedial provisions, individual remedies under the *Charter* are those that are "appropriate and just" in the circumstances of the case. The *CHRA* specifically provides for compensation, against all respondents, while entitlement to *Charter* damages depends not only on proving a *Charter* breach, but also on demonstrating a functional justification for damages, with an opportunity for the State to prove counter-vailing factors preclude a damages award.

55. The Caring Society acknowledges that courts have ruled that compensatory claims under Section 15 of the *Charter* do not generally survive the death of a victim.[61] However, it does not follow that deceased victims of discrimination under the *CHRA* ought to also be denied compensation. While there can sometimes be "cross-fertilisation" between the *CHRA* and the *Charter*, such analogies must be made only with an aim to "enrich equality jurisprudence"[62] or when it is justified by similarities in the wording of provisions.[63] Courts, tribunals and scholars have cautioned against importing principles of constitutional law in the human rights analysis particularly when this undermines the objectives these statutes. [64]

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[61] *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 ("*Hislop*"); *Giacomelli Estate v. Canada (Attorney General)*, 2008 ONCA 346.

[62] Leslie A Reaume, "Postcards from O'Malley: Reinvigorating Statutory Human Rights Instruments in the Age of the Charter" in Fay Faraday, Margaret Denike, and M Kate Stephenson, eds, Making Equality Rights Real: Securing Substantive Equality under the Charter (Toronto: Irwin Law, 2006) at 400, Caring Society BOA, Tab 7.

[63] *Dickason v. University of Alberta,* 1992 CanLII 30 (SCC), [1992] 2 SCR 1103.

[64] See, for example, *Canada (Human Rights Commission) v. Canada (Attorney General),* 2012 FC 445, para 280-316. See also Jennifer Koshan, Under the Influence: Discrimination under Human Rights Legislation and Section 15 of the Charter, 2014 3-1 *Canadian Journal of Human Rights* 115; Denise Réaume, Defending Human Rights Codes from the Charter, (2012) 9 J.L. & Equality 67 – 102, Caring Society BOA, Tab 6; Leslie A Reaume, "Postcards from O'Malley: Reinvigorating Statutory Human Rights Instruments in the Age of the Charter" in Fay Faraday, Margaret Denike, and M Kate Stephenson, eds, Making Equality Rights Real: Securing Substantive Equality under the Charter (Toronto: Irwin Law, 2006) 373, Caring Society BOA, Tab 7; Andrea Wright, "Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate" in Fay Faraday, Margaret Denike, and M Kate Stephenson, eds, Making Equality Rights Real: Securing Substantive Equality under the Charter (Toronto: Irwin Law, 2006) at 409, Caring Society BOA, Tab 5.

56. Moreover, subsection 24(1) of the *Charter* does not mirror or track the language from section 53(2)(e) or 53(3) of the *CHRA*, and both provisions seek to achieve different objectives. There is therefore no justification for automatically relying on authorities regarding *Charter* remedies in this context.

57. The Caring Society submits that the Tribunal ought to follow the approach taken 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.[65] Furthermore, the Tribunal stated 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.[66]

58. While *Stevenson* dealt with a claim between two private individuals, there is nothing in the *CHRA* to suggest that its important purposes have any less application when the respondent is the federal government, as is the case in this proceeding.

(ii) Keeping the Victims at the Forefront

59. The Caring Society wishes to honour the memories of the children, youth and adult victims of Canada's discrimination who passed away during the 13 years since this case was filed and express its deepest condolences to their families and communities.

60. While most of these people never benefited from the culturally appropriate and equitable services ordered by the Tribunal, a measure of justice can still be done for them by providing compensation to their estates. This is particularly the case in situations where Canada's discriminatory conduct was linked to their deaths, such as in the tragic case of the children and young people in Wapekeka First Nation, who died by suicide in January and February 2017 while waiting for Canada to provide mental health services under Jordan's Principle:[67]:

> 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

[65] *Stevenson*, 2001 CanLII 38288, at para 32.
[66] *Ibid* at para 31.
[67] *FNCFCSC et al v AGC*, 2017 CHRT 7 at paras. 8-10.

> 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.[68]
>
> […]
>
> While Canada provided assistance once the Wapekeka suicides occurred, the flaws in 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.[69]

61. Maurina Beadle is another victim who died without ever being made whole for the discrimination she experienced.[70] Ms. Beadle was Jeremy Meawasige's mother and an applicant in the case of *Pictou Landing Band Council v. Canada*, 2013 FC 342, wherein Ms. Beadle and her community applied for judicial review of Canada's decision to not reimburse the cost of in-home care for Jeremy. The Federal Court summarized as follows:

> The other Applicant is Ms. Maurina Beadle, a 55 year-old member of the Pictou Landing First Nation. Her son, Jeremy Meawasige, is a teenager with multiple disabilities and high care needs. He has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism. Jeremy can only speak a few words and cannot walk unassisted. He is incontinent and needs total personal care including showering, diapering, dressing, spoon feeding, and all personal hygiene needs. He can become self-abusive at times, and needs to be restrained for his own safety.
>
> Jeremy lives on the Pictou Landing Indian Reserve. Ms. Beadle, his mother, is Jeremy's primary caregiver and she was able to care for her son in the family home without government support or assistance until Ms. Beadle suffered a stroke in May 2010.
>
> After her stroke, Ms. Beadle was unable to continue to care for Jeremy without assistance. She was hospitalized for several weeks, and when she was released, required a wheelchair and assistance with her own personal care. The PLBC immediately started providing 24 hour care for both Ms. Beadle and Jeremy in their home. Between May 27, 2010 and March 31, 2011, the PLBC spent $82,164.00 on in-home care services for Ms. Beadle and Jeremy.
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> […]

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[68] 2019 CHRT 39, at para. 241.
[69] 2017 CHRT 14, at para. 89.
[70] Burke-Lachaine Affidavit, at Exhibit "D".

> Ms. Beadle and her son Jeremy have a deep bond with each other. His mother is often the only person who can understand his communication and needs. She spent many hours training him to walk and helping him with special exercises. She discovered his love of music and sings to him when he is upset or does not want to cooperate. Her voice calms him and can make him desist in self-abusive behaviour. She takes him on the pow-wow trail, travelling to communities where pow-wows are held. She says Jeremy is happiest when he is dancing with other First Nations people and singing to traditional music. Jeremy has never engaged in self-abusive behaviour on those occasions.[71]

62. In determining that Canada discriminated against First Nations children and their families in its failure to implement Jordan's Principle, the Tribunal reviewed *Pictou Landing*.[72]

63. On March 4, 2019, Maurina Beadle (representing her son Jeremy) joined Xavier Moushoom as plaintiffs in the Moushoom v Attorney General of Canada case.[73] Tragically, on November 14, 2019, Ms. Beadle passed away.[74] The Caring Society submits that a severe injustice, contrary to the *CHRA*, will be perpetrated if victims, such as Ms. Beadle who fought so courageously so her son and other children could receive services under Jordan's Principle, are denied the compensation to which they are entitled.

64. Finally, we know that hundreds of child victims have died in care since the Complaint was commenced. This includes high profile cases such as Tina Fontaine, who died in August 2014[75] and Kanina Sue Turtle, who died in October 2016[76].

65. 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. 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

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[71] 2013 FC 342, at paras. 6-10.
[72] 2016 CHRT 2, at para. 376-378.
[73] Burke-Lachaine Affidavit, at para 6.
[74] Blackstock Affidavit, at para. 62; Burke-Lachaine Affidavit, at Exhibit "D".
[75] Burke-Lachaine Affidavit, at Exhibit "E".
[76] Burke-Lachaine Affidavit, at Exhibits "F". See also Burke-Lachaine Affidavit, at Exhibit "G".

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.

(iii) Alternative submission based on the Tribunal's implied statutory authority to backdate its orders

66. In the alternative to ordering compensation be paid to the estate of the victims in this case as of January 1, 2006, (which the Caring Society states ought to be ordered for the reasons outlined above) the Caring Society proposes other options, in keeping with the policy objectives of the *CHRA* and other judicial considerations in cases where a complainant has passed away.

67. These options are based on the Tribunal's implied statutory authority to backdate its Compensation Entitlement Order, *nunc pro tunc*, to August 30, 2013 in order that victims who were alive on that date, but have since passed away, may be eligible to receive compensation. This is in keeping with the general rule that administrative tribunals are "masters in their own house", meaning that "they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."[77]

68. The basis for the Tribunal's authority to issue its order *nunc pro tunc* rests on the same foundation as that of superior courts to issue their own orders *nunc pro tunc*:

> The history of the courts' inherent jurisdiction to issue orders *nunc pro tunc* is intimately tied to the maxim *actus curiae neminem gravabit* (an act of the court shall prejudice no one). Originally, the need for this type of equitable relief arose when a party died after a court had heard his or her case but before judgment had been rendered. In civil suits, this situation caused problems because of the well-known common law rule that a personal cause of action is extinguished with the death of the claimant.[78]

69. In order to be able to control its procedures, the Tribunal must have the ability to backdate its orders to ensure that the purpose of the Tribunal's role under the *CHRA* is not prejudiced by the death of a claimant while procedures were ongoing before the Tribunal. In exercising this discretion, the Tribunal should bear in mind the six non-exhaustive and non-exclusive factors set out in *CIBC v Green*: (1) the opposing party will not be prejudiced by the order; (2) the order would

[77] *Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at 568-569.
[78] *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at para 86.

have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court/tribunal; and (6) the order would facilitate access to justice.[79]

70. The first alternative is to order financial compensation to the estates of those victims who were alive on or after **September 30, 2008** - the date the Commission referred the Complaint to the Tribunal. This is the approach taken in *Baptiste*. In that case the Board ordered $2,000 in general damages to be paid to the estate of a complainant, "for loss of the right of freedom from discrimination and resulting humiliation".[80] The Board made this determination on the basis that preliminary factual determinations regarding the discrimination experienced by the victim had been made before the complainant died.

71. In keeping with this approach, September 30, 2008 is a clear date on which preliminary factual determinations were made in this case: by referring the Complaint to the Tribunal, the Commission made an initial determination that there was enough evidence of discrimination in this case to adjudicate a hearing on the merits. Moreover, these preliminary determinations were not interfered with by the Federal Court when Canada brought an application for judicial review.[81]

72. The Caring Society submits that the second alternative is to order financial compensation to the estates of those victims who were alive on or after **August 30, 2013**, the originally scheduled final date for closing of arguments, prior to the adjournment of proceedings as a result of Canada's abuse of process).

73. The third alternative is to order financial compensation to the estates of those victims who were alive on or after the conclusion of closing arguments on **October 24, 2014**. This approach was endorsed by the Supreme Court of Canada in *Hislop*, with reference to the *nunc pro tunc*

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[79] *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at para 90.
[80] *Baptiste v. Napanee and District Rod and Gun Club*, (1993), 19 C.H.R.R. D/246 at para 61 (ON BOI), Caring Society BOA, Tab 2.
[81] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (24 Nov. 2009) Ottawa T-1753-08 (F.C.) (Proth.); and *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343.

doctrine.[82] While the Supreme Court of Canada determined that an estate of a victim could not bring a section 15 claim under the *Charter*, it stated that the estate of a complainant to the proceeding was entitled to the benefit of the judgment, so long as he or she passed away after the conclusion of argument.[83]

74. While the approach in *Hislop* offers a number of options: **October 24, 2014 –** the final date of closing arguments and the date the matter was taken under reserve; **January 26, 2016 –** the date the decision on the merits was released; **April 25, 2019 –** the completion of arguments on compensation; and **September 6, 2019 –** the date the Compensation Entitlement Order was released, it is the Caring Society's view that the earliest date possible ought to be ordered in this case. It would be inappropriate and unjust to allow Canada to profit from the death of the victims who passed away due to Canada's delay tactics and wilful and reckless choice to perpetuate the discrimination. This injustice is amplified if Canada is allowed to profit from the death of victims who passed away between August 30, 2013 and April 26, 2019. The Caring Society submits that the principles of the *CHRA* ought to guide the Tribunal's decision in this regard, with a view to deterring and discouraging other respondents from benefitting from discrimination.

VII. Children in Care on January 1, 2006

75. At paragraph 270 of the Compensation Entitlement Order, the Panel "the Panel welcome[d] 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."[84] This is in keeping with the Tribunal's practice on past orders.[85]

76. The Caring Society asks that the Tribunal clarify its compensation ruling in relation to children who were <u>in care</u> on January 1, 2006, but were removed prior to that date.

77. At paragraph 245, the Tribunal states:

> Canada is ordered to pay $20,000 to each First Nation child removed from its home, family and Community between **January 1, 2006** (<u>date following the last WEN DE report as explained above</u>) until the earliest of the following options

[82] *Canada (Attorney General) v Hislop*, <u>2007 SCC 10</u>, at paras. 74-77.
[83] *Ibid* at para 77.
[84] *FNCFCSC et al v AGC*, <u>2019 CHRT 39</u> at para. 270.
[85] <u>2017 CHRT 35</u>; <u>2018 CHRT 4</u> at para 445.

> occur: 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 agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order.[86] [Emphasis added]

78. The date of **January 1, 2006** is replicated throughout the Compensation Entitlement Order but is unclear whether being in care on January 1, 2006 qualifies a child/parent/grandparent for compensation. The Caring Society seeks clarification from the Tribunal on this issue and offers the following submissions in support of its view that if a child was in care on January 1, 2006 (despite the removal occurring prior to January 1, 2006), that child and parent/caregiving grandparent ought to receive compensation, subject to the other parameters outlined in the Compensation Entitlement Order.

79. The Tribunal made numerous factual findings that support providing compensation to children in care on January 1, 2006, as well as their parent or caregiving grandparent. For example, the Tribunal noted as follows:

> 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** [emphasis added].[87]
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> […]
>
> 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.**[88] [Emphasis added]

[86] 2019 CHRT 39, at para. 245.
[87] 2016 CHRT 2, at para. 349.
[88] 2016 CHRT 2, at para. 385.

80. The Tribunal made additional findings that make it clear that Canada's conduct was perpetuating adverse impacts for First Nations children in care as of January 2006:

a. Canada was aware, through various reports and evaluations of the FNCFS Program (including many of its own reports), that the FNCFS Program is not adapted to provincial/territorial legislation and standards, creating funding deficiencies for such items as salaries, 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[89];

b. Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, Canada did not significantly modify the program since its inception in 1990[90]; and

c. The failure to implement Jordan's Principle was causing detrimental impacts for First Nations children, including the denial, delay and availability of services to First Nations children in need of, at times, life changing and live saving services.[91]

81. Many of these findings were echoed in the Compensation Entitlement Order, including the specific knowledge available to Canada regarding the harms and adverse impacts experienced by the victims of its discriminatory conduct. In particular, the Tribunal focused on the significant findings in the Wen:de reports[92], which clearly demonstrates that Canada knew about the its discriminatory conduct and the harm and adverse impacts experienced by First Nations children and families within the child welfare system:

> The Wen:de we are coming into 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 finds 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."
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> […]

[89] 2016 CHRT 2, at para 389.
[90] 2016 CHRT 2, at para 461.
[91] 2016 CHRT 2, at paras 362, 363, 365, 366-373, and 374-376.
[92] 2019 CHRT 39, at paras. 162, 163, 165, 166 and 179.

> The Panel finds that Canada's conduct was devoid of caution with little to no regard to the consequences of its behaviour 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 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.[93]

82. Indeed, throughout the Compensation Entitlement Order, and in fact, in all of its orders, the Tribunal has consistently expressed concerns about the harms caused to children *as a result* of being away from their home and families. In other words, the Tribunal's analysis of the "worst case scenario" focused on the denial of the "vital right [of children] to live in their families and communities."[94] As such, being away from one's family or community on or after January 1, 2006 is what ought to trigger eligibility for compensation.

83. Using the eligibility cut off date established by the Tribunal, one must ask: on or after January 1, 2006, which children and families were being harmed by Canada's discriminatory practices? The answer is clear. Children in care on January 1, 2006, experienced the same discrimination and the same harms as those children who came into care on or after January 1, 2006. The same is true of parents or caregiving grandparents. The evidence is also clear that Canada knew that those children already in care as of January 1, 2006 were experiencing adverse impacts, as clearly outlined throughout the WEN DE report. Moreover, these children, including those who were in care prior to January 1, 2006, were deprived of the equal opportunity to able to return to their homes, families or communities that would have existed had Canada provided culturally appropriate and equitable prevention services on or after January 1, 2006.[95] In other words, every day Canada failed to provide culturally appropriate and equitable prevention services on or after January 1, 2006 to First Nations children in care was like a new act of discrimination, needlessly prolonging their time away from their families, homes and communities. In light of this, the Caring Society urges the Tribunal to include those children

[93] 2019 CHRT 39, at paras. 162 and 231.
[94] *Ibid,* para 2.
[95] 2016 CHRT 2 at paras. 349, 385 and 467 and 2019 CHRT 39 at paras. 162, 165.

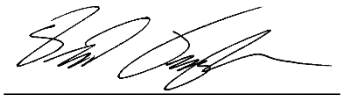
already in care as of January 1, 2006, as well as their parents or caregiving grandparents, among those eligible for compensation.

VIII. The definition of "essential service", "service gap" and "unreasonable delay" for the purposes of compensation related to Canada's discrimination in the implementation of Jordan's Principle

84. During discussions with respect to the Compensation Process Framework, it has become clear that the definition of an "essential service", a "service gap", and an "unreasonable delay" are matters on which the parties have different views and therefore require the Tribunal's clarification and guidance. As such, in keeping with the Tribunal's invitation at paragraph 270 of the Compensation Entitlement Order, the Caring Society submits its proposed definitions of these three terms for the Tribunal's consideration in providing that clarification and guidance.

85. The Caring Society's definitions for "essential service", a "service gap" and an "unreasonable delay" are contained in **Schedule "1"** appended to these submissions.

All of which is respectfully submitted this 21st day of February, 2020.



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Legislation

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Schedule "1" – Definition of "essential service", "service gap", and "unreasonable delay"

Essential Service

1.1 Consistent with international human rights law, section 36 of the *Constitution Act, 1982*, and the *Canadian Human Rights Act*, an **"Essential Service"** within the meaning of the Compensation Entitlement Order is a federal government service that is necessary to allow a First Nations child to fully enjoy their right under the *Canadian Human Rights Act* to have an opportunity equal with other children to make for themselves the lives that they are able and wish to have by overcoming the historic and contemporary disadvantages that affect them.

1.2 This definition accounts for the systemic discrimination rooted in federal government legislation, policy and practice resulting in First Nations children and their families experiencing deeper levels of inequality than their non-Indigenous peers. Therefore, a substantive equality approach is required.

1.2.1 For greater certainty, essential services include, but are not limited to, services that, if not provided in a timely manner or interrupted, would cause harm to the child's dignity by adversely impacting their development, safety, wellbeing or ability to participate fully in their culture and society.

1.2.2 Determination of what is "essential" in any particular child's circumstances is informed by the principles of substantive equality (i.e., the child's needs and circumstances – including their cultural, linguistic, historical and geographical needs and circumstances) and the best interests of the child.

1.2.3 The parties will agree to a non-exhaustive list of services that are presumptively essential, to be attached to this agreement as **Schedule "B"**. If the parties are unable to agree, the non-exhaustive list of presumptively essential services will be brought to the Tribunal for direction.

The definitions of **"Service gap"** and **"Unreasonable service delay"** are informed by the definition of "essential service" in 1.0.

1.3 **Service Gaps**

1.3.1 From **December 12, 2007 and July 4, 2016**, a service gap is deemed to exist where a child, or group of children, needed a service that was deemed necessary by a professional with relevant expertise but would not have been considered to be a Jordan's Principle case by Canada due to the federal government's discriminatory definition of Jordan's Principle throughout this time period, whether or not this was

communicated to Canada. More specifically, Canada's discriminatory definition and approach to Jordan's Principle included all of the following:

1.3.1.1 Child registered as an Indian per the *Indian Act* or eligible to be registered and resident on reserve;

1.3.1.2 Child with multiple disabilities requiring multiple service providers;

1.3.1.3 Limited to health and social services;

1.3.1.4 A jurisdictional dispute existed involving different levels of government (disputes between federal government departments and agencies were excluded); and

1.3.1.5 The case must be confirmed to be a Jordan's Principle case by both the federal and provincial Deputy Ministers)

1.3.1.6 The service had to be consistent with normative standards

1.3.2 Between **July 5, 2016 and November 2, 2017**, where a child, or group of children, needed a service that was deemed necessary by a professional with relevant expertise but would not have been considered a Jordan's Principle case by Canada case due to the federal government's discriminatory definition of Jordan's Principle throughout this time period, whether or not this was communicated to Canada. More specifically, Canada's discriminatory definition and approach to Jordan's Principle included all of the following:

1.3.2.1 Child is a registered Indian per the *Indian Act* or eligible to be registered and is resident on reserve (July 5, 2016 to September 14, 2016);

1.3.2.2 Child had a disability or critical short- term illness (July 5, 2016 to May 26, 2017)

1.3.2.3 Limited to health and social services (July 5, 2016 to May 26, 2017).

1.3.3 For greater certainty, all children who had terminal illnesses and were in palliative care ought to have received services deemed necessary by professionals with relevant expertise through Jordan's Principle where other federal programs could not provide the service in time frames per 2017 CHRT 35.

1.4 **Unreasonable delay**

1.4.1 An unreasonable delay will be presumed where Canada did not provide an individual requestor with an initial evaluation and determination of the Jordan's Principle request within 12 hours for an urgent request or 48 hours for a non-urgent request.

1.4.2 Where a request was not evaluated and determined within 12 hours (urgent) or 48 hours (non-urgent), the name of the child in question, the date of the service request, and the nature of the service deemed necessary by a professional with relevant expertise will be transmitted to Canada in confidence. Canada will have two weeks to satisfy a second level reviewer that the delay in the child receiving the requested service was not unreasonable.

1.4.3 Much like "essential services", determination of what is an "unreasonable delay" in any particular child's circumstances is informed by the principles of substantive equality (i.e., the child's needs and circumstances – including their cultural, historical and geographical needs and circumstances) and the best interests of the child.

1.4.4 Unreasonable delays cause harm to the child's dignity by adversely impacting their development, safety, wellbeing and ability to participate fully in their culture and society

1.4.5 An unreasonable delay will be presumed where Canada did not provide a group requestor with an initial evaluation of the affected children and determination of the Jordan's Principle request within 7 days or within 48 hours in an urgent case.

1.4.6 Where a group request was not evaluated and determined within 48 hours (urgent) or 7 days (non-urgent), details regarding the group of children in question, the date of the service request, and the nature of the service deemed necessary by a professional with relevant expertise will be transmitted to Canada in confidence. Canada will have two weeks to satisfy a second level reviewer that the delay in the group of children receiving the requested service was not unreasonable.

Schedule "B" –Services that presumptively meet the definition of "essential service" Each service ought to be provided in a quality manner and, in the case of products, be in good operating condition

1. ALLIED HEALTH
Assessments and screenings by allied health professionals
Services provided by allied health professionals including: (i) occupational therapy; (ii) speech language pathologists; (iii) physiotherapists; iv) audiologists; v) optometrists; vi) special needs education teachers; vi) early childhood development experts.
Therapy provided by a paraprofessional under the guidance of an allied health professional (e.g. a physiotherapist assistant providing daily support to implement a program outlined by a physiotherapist)
2. EDUCATION
Assistive technologies and electronics including software, apps and required protective cases
Psycho-educational assessments
Tutoring Services
First Nations language lessons if not available at school
3. HEALTHY CHILD DEVELOPMENT
Car Seats
4. INFRASTRUCTURE
Adaptive Furniture
Enhanced home security and safety equipment/systems
5. MEDICAL EQUIPMENT AND SUPPLIES.
Environmental Aids, including lifts and transfer aids and installation thereof
Mobility aids, includes standing and positioning aids and wheelchairs
Hospital Beds
Assistive technologies
Medical equipment related to diagnosed illnesses (i.e.: percussion vests, oxygen, insulin pumps)
6. MEDICAL TRANSPORTATION
Travel costs for all services approved under allied health, oral health, orthodontic, vision care and mental wellness, in addition to travel for other medical care
Travel (air, ground, and water)
Meals and accommodation
Emergency Transportation
7. MEDICATIONS/NUTRITIONAL SUPPLEMENTS
Prescription medications
Infant Formula
Nutritional supplements
8. MENTAL WELLNESS
Assessments
Individual Therapy
Treatment for mental health and/or substance abuse, including residential
9. ORAL HEALTH (EXCLUDING ORTHODONTICS)
Diagnostic services, including examinations and x-rays

Oral surgery services, including general
Restorative services, including caries and crowns
Endodontic services, including root canals
11. RESPITE
Respite care (if recommended by a social worker or medical professional)
14. VISION CARE
Examinations
Corrective eyewear (eye glasses and contact lenses)
15. SERVICES FOR CHILDREN WITH TERMINAL ILLNESSES OR IN PALLIATIVE CARE
All services authorized by professionals and traditional knowledge holders recognized by the child's community are essential