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FIRST NATIONS CHILD WELFARE: COMPENSATION FOR REMOVALS



OFFICE OF THE PARLIAMENTARY BUDGET OFFICER
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The Parliamentary Budget Officer (PBO) supports Parliament by providing economic and financial analysis for the purposes of raising the quality of parliamentary debate and promoting greater budget transparency and accountability.

This report estimates the financial cost of complying with a Canadian Human Rights Tribunal decision (2019 CHRT 39) as it relates to First Nations children taken into care. It was prepared at the request of Mr. Charlie Angus, Member of Parliament for Timmins-James Bay.

Some data used in this publication came from the First Nations Component of the 2008 Canadian Incidence Study of Reported Child Abuse and Neglect (FNCIS 2008). These data were used with the permission of the First Nations Child Welfare Research Committee. The study was funded by the federal, provincial, and territorial governments of Canada, the Social Sciences and Humanities Research Council of Canada, and the Canadian Foundation for Innovation.

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For readability, all counts have been rounded to hundreds of persons.

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Executive Summary

In September 2019, the Canadian Human Rights Tribunal (CHRT) ordered Canada to pay compensation to First Nations children and caregivers who were affected by the on-reserve child welfare system.

The Government of Canada has applied for judicial review of the CHRT decision, which could result in the compensation order being dramatically narrowed or voided entirely. This report estimates the cost of complying with the decision as it relates to children taken into care.

The preliminary estimate of Indigenous Services Canada (ISC) was that 125,600 people are eligible for compensation totalling \$5.4 billion. Based on the PBO's assumed legal interpretation, the PBO estimates that 19,000 to 65,100 people are eligible for compensation in a range of \$0.9 billion to \$2.9 billion. Both estimates assume compensation is paid by the end of 2020.

Summary Table 1

High-level comparison of estimates

	ISC	PBO
# Eligible	125,600	19,000 to 65,100
Cost to compensate (\$ billions)	\$5.4	\$0.9 to \$2.9

The PBO expects fewer people to be eligible primarily because we assume that children placed within their extended family or community are not eligible for compensation.

Our estimate is presented as a range, as it is unclear what proportion of children will be excluded, either because the CHRT deems that their removal was necessary, or that their family benefited from prevention services. This report examines a number of scenarios under which these two eligibility criteria might be applied, and their possible impact on eligibility for compensation.

The Government of Canada has indicated that it intends to compensate those harmed by removals through the settlement of a class action. There may be significant barriers to a successful class action, which could result in fewer families receiving compensation. In addition, compensation for each removed child would not necessarily be more than the amount awarded by the CHRT.

1. Introduction

In September 2019, the Canadian Human Rights Tribunal (CHRT) ordered Canada to pay compensation to certain First Nations children and caregivers who were harmed by racial discrimination in federal funding for child and family services on-reserve and in Yukon.¹

The decision included orders of compensation related to the removal of children from their family and related to delays and denials of essential services to children. This report focuses solely on compensation for removals. It includes compensation for removals to receive services but excludes compensation for delays and denials of services to children who remained in their homes.

The preliminary estimate of Indigenous Services Canada (ISC) was that 125,600 people are eligible for compensation totalling \$5.4 billion, including interest. Based on the PBO's assumed legal interpretation, we estimate that 19,000 to 65,100 individuals are eligible for compensation that would range from \$0.9 billion to \$2.9 billion, including interest.

The PBO assumes that the CHRT decision requires Canada to pay \$40,000 to all First Nations children ordinarily resident on-reserve or in Yukon at the time of their removal who were:

1. Unnecessarily removed from their home, family, and community after 1 January 2006 due to poverty, poor housing, neglect, or substance abuse and did not benefit from prevention services that would have permitted them to remain safely in their home, family and community;
2. Removed from their homes after 1 January 2006 due to abuse and placed outside their family and community; or
3. Were deprived of essential services within the scope of Jordan's Principle² and placed in care outside their homes, families and communities in order to receive those services between 12 December 2007 and 2 November 2017.

For each eligible child removed for reasons other than abuse, the parent(s) or grandparents of that removed child are also entitled to \$40,000 in compensation.³

All the major parties to the CHRT proceedings have varying legal interpretations that differ from each other and from the PBO's assumptions set out above.⁴ The PBO's assumed legal interpretation is an objective assessment of what the CHRT order requires; it is not a normative position regarding what compensation should have been ordered. The CHRT may

revise its order as parties seek clarification, as the CHRT did through a letter dated 16 March 2020.⁵

The Government of Canada has applied for judicial review of the decision, which could dramatically reduce or entirely void this compensation order.⁶ The Tribunal's orders are also suspended pending a decision by the Tribunal regarding the process to be used to identify those eligible for compensation. Ongoing discussions or future CHRT orders could change the scope of who is entitled to compensation relative to what is required by the September CHRT order.

The PBO's estimate reflects the cost of paying the compensation ordered by the CHRT; it is not discounted for the probability of that order being reduced or voided through judicial review.

2. Cost of complying with the CHRT order

2.1. Placements by type

Based on data supplied by ISC from their financial records, the PBO estimates that 53,700 children will have been removed from their home - either on-reserve or in Yukon⁷ - and placed in ISC-funded placements from 1 January 2006 to the end of 2020. This includes 8,500 children already in care in 2006.

Because this figure is based on ISC's financial records, it excludes unfunded placements of First Nations children with family, family friends or community members, where no federal expenditure would be recorded.

ISC classifies funded placements into four types: kinship care, foster care, institutional care, and group homes. The estimated breakdown of placements is shown in Table 2-1.

Table 2-1 Number of children taken into funded care for the first time by care type (2006-2020)

	#
<i>Kinship</i> ⁸	12,500
<i>Foster</i> ⁹	36,700
<i>Institutional</i>	2,100
<i>Group Homes</i>	2,400
<i>Total</i>	53,700

Source: PBO based on data derived from ISC's Child and Family Services Information Management System (CFS IMS).

Notes: This represents an estimate of the number of unique children who will have been taken into care for the first time at some point from 2006 up to the end of 2020. Removals prior to 2014 were estimated based on indexing to point-in-time counts.¹⁰ The type of care is based on the child's first placement.

2.2. Placements outside family and community

According to the CHRT decision, compensation is awarded in relation to children placed in care outside of their homes, families and communities.¹¹ Thus, children removed from their home and placed within their extended family or community are not eligible for compensation.

By definition, children placed in informal or formal kinship foster care remain within their families or their communities for that placement. In addition, some children placed in non-kinship foster care and group homes remain within their communities. The estimated proportion and number of children in each type of care who were removed from their family and from their community is shown in Table 2-2.

Table 2-2 Share and number of children removed from their family and from their community by care type (2006-2020)

Share removed from their family and from their community	%	#
<i>Kinship</i> ¹²	8%	1,000
<i>Foster</i> ¹³	76%	27,900
<i>Institutional and Group Homes</i> ¹⁴	84%	3,900
<i>Total removed from their home, family and community</i>		32,700

Source: PBO based on 2016 Census and 2011 Census and ISC's CFS IMS

Note: See endnotes for assumptions and calculations. For foster care, institutional care and group homes, these proportions reflect the share of children placed off-reserve, either in their initial placement or in a subsequent placement. Some First Nations may consider some off-reserve placements with families sharing the same Aboriginal identity to be placements within the child's community. In the 2011 National Household Survey, 21 per cent of First Nations foster children living off-reserve lived with at least one First Nations foster parent.¹⁵

2.3. Reason for removal

Of those children who were removed from their home, family, and community, the estimated breakdown of reasons for removal is shown in Table 2-3 below. Two-thirds of children, roughly 22,000, were removed for reasons other than abuse. They are analyzed together because they cannot be distinguished based on caseworker-reported reasons for removal; both children and parents would be eligible for compensation in almost all cases.¹⁶

Table 2-3 Share and number of children removed from home, family and community by primary reason for removal (2006-2020)

Primary reason for removal	%	#
Abuse	33%	10,700
Reasons Other than Abuse	67%	22,000
Total		32,700

Source: PBO based on custom analysis of First Nations Component of the 2008 Canadian Incidence Study of Reported Child Abuse and Neglect (FNCIS 2008).

Note: The breakdown was based on the primary reason for removal as recorded in the FNCIS 2008. Exposure to intimate partner violence (the primary reason for removal in 8 per cent of removals)¹⁷ and emotional maltreatment (3 per cent) were classified as removals due to abuse. Multiple factors are often present in a removal. For example, poverty and substance abuse may be factors in a removal due to abuse. This breakdown is based on caseworker's primary classification of the reason for removal which focused on the type of maltreatment rather than underlying causes.

2.4. Necessity and prevention services

Families with children removed for reasons other than abuse are entitled to compensation only if:

- The child was "unnecessarily apprehended"; and
- The family "especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities."¹⁸

The PBO considered seven possible scenarios for how these criteria might be applied. (The scenarios are outlined in Appendix A.) Under these possible scenarios, the proportion of otherwise eligible families who would be excluded from compensation would range from 0 per cent to 85 per cent. In other words, at the upper bound, all 22,000 eligible children removed for reasons other than abuse would receive compensation, compared with only 3,300 at the lower bound.

2.5. Parents

Parents of children removed due to abuse are not entitled to compensation; however, parents who had a child removed for reasons other than abuse are entitled to compensation.¹⁹ To be eligible for compensation, the parent must have been caring for the child at the time of the child's removal.

Grandparents are eligible for compensation only if the parents were absent and the children were in their care.²⁰ The term parent was not defined by the Tribunal. However, the PBO assumes that it includes step-parents and adoptive parents, including parents under customary adoptions not formalized by court order.

Children who were removed from their homes have a second in-home caregiver in 47 per cent of cases.²¹ So, it is assumed that there are 1.47 eligible caregivers per child. No limitation was applied with respect to the relationship between the in-home caregiver(s) and child, so this includes adoptive parents and step-parents acting as in-home caregivers.

The number of parents who are eligible depends on the number of children who are eligible for reasons other than abuse. This number of children is affected by the extent to which children are excluded because their removal was necessary or their family received preventative services.

If none are excluded, 22,000 children would be removed for reasons other than abuse. This implies that 32,400 parents would be eligible for compensation.

If 85 per cent are excluded, 3,300 children would be removed for reasons other than abuse. This implies that 4,900 parents would be eligible for compensation.

2.6. Compensation

According to the CHRT ruling, each eligible parent and child would receive \$40,000 plus applicable interest.²²

Again, compensation depends on the extent to which children are excluded because their removal was necessary or their family received preventative services.

If no children are excluded, this would result in \$1,309 million in pre-interest compensation for the 32,700 eligible children, and \$1,295 million in pre-interest compensation for the 32,400 eligible parents.

If 85 per cent are excluded, this would result in \$564 million in pre-interest compensation for the 14,100 eligible children. For the 4,900 eligible parents, the pre-interest compensation would amount to \$194 million.

The range of estimated compensation is shown in Table 2-4.

Table 2-4 Summary of the number of children and parents eligible and associated compensation costs

	Upper Bound		Lower Bound	
	Children	Parents	Children	Parents
# Eligible	32,700	32,400	14,100	4,900
Pre-interest compensation per eligible person	40,000	40,000	40,000	40,000
Pre-interest compensation (\$ millions)	\$1,309	\$1,295	\$564	\$194
Interest on compensation (\$ millions)	\$340		\$99	
Total cost of compensation (\$ millions)	\$2,944		\$857	

All figures represent the costs up to the end of 2020. Additional costs will continue to accumulate after that time, including interest and compensation in relation to ongoing removals. By the end of 2025, the expected cost would reach \$3.7 billion under the 0% scenario.

2.7. Differences in assumptions

The PBO's estimate relies on factual and legal assumptions that differ substantially from those used in ISC's preliminary cost estimate and eligibility criteria proposed by other parties.

Children already in care in 2006

About 8,500 children were in care as of 1 January 2006. The PBO assumes these children are eligible.²³ ISC's preliminary estimate assumes they are not eligible.

Adjustment factor

ISC's preliminary estimate of 48,200 children coming into care for the first time up to the end of 2017-18 is significantly higher than the PBO's estimate of 36,400 children. This is due to an adjustment factor ISC applied in projecting backwards children in care prior to 2014. ISC found that indexing to point-in-time counts underestimated the number of children coming into care relative to administrative data kept by three regions and grossed up its backwards projections accordingly. The PBO chose not to apply a similar

adjustment factor because we could not verify the methodology used by those regions and ISC could not provide us with the regional data.

Children off-reserve

The Chiefs of Ontario argued in recent submissions that “in Ontario, the Compensation Entitlement Order should apply equally to First Nations persons on or off reserve.”²⁴

The PBO did not adopt this approach because the Tribunal’s order is explicitly limited to “First Nations children living on reserve and in the Yukon Territory.” Ontario has 182,890 off-reserve individuals who identify as First Nations, just under half of the 380,355 persons on-reserve in all of Canada.²⁵

Children placed within their extended family or community

In its written representations on its application for judicial review, ISC defines the eligible group as “every child removed from their home, temporarily or long-term, and every caregiving parent or grandparent to that child, unless they abused the child or children.”²⁶

Under this interpretation, all children removed from their homes are entitled to compensation, even if they were placed with family or within their community. This is the approach taken in ISC’s preliminary estimate. If these children who were placed within their extended family or community were included, it would roughly double the number of eligible children.

Children placed in informal care

ISC’s preliminary estimate is based on its child expenditure records. Thus, it implicitly excludes compensation for children removed from their homes and placed in unfunded kinship care where no expenditure would be recorded. Children in unfunded care are not relevant to the PBO’s estimate because these children are all placed within their family or community and are thus ineligible for compensation.

However, under the definition set out in ISC’s written representations, these children placed in unfunded care would appear to be eligible, even though they are not included in ISC’s preliminary estimate. Since 49 per cent of all children removed from their homes are placed in informal kinship care, including these children would roughly double the cost of complying with the order.²⁷

Prevalence of abuse

ISC’s preliminary estimate assumes that 40 per cent of parents are ineligible because they abused their child. This assumption was made on the basis that 40 per cent of aboriginal respondents reported experiencing childhood physical and/or sexual abuse in a 2015 survey. (An alternative scenario showed 20 per cent of parents ineligible due to abuse.)²⁸

The PBO obtained access to the First Nations Component of the Canadian Incidence Study of Reported Child Abuse and Neglect 2008; it showed that 33 per cent of children taken into care on-reserve were the result of abuse. As noted above, the PBO assumes that parents of children removed due to abuse are not eligible even if they did not abuse their child.

Unnecessary removal and non-benefit from prevention services

ISC's preliminary estimate does not incorporate any further inquiry into whether a child's removal was unnecessary or whether their family benefited from preventative services allowing the child to remain in the home.

Number of parents and eligibility of grandparents

With respect to factual assumptions, ISC's preliminary estimate assumes that each child has two eligible caregivers. Based on the First Nations Component of the Canadian Incidence Study of Reported Child Abuse and Neglect 2008, the PBO estimates that removed children have an average of 1.47 in-home caregivers.

It is not clear whether ISC's interpretation of the Tribunal's decision requires the parents to be absent for grandparents to receive compensation. If caregiving grandparents are eligible irrespective of whether the parents of the child are absent, the number of eligible grandparents could be much higher.

The Chiefs of Ontario argued in recent submissions that "the reality of families in First Nations communities means that aunties, uncles and other family members may well have been caring for children at the time of removal, and submits that such people should not be precluded from entitlement to compensation."²⁹

The Tribunal rejected this approach, stating: "While the Panel does not want to diminish the pain experienced by other family members such as other grand-parents not caring for the child, siblings, aunts and uncles and the community, the Panel decided in light of the record before it to limit compensation to First Nations children and their parents or if there are no parents caring for the child or children, their grand-parents."

The PBO's estimate is based on compensation for up to two in-home caregivers irrespective of their relationship with their child, so it is not strictly limited to biological parents. However, it would exclude the broader family and community providing care and companionship to a removed child.

Interest calculation

ISC's estimate includes compound interest at the Bank of Canada Policy Rate with unspecified adjustments, whereas the PBO estimate includes simple interest at the Bank of Canada's Bank Rate consistent with the default under section 9(12) of the CHRT *Rules of Procedure*.³⁰

The decision nominally awards compensation at the Bank of Canada Rate. However, given the absence of any rationale for deviating from the Tribunal's rules of procedure, the PBO assumes the Tribunal intended to award compensation at the slightly higher Bank of Canada Bank Rate.

Resolution date

ISC's estimates also explore the implications of it taking until 2025-26 to resolve the claim. Under that scenario, ISC's preliminary cost estimate rises to \$6.7 billion. The PBO's estimate rises to \$3.7 billion under the scenario where all children removed from their home, family, and community for reason other than abuse are eligible.

Impact of assumptions

It seems reasonably clear that ISC's interpretation as set out in court filings deems children placed within their extended family or community to be eligible. It does not incorporate any further inquiry into whether a child's removal was unnecessary or whether their family benefited from preventative services allowing the child to remain in the home.

However, ISC's interpretation is unclear with respect to two of the other most consequential differences in assumptions, specifically:

1. The eligibility of children placed in unfunded care, and
2. The eligibility of caregiving grandparents where the parents are not absent.

If children placed in unfunded care are excluded and the grandparents of children in the care of their parents are excluded, the cost under ISC's interpretation is estimated to be \$4.8 billion. Including children placed in unfunded care and four caregiving grandparents per child, the cost under ISC's interpretation would be \$22.8 billion.

If proposals to compensate children off-reserve in Ontario were accepted by the Tribunal, the cost would increase by about 50 per cent. Compensating all relatives of a child who provided care to a removed child would result in an indeterminable, but likely large, increase in the cost.

3. Comparative cost of settling a class action

The Government of Canada (hereafter referred to as “Canada”) has publicly indicated that it intends to compensate families entitled to compensation under the CHRT order through a settlement of a class action. This could be *Xavier Moushoom and Jeremy Meawasige v. The Attorney General of Canada* or a similar class action recently filed by the Assembly of First Nations.

Canada cannot void the CHRT’s order simply by settling a class action. So, the framing of a class action settlement as an alternative to complying with the CHRT decision still relies on Canada having that order quashed through judicial review. If the CHRT order was paid out, Canada has argued that any compensation awarded under the CHRT order would be offset against damages awarded in a class action.³¹

It appears that eligibility for compensation under either class action could be broader in terms of three factors: the time period covered; the relatives entitled to compensation; and the eligibility of families of children removed due to abuse.

However, there may be barriers to the success of a class action. Federal funding for child welfare differs dramatically between provinces, between agencies, and over time. Families differ in the prevention services they received, the reasons their child was taken into care, and where their child was placed. Responsibility for removals and the circumstances leading to removals are shared among many parties.

To establish a clear relationship between an action for which the federal government is liable and harm suffered by the plaintiffs, it may be necessary lawyers representing the plaintiffs to dramatically limit the scope of who is eligible for compensation, or the harm for which they are being compensated. For example, in the *Sixties Scoop* class action, the group eligible for compensation was limited to children who were placed in non-aboriginal foster homes, and only included compensation for loss of culture.³²

In terms of the amount of compensation, previous class action settlements regarding the removal of children from their homes, families and communities suggest that compensation for each removed child would not necessarily be any more than the \$40,000 maximum awarded by the CHRT. The amounts awarded in previous similar cases are shown in Table 3-1.

However, individuals who suffered exceptional harm as a result of their removal, such as children who suffered abuse while in a foster home, could potentially receive much more if an individualized assessment process is implemented. An example of that would be the process used for the Indian Residential School Settlement.

The scope of eligibility and amount of compensation are negotiated and are, therefore, difficult to predict.

Table 3-1 Summary of compensation awarded in previous similar cases

	Common experience payments	Individualized compensation	Differences
<u>Indian Residential Schools Settlement (2006)</u>	\$10,000 for the first year, \$3,000 for subsequent years, averaging \$20,457 (\$25,900 in 2020 dollars) for emotional abuse, loss of family life, loss of language/culture, etc.	38,178 claims out of 105,530 claimants with awards averaging \$111,265	Longer average duration, more abuse
<u>Sixties Scoop Settlement (2017)</u>	Likely <= \$25,000, solely for loss of cultural identity	Not settled	Generally permanent

Appendix A – Possible interpretations of further restrictions

Families with children removed for reasons other than abuse are entitled to compensation only if:

- The child was “unnecessarily apprehended” and
- The family “especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities.”

The CHRT’s decision does not clearly explain how these eligibility criteria are supposed to be applied. Seven possible approaches were considered, including:

- Canada-wide approaches,
- province-year specific approaches,
- group-by-group analysis of the presence of factors or services, and
- group-by-group causal analysis.

The 0 per cent to 85 per cent range reflects the possible exclusions under these interpretations.

Among these possible approaches, the most likely interpretation is that the CHRT’s eligibility criteria require a further group-by-group assessment of whether each child was unnecessarily removed. The evidence would be that they did not benefit from prevention services which would have permitted them to remain at home.

The assessment would not be the extent of harm, which the Tribunal rejected as harmful and unnecessary. Rather, it would be whether the harm associated with a child’s removal arose from the underfunding of preventative services.

One factor that supports the interpretation that an additional group-by-group assessment is required is that the evidence summarized by the CHRT and the conclusions it drew accept the existence of unnecessary removals, but do not address the prevalence of unnecessary removals.

In summarizing the evidence, the CHRT states that the least disruptive measures to address neglect are underfunded, and that “without funding for [the] provision of preventative services many children [...] are unnecessarily removed from their homes and families.”³³

The necessity of a case-by-case assessment is further supported by the reference to substance abuse in the CHRT order. The CHRT appears to be making some attempt to define a population it expects to be found ineligible as a result of a further assessment.

It does so when it restricts eligibility to families who “especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting [the children] to remain safely in their homes, families and communities.”³⁴

This suggests that removals due to caregiver substance abuse, where the caregiver benefited from prevention services intended to allow the child to remain in the home, do not give rise to compensation. The term “especially” suggests that families benefiting from prevention services may be excluded in other circumstances. Determining whether caregivers benefited from prevention services intended to allow the child to remain in the home requires a case-by-case assessment.

Another important contextual factor is that the order was issued in response to a request by the Assembly of First Nations (AFN) to establish an expert panel to determine appropriate case-by-case compensation. This proposal was not just for a case-by-case assessment of individual damages, which the Tribunal rejected as harmful and unnecessary. It was also to determine whether preventative services would have prevented abuse leading to a child’s removal.³⁵

Canada-wide approaches

Under these approaches, no children are screened out and no case-by-case assessment is required.

Scenario 1: Reliance on finding of systemic discrimination

A taxonomy of compensation category proposed by the First Nations Child and Family Caring Society (FNCFCS) argues that a prior CHRT ruling “found that First Nations children living on-reserve were discriminated against by the Canadian government in part because they did not receive adequate prevention services.”³⁶ On this basis, the taxonomy appears to accept that all children did not benefit from prevention services. This would result in no cases being screened out.

Scenario 2: Reliance on placement outside of family and community

Alternately, the Tribunal could reason, as it did in relation to cases of abuse, that all First Nations children should have been placed within their family and community. If the Tribunal does not entertain evidence that equitable funding to find and support such placements was in place or that an equitable level of such placements occurred, this would result in no cases being screened out (the PBO's cost estimate already excludes placements with family and community).

Province-year specific approach

Under these approaches, children are screened out depending on the province and year in which they were taken into care.

Scenario 3: Removals in province-years where funding for prevention services was in place

The eligibility criteria ask specifically about whether a family benefited from prevention services. Canada has been incrementally providing funding for prevention services on a province-by-province basis in an attempt to address the systemic discrimination identified by the Tribunal.

For about 85 per cent of removals for which compensation has been ordered, prevention services were funded under a bilateral agreement or the enhanced prevention focused approach. This suggests that if children are screened out in province-years for which the additional funding for prevention services was in place, as much as 85 per cent of cases could be screened out.

Group-by-group and case-by-case analysis of the presence of factors

Under these approaches, the Tribunal or delegated body would determine, or has determined, that children removed in certain circumstance are eligible. Then it would consider whether each case falls within an eligible group.

Scenario 4: Removals related to poverty, housing, or substance abuse

The FNCFCS's taxonomy has an eligibility requirement asking whether the child experienced neglect related to poverty, housing and substance abuse. This is in conflict with the wording of the CHRT order, which includes neglect as a parallel ground. However, in this way, the taxonomy indirectly restricts eligibility to those found to be harmed in the Wen:de reports prepared by the First Nations Child and Family Caring Society of Canada.

Those reports speak of neglect related to poverty, housing and substance abuse as circumstances where removals are potentially preventable.³⁷ In this way, looking at whether a removal was related to poverty, housing or

substance abuse may be a reasonable proxy for determining the circumstance where removals are potentially preventable in the view of the CHRT.

To assess the impact of this approach, the PBO requested a custom tabulation from the First Nations Component of the 2008 Canadian Incidence Study of Reported Child Abuse and Neglect. That custom tabulation shows that this approach would only slightly restricts eligibility, as poverty, housing and substance abuse were a suspected or confirmed factor in 94 per cent of investigations resulting in placements outside the home.

Table A-1 Presence of risk factors among investigation resulting in an out-of-home placement for First Nations on-reserve children, as reported by caseworkers

	%
<i>Unsafe housing conditions</i>	23%
<i>Home overcrowding</i>	10%
<i>Household income only from social assistance, EI, other benefits, or none</i>	54%
<i>Household ran out of money for necessities within the past six months</i>	19%
<i>Suspected or confirmed drug or alcohol abuse by caregiver</i>	84%
<i>Any of above risk factors</i>	94%

Source: PBO based on custom analysis of FNCIS 2008.

Scenario 5: Exclusion of substance abuse cases

The decision indicates that the exclusion related to benefit from prevention services applies especially with regard to cases of substance abuse. The particular emphasis placed on substance abuse in the context of the availability of prevention services mirrors earlier quotes from the Wen:de reports. These quotes express the view that where treatment services were available, continuing substance misuse lies within the personal domain for change.³⁸

First Nations addiction treatment centres and community-based prevention programs are offered at various locations across Canada.³⁹ Without a clear definition and further data, it cannot be determined whether these services were adequate and available in the context of a particular removal. If the

assessment were to screen out all families where caseworkers flagged suspected or confirmed substance abuse, 84 per cent of families could be excluded.

Group-by-group and case-by-case causal analysis

If the CHRT requires evidentiary proof that prevention funding would have averted the removal of a group of children on a balance of probabilities, the outcome will depend on the evidence accepted and the scope of least disruptive measures and prevention services the CHRT believes should have been provided.

Scenario 6: Causal analysis based on ISC definition of preventative services

The types of “prevention services” funded by Canada over most of the relevant period were non-medical services delivered to families, such as education, counselling and intensive in-home supports.⁴⁰ Between 2007-08 and 2013-14, Canada increased funding for prevention services under an “Enhanced Prevention Focused Approach” (EPFA).

However, it was not possible to identify a distinct group of children who are no longer coming into care as a result of the EPFA. In the decade since implementation of the EPFA began, the number of children in ISC-funded care has increased in some provinces with EPFA funding, while decreasing in others.

In total, the number of children in care increased 18 per cent in provinces with EPFA funding, whereas the number of children in care decreased 9 per cent in the remaining provinces and single territory (Yukon).

However, excluding kinship care, the number of children in care in EPFA provinces with EPFA funding is estimated to have decreased 25 per cent. Beyond the absence of a clear aggregate impact, it is difficult to identify a causal relationship for a variety of other reasons.⁴¹

Based on experiences over the last decade with EPFA funding, it would be difficult to prove that the removal of any particular group of children would not have occurred with adequate funding for prevention services.

Academic literature is inconclusive regarding the effectiveness of prevention services. Several types of home visitation programs have been found to reduce child maltreatment or maltreatment risk factors in some cases; but, in other cases the same or similar programs have not been effective or even increased maltreatment.⁴² Such results may also not be generalizable to First-Nations on-reserve families and few studies look at impacts on probabilities of being taken into care. Even where effective, these programs only reduce the probability of a child being taken into care. It would still be difficult to say

that any particular family would not have been taken into care if the intervention had been in place. It is difficult to predict what conclusions the CHRT would draw from such a mixed body of research.

Scenario 7: Causal analysis based on broader definition of preventative services

Under a broader definition of preventative services, there do appear to be services which could reduce the number of children removed from their homes, families and communities. Specifically, funding to find and support kinship placements and foster care on-reserve, funding for housing and income assistance could avoid the removal of some children. It might even be possible to show that the removal of a particular family's child could have been prevented if the child was removed from to their home due to poverty, unsafe housing, or if a family member would have been willing and able to take in a child if more support was available.⁴³ However, for many cases of neglect, it would be difficult to point to any particular program that would have prevented the removal of a child.

Notes

- ¹ *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39.
- ² As set out in 2017 CHRT 35, Jordan’s Principle relates to the approval of and reimbursement for government services for First Nations children. Where a government service is available to all other children, the government department of first contact must pay for the service. Where a service is not necessarily available to all other children, the government department of first contact must evaluate the needs of the child to determine whether the requested services should be provided to ensure substantive equality or culturally appropriate services, or to safeguard the best interests of the child. The CHRT decision orders compensation to be paid to each First Nations child who “was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal.” The parents or grandparents of those children are also eligible for compensation.
- ³ Compensation will be paid to caregiver grandparents only if the parents were absent. 2019 CHRT 39 at para 185.
- ⁴ [Written Representations of the Applicant/Moving Party on Motion to Stay](#) at para 9; [Affidavit of Cindy Blackstock](#) at p 117 (Page 5 of Exhibit 12) [FNCFCFS taxonomy]; Assembly of First Nations (AFN), [Compensation Order / Questions and Answer](#).
- ⁵ CHRT, [Letter of 16 March 2020](#).
- ⁶ Among other issues, the Application for Judicial Review challenges the Tribunal’s decision to award individual compensation in a case of systemic discrimination, its decision to award individual compensation in light of a lack of evidence proper funding could have prevented all removals, and the amount of compensation awarded in the case of short temporary removals. Attorney General of Canada, [Written Representations of the Applicant/Moving Party on Motion to Stay](#).
- ⁷ This differs from the approach taken by the FNCFCFS’s taxonomy, which limits eligibility to children who have, or are eligible, for Indian Status. Eligibility is not expected to be restricted to Status Indian children because:
 - The decision refers to First Nations children rather than “Status Indian” children;
 - Canada has jurisdiction over lands reserved for Indians; and
 - Underfunding of on-reserve prevention services would negatively affect all children on-reserve. irrespective of their status.

The definition of a First Nations child is an open issue being considered by the CHRT.

- ⁸ Because kinship care was not distinguished in ON, MB, and YK for the entire period, point-in-time counts for the number of children in kinship care in ON, MB, and YK were interpolated based on provinces that distinguished kinship care. Interpolated kinship placements were deducted from foster placements.
- ⁹ Quebec and the Atlantic provinces include placements with family within foster placements in some circumstances. This error also effects the result for Ontario and Manitoba due to interpolation for these provinces. In addition, and possibly as a result, the share of children in non-kinship foster care is higher than found in the First Nations Component of the Canadian Incidence Study of Reported Child Abuse and Neglect, where non-kinship foster care accounted for 53 per cent of placements with expenditures. As defined in the FNCIS 2008, kinship foster care includes all formal placements arranged within the family support network, including placements with extended family and in customary care.
- ¹⁰ Expenditures have only been nationally tracked at the child level since 2013, meaning children entering care for the first time can only be identified for 2014 onwards. The number of children taken into care for the first time prior to 2014 was estimated based on indexing the number of children taken into care for the first time in 2014 by care type to point-in-time counts of the number of children in care by care type. The 2014 base year only excluded children in care in 2013. So this approach may overestimate the number of unique children who were taken into care to the extent there are recurrent placements with a gap of more than one year between placements. If this were common, one would expect to see a decline in unique children coming in care for the first time since 2014, which has not occurred.
- ¹¹ This differs from the approach taken by the FNCFCS taxonomy and by Indigenous Services Canada, which both ask whether children were removed from their “homes, families, or communities.” That would result in compensation being paid to children placed within their family or community. See: [Affidavit of Sony Perron](#) at para 5; Attorney General of Canada, [Written Representations of the Applicant/Moving Party on Motion to Stay](#) at para 9; [Affidavit of Cindy Blackstock](#) at p 117 (Page 5 of Exhibit 12).

The PBO interprets the decision to only compensate children removed from their family and community because:

- The decision uses the word “and” rather than “or”;
- The references to families and communities would be redundant if all children removed from the home qualified;
- The panel’s corresponding factual finding is that “removing a child from its family and community is a serious harm” (paras 161, 169, 184);
- Similar wording specifying that compensation is for children “placed in care outside of their extended families and communities” (para 249) is used with respect to abused children. The CHRT had earlier found that

abused children “should have been placed in kinship care with a family member or within a trustworthy family within the community” (para 149). This suggests that the CHRT believes no wrong was done in cases where a child was placed with a family member outside of the child’s community or a non-family member within the child’s community.

- ¹² Over a 3-year period, a study Perry et al. found 13.6% of children placed in kinship care were moved to another family or group. Gretchen Perry, Martin Daly and Jennifer Kotler, [Placement stability in kinship and non-kin foster care: A Canadian study](#) (2011).

It was assumed subsequent placements had an equal probability of being non-kinship placements. Children moved to non-kinship placements were assumed to have an equal probability of being placed off-reserve as a child directly placed in a non-kinship placement.

- ¹³ Based on ISC data, the PBO estimated the number of First Nations children in ISC-funded non-kinship foster care in 2016. Based on 2016 Census data, the PBO could determine the number of children in non-kinship foster care on reserve. The probability of any particular placement being on-reserve for each province was assumed to be equal to the percentage of these children ISC funded care who were in care on reserve. The number of subsequent placements for First Nations children was derived from Quebec administrative data. An expected probability of being placed on reserve in any placement was calculated using the Quebec distribution of number of placements and each province’s probability of being placed off-reserve for each placement. That probability was weighted based on the provincial distribution of children in care to produce a national probability of being placed on reserve in any placement.

The key assumptions in this approach are:

- All First Nations children placed in foster care on-reserve came from homes on-reserve,
- The duration of time in care for placements on-reserve is similar to the duration of placements off-reserve and,
- The probability of a subsequent placement being off-reserve is independent of the probability of the initial placement being off-reserve.

ISC, Response to PBO IR0437; Statistics Canada, [Aboriginal Population Profile, Census 2016](#). First Nations of Quebec and Labrador Health and Social Services Commission: [Trajectories of First Nations youth subject to the Youth Protection Act COMPONENT 3: Analysis of mainstream youth protection agencies administrative data](#).

- ¹⁴ The estimated share of children placed in group homes is based on the number of Status Indians in residential care facilities (which includes group homes) on-reserve based on the 2016 Census, as a percentage of the number of children who had been in group homes for 6 months or longer as of census day based on ISC’s CFS IMS. This assumes that individuals residing in the group home less than six months would have been recorded at their ordinary residence and there is no significant difference in the duration of

group home placements on and off reserve. An expected probability of being placed on reserve in any placement was calculated using Quebec distribution of number of placements for placements in group homes and institutions.

Institutions are generally distinguished from group homes by capacity. Given the low total number of children in residential care facilities in any province, it was deemed unlikely that there were any children in institutional care on reserve. The figure presented represents the weighted average of the two figures.

ISC, Response to PBO IR0437; Statistics Canada, Custom Tabulation based on 2016 Census; Tonino Esposito, Nico Trocmé et al., [The stability of child protection placements in Québec, Canada](#) 42 Children and Youth Services Review (2014) 10-19.

- ¹⁵ Statistics Canada, [Living arrangements of Aboriginal children aged 14 and under](#) (2016).
- ¹⁶ There may be rare cases in which a child is removed for reasons other than abuse, poverty, poor housing, neglect, or substance abuse, or in order to receive services. For example, a child could be taken into care because the parents are unable to care for them for other reasons, such as illness, death or incarceration.
- ¹⁷ The order elaborates on abuse as including sexual, physical and psychological abuse (2019 CHRT 39 at para 256). The term psychological abuse is not actually defined in provincial child welfare legislation. But the most comparable definitions of 'emotional injury', 'emotional harm', 'psychological ill-treatment' typically all include exposure to family violence (See [Affidavit of Cindy Blackstock](#) at p 196, Page 84 of Exhibit 12). This is not to say that the victim of intimate partner abuse abused their child by exposing their child to intimate partner violence. However, the abused parent is nevertheless not eligible because their child was necessarily removed due to abuse by the perpetrator of intimate partner violence. There is no order of compensation that covers even innocent parents of children removed due to abuse.

The primary reason for removal differs from the prevalence because multiple factors may be present in a particular case. As reported by caseworkers in cases where children were removed, 39 per cent of caregivers were victims of intimate partner violence, while 31 per cent of caregivers were perpetrators of intimate violence. This was the case even though intimate partner violence was the primary reason for removal in only 8 per cent of removals.

- ¹⁸ 2019 CHRT 39 at para 245.
- The PBO assumes the order for compensation is to be limited to those groups found to be harmed as described within the order. This is the approach taken by the FNCFCST taxonomy, but not the approach taken by ISC. ISC appears to read each order as not limited by the preceding findings of harms. Despite the lack of a demonstrative pronoun indicating this

restriction, the orders are assumed to be limited to those found to be harmed because:

- The explicit purpose of the decision is to compensate children and caregivers harmed by discriminatory underfunding of child protection services, so one would expect compensation to be limited to those found to be harmed;
- The identical orders made in paragraph 245 (regarding neglected children) and 249 (regarding abused children) would be redundant if not limited to the groups found to be harmed;
- Without being restricted to those found to be harmed, the order would include First Nations children residing off-reserve, who receive services funded by provincial governments;
- In further restricting eligibility to children who “especially in regards to substance abuse, did not benefit from prevention services [...] permitting them to remain safely in their homes, families and communities”, the Tribunal is excluding a group of households.

The order appears to accept that the fact an abused child was placed in care outside of their extended families and communities is sufficient proof that an abused child did not benefit from prevention services. This flows from the use of the phrase “and therefore, did not benefit from prevention services”. This implies that the Tribunal is finding, as a matter of fact, that removed abused children placed outside their families and communities did not benefit from prevention services. The Tribunal made this factual finding explicit earlier in its reasons at paragraph 149. The word ‘therefore’ was not used in the corresponding order regarding removals for reasons other than abuse.

Although the CHRT uses the term “apprehended” in English, it uses the term “placés” in French and “removed” in the heading and later in the same paragraph. This suggests the term is not being used in a precise legal sense to limit eligibility to children apprehended by children’s aid societies to the exclusion of children voluntarily placed in care. Voluntary placements in care account for about 6 per cent of placements in care. Even if excluded on this ground, they would likely be eligible on the basis their child was taken into care in order to receive essential services.

¹⁹ As written, the decision would not compensate parents of children removed due to abuse even when the parent was not the perpetrator of the abuse. Specifically, the decision explicitly excludes caregivers who abused their children (para 256). However, the decision also does not include a positive order to compensate the parents of children necessarily removed due to abuse. For physical abuse, the only category for which a sufficient sample size was available, the primary caregiver was the perpetrator in 97 per cent of cases, and a secondary caregiver the perpetrator in 3 per cent.

²⁰ 2019 CHRT 39 at para 185.

²¹ Based on custom analysis of the FNCIS-2008.

- 22 The interest on compensation was calculated assuming simple interest at the Bank of Canada's Bank Rate.
- 23 CHRT, [Letter of 16 March 2020](#).
- 24 Chiefs Of Ontario, [Submissions](#).
- 25 2016 Census, [Aboriginal Population Profile](#).
- 26 Attorney General of Canada, [Written Representations of the Applicant/Moving Party on Motion to Stay](#) at para 9.
- 27 Based on custom analysis of the FNCIS-2008.
- 28 Statistics Canada, [Family violence in Canada: A statistical profile, 2015](#).
- 29 COO, [Submissions](#).
- 30 The Bank of Canada's Bank Rate was the series used in *O'Bomsawin v. Abenakis of Odanak Council*, 2018 CHRT 25 (CanLII), <<http://canlii.ca/t/hxsvq>>.
- 31 2019 CHRT 39.
- 32 *Brown v. Canada* (Attorney General), 2017 ONSC 251. The final settlement was broader that established in that case, see [Sixties Scoop Settlement Agreement](#) (2017).
- 33 2019 CHRT 39 at paras 163-165).
- 34 2019 CHRT 39 at para 245.
- 35 AFN, [Written Submissions Regarding Compensation](#) returnable April 25-26, 2019 at para 12.
- 36 [Affidavit of Cindy Blackstock](#) at p 117, Page 5 of Exhibit 12.
- 37 2019 CHRT 39 at para 163.
- 38 2019 CHRT 39 at para 163.
- 39 ISC, [National Native Alcohol and Drug Abuse Program](#).
- 40 ISC, [National Social Programs Manual 2012](#) at § 4.4.2. ISC, [Mid-Term National Review for the Strategic Evaluation of the Implementation of the Enhanced Prevention Focused Approach for the First Nations Child and Family Services Program](#) at § 1.2.1 ["Prevention services may include, but are not limited to, respite care, after-school programs, parent/teen counselling, mediation, in-home supports, mentoring and family education, in accordance with services similarly offered by the province of residence off reserve."]; ISC, [Program Directive: Prevention/Least Disruptive Measures \(Draft\)](#).
- 41 Many other changes occurred over the decade. The count of children in care may be affected by expansions in funding eligibility for kinship and customary care placements. In addition, significant prevention funding may have been diverted towards other purposes, including intake services, which can increase the number of children taken into care. ISC does not know how much prevention funding was actually spent on prevention services.

According to a survey of agencies by the IFSD, 12 per cent of federal funding was used for prevention services. IFSD, [Enabling Children to Thrive](#), Figure 36.

- ⁴² Anne Blumenthal, [Child Neglect II: Prevention and Intervention](#); Preventing Violence Across the Lifespan Research Network, [RESEARCH BRIEF: Interventions to Prevent Child Maltreatment](#); WHO, [Child maltreatment prevention: a systematic review of reviews](#); Sarah Dufour and Claire Chamberland, [The Effectiveness of Child Welfare Interventions: A Systematic Review](#); Richard P. Barth, [Preventing Child Abuse and Neglect with Parent Training: Evidence and Opportunities](#); Prinz et al, [Population-Based Prevention of Child Maltreatment: The U.S. Triple P System Population Trial](#).
- ⁴³ Anne Blumenthal, [Child Neglect II: Prevention and Intervention](#); Lyn Morland, [Effect Of Safety Net Policies On Child Neglect](#); Cancian et al, [The Effect of Family Income on Risk of Child Maltreatment](#).