Federal Court  Cour fédérale

Date: 20210929

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

Citation: 2021 FC 969

Ottawa, Ontario, September 29, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

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

Respondents

and

CONGRESS OF ABORIGINAL PEOPLES

Intervener

JUDGMENT AND REASONS

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I. Nature of the Matter

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

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

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

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

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

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

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

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

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

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

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

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

II. Background and Context

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

A. *The Complaint*

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

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

B. *FNCFS Program*

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

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

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

C. *Jordan's Principle*

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

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

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

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

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

D. *Parties before the Tribunal*

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

III. Procedural History

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

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

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

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

B. *Retaliation*

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

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

C. *The Merit Decision*

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

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

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

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

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

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

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

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

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

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

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

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

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

D. *Decisions following the Merit Decision*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[46] The Applicant raised concerns about the fairness of the Tribunal's approach to remedial jurisdiction. However, the Tribunal found no unfairness and stated that it would remain seized to ensure discrimination is eliminated. Specifically, the Tribunal found that "any potential procedural fairness to Canada is outweighed by the prejudice borne by the First Nations children

and their families who suffered and, continue to suffer, unfairness and discrimination" (2018 CHRT 4 at para 389).

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

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

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

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

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

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

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

[51] The Tribunal ordered the following:

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

E. *Compensation Decisions*

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

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

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

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

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

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

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

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

(2) Additional Compensation Decision

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

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

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

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

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

(3) The Definitions Decision

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

(4) The Trusts Decision

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

(5) The Framework Decision

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

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

F. *Jordan's Principle Eligibility Decisions*

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

(1) Interim Eligibility Decision

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

(2) Eligibility Decision: T-1559-20

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

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

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

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

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

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

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

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

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

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

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

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

(3) 2020 CHRT 36

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

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

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

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

(d) The child is ordinarily resident on reserve.

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

(4) The Framework Decision

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

IV. Issues and Standard of Review

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

(1) Was the Compensation Decision reasonable?

(2) Was the Eligibility Decision reasonable?

(3) Was Canada denied procedural fairness?

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Parties' Positions

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

A. *Compensation Decision*

(1) Applicant's Position

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

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

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

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

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

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

(d) The reasons are inadequate;

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

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

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

(h) It erred in giving compensation to caregivers.

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

(2) Caring Society's Position

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

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

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

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

(d) The estates and trusts orders are reasonable;

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

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

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

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

(3) The AFN's Position

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

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

(4) The Commission's Position

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

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

(5) The COO's Position

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

(6) NAN's Position

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

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

(7) Amnesty's Position

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

(1) CAP's Position

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

B. *Eligibility Decision*

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

(1) The Applicant's Position

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

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

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

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

(2) The Caring Society's Position

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

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

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

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

(3) The AFN's Position

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

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

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

(4) The Commission's Position

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

(5) The COO's Position

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

(6) NAN's Position

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

(7) Amnesty's Position

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

(8) CAP's Position

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

C. *Procedural Fairness*

(1) Applicant's Position

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

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

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

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

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

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

(2) Position of the Respondents and Intervener

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

VI. Analysis

A. *Preliminary Matter – Motion*

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

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

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

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

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

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

B. *The Compensation Decision*

(1) Reasonableness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Scope of the Complaint*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) *Class Action*

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

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

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

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

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

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

(d) *Principles of Damages Law*

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

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

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

> The tribunal held that it could not award pain and suffering damages without evidence that spoke to the pain and suffering of individual claimants. This does not, however, mean that it necessarily required direct evidence from each individual. As the Commission noted, the Tribunal is empowered to accept evidence of various forms, including hearsay. Therefore the Tribunal could find that evidence from some individuals could be used to determine suffering of a group.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) *Wilful and Reckless*

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

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

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

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

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

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

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

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

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

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

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

(f) *Definitions in the Definitions Decision*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) *Inadequate Reasons*

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

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

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

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

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

(h) *Jordan's Principle Compensation*

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

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

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

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

(i) *Compensation to Caregivers*

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

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

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

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

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

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

(2) Compensation Decision Conclusion

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

C. *The Eligibility Decision*

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

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

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

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

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

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

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

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

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

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

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

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

(1) Reasonableness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Implications for Compensation Decision*

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

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

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

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

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

(c) *Alleged Lack of Evidence*

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

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

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

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

(d) *Non-Party First Nations*

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

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

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

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

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

(e) *Determining Complex Questions of Identity*

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

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

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

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

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

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

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

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

(2) Eligibility Decision Conclusion

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

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

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

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

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

D. *Procedural Fairness*

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

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

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

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

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

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

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

[286] With respect, the Applicant never raised any objections with the Tribunal's approach. A party alleging a breach of procedural fairness has an obligation to raise it before the Tribunal at the earliest opportunity. The Applicant, being a sophisticated litigant, should be aware of their obligation. For example, at paragraph 11 of the Compensation Decision, the Tribunal reiterated its earlier finding in 2018 CHRT 4 at paragraph 389, that First Nations children and families continue to suffer. The Applicant did not challenge this finding.

[287] The Applicant also submits that the Tribunal did not explain itself or provide reasons when it stated that any procedural unfairness to Canada is outweighed by the prejudice borne by First Nations children and their families who suffered and continue to suffer unfairness and discrimination. I disagree. From the Merit Decision onward there were findings made on the harm suffered by children and their families. The fact that the Tribunal did not directly state how that weighing occurred does not render the decision procedurally unfair. It can be inferred from the record and, specifically, the evidence related to the harms suffered by children as referenced in the Tribunal's numerous decisions and rulings.

[288] All parties received notice of issues that were under consideration. Where outstanding issues were before the Tribunal and further questions remained, it notified all parties in writing and provided them with an opportunity to provide written and/or oral submission. The

evidentiary record considered by the Tribunal and section 50(3)(e) of the *CHRA* empowers the Tribunal to decide procedural issues related to the inquiry. The Tribunal managed its remedial jurisdiction to ensure discrimination ceased and would not occur in the future.

[289] Since the Merit Decision, the issues of compensation and definitions related to Jordan's Principle were reserved by the Tribunal. I agree with the Caring Society and the AFN that Canada had every opportunity to seek a judicial review of that decision but chose not to. Nothing in the record suggests that the Tribunal limited the type or amount of evidence that the Applicant or any of the parties could adduce. Accordingly, I find that the Applicant was not treated unfairly.

[290] I also agree with the COO that the Tribunal appropriately considered the context, the rights, and interests of the parties when it crafted the decisions and its procedure. For example, in the Eligibility Decision, the Tribunal asked the parties to negotiate a mechanism that would implement the community eligibility decision on the ground. In 2020 CHRT 36 the Tribunal's order stemmed from the Tribunal's request that the parties negotiate an implementation plan for the Eligibility Decision.

[291] The Tribunal previously rejected the Applicant's suggestion that more or any negotiation has to occur before a remedy can be awarded (2018 CHRT 4 at paras 395-400).

[292] I also find that the Tribunal dealt fully and reasonably with the Applicant's claim of surprise with respect to the Compensation Decision. The AFN submits that it and the Caring

Society clearly demonstrated their intention from the date of their initial filing to pursue individual compensation. The AFN points to paragraph 21(3) of the statement of particulars submitted prior to the Merit Decision. The Tribunal also recognized this at paragraph 108 of the Compensation Decision.

[293] As set out above, the Tribunal provided advance notice of the questions it wished the parties to respond to prior to the Compensation Decision. If the Applicant thought that the process was unfair, this would have been the opportune time to raise those concerns. It did not.

[294] At paragraph 490 of the Merit Decision, the Tribunal provided advance notice that it was seeking input from the parties on the outstanding question of remedies. In addition, the Tribunal dealt directly with the Applicant's arguments about unfairness of the process (2018 CHRT 4 at paras 376-389). The Tribunal reminded the Applicant that there were three phases identified in the Merit Decision and that the ruling closed the immediate relief phase (2018 CHRT 4 at paras 385-388). This ruling was not challenged by the Applicant.

[295] In 2017 CHRT 14 the Tribunal also pointed out the process it employed to address the remedies ordered in the Merit Decision, which required additional information from the parties (at para 32).

[296] For all of these reasons I find that the Applicant was not denied procedural fairness. The Tribunal afforded all parties with a full picture of what was to be determined at each stage of the proceedings and sought submissions from the parties. There were no surprises.

VII. Some Thoughts on Reconciliation

[297] While noting that these applications for judicial review did not involve constitutional issues or section 35 Aboriginal rights, the parties and the Tribunal have discussed the concept of reconciliation throughout these proceedings. Prior to concluding, I find it necessary to pause and reflect on this concept and consider but a few of the many lessons that have arisen during these proceedings.

[298] In *Desautel*, the Supreme Court stated the following on reconciliation and negotiation:

> [30] In this Court's recent jurisprudence, the special relationship between Aboriginal peoples and the Crown has been articulated in terms of the honour of the Crown. As was explained by McLachlin C.J. and Karakatsanis J. in *Manitoba Metis*, at para. 67:
>
> > The honour of the Crown [. . .] recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies. Aboriginal peoples were here first, and they were never conquered; yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice…
>
> While the honour of the Crown looks back to this historic impact, it also looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, "mutually respectful long-term relationship"... The honour of the Crown requires that Aboriginal rights be determined and respected, and may require the Crown to consult and accommodate while the negotiation process continues... It also requires that the Crown act diligently to fulfill its constitutional obligations to Aboriginal peoples. [Citations omitted.]
>
> …

> [87] Negotiation has significant advantages for both the Crown and Aboriginal peoples as a way to obtain clarity about Aboriginal rights:
>
> > Negotiation . . . has the potential of producing outcomes that are better suited to the parties' interests, while the range of remedies available to a court is narrower. . . . The settlement of indigenous claims [has] an inescapable political dimension that is best handled through direct negotiation.
> >
> > (S. Grammond, *Terms of Coexistence, Indigenous Peoples and Canadian Law* (2013), at p. 139)
>
> Negotiation also provides certainty for both parties... As the Court said in *Clyde River*… at para. 24, "[t]rue reconciliation is rarely, if ever, achieved in courtrooms". [Citations omitted.]
>
> [Emphasis in Original.]

[299] In my view, the concept of reconciliation is, in essence, a continuation of the nation-building exercise of this young country in the sense that the foundational relationships between Indigenous people and the Crown continue to evolve. Reconciliation, as nation-building, can also result in the re-establishment, on a proper foundation, of broken or damaged relationships between Indigenous people and Canada in the manner suggested by the Supreme Court in its numerous judgments.

[300] Negotiations are also seen as a way to realize the goal of reconciliation. It is, in my view, the preferred outcome for both Indigenous people and Canada. Negotiations, as part of the reconciliation process, should be encouraged whether or not the case involves constitutional issues or Aboriginal rights. When there is good will in the negotiation process, that good will must be encouraged and fostered before the passage of time makes an impact on those

negotiations. As Pitikwahanapiwin (Chief Poundmaker), a nation-builder in his own right, so aptly said:

> We all know the story about the man who sat by the trail too long, and then it grew over, and he could never find his way again. We can never forget what has happened, but we cannot go back. Nor can we just sit beside the trail.

[301] In my view, the procedural history of this case has demonstrated that there is, and has been, good will resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the parties is unfinished. The parties must decide whether they will continue to sit beside the trail or move forward in this spirit of reconciliation.

VIII. Conclusion

[302] I find that the Applicant has not succeeded in establishing that the Compensation Decision is unreasonable. The Tribunal, utilizing the dialogic approach, reasonably exercised its discretion under the *CHRA* to handle a complex case of discrimination to ensure that all issues were sufficiently dealt with and that the issue of compensation was addressed in phases. The Tribunal ensured that the nexus of the Complaint, as discussed in the Merit Decision, was addressed throughout the remedial phases. Nothing changed. All of this was conducted in accordance with the broad authority the Tribunal has under the *CHRA*.

[303] I also find that the Applicant has not succeeded in establishing that the Eligibility Decision is unreasonable. The Tribunal was aware of its jurisdiction when the Caring Society asked the Tribunal to create three new categories for Jordan's Principle. The Caring Society claimed that the third category would prevent further discrimination based on *Indian Act* status.

The Tribunal reasonably noted the issues with Indian status within the scope of the proceedings. It concluded that only two of the proposed categories were tied to the scope of the Complaint and the proceedings. I find no error in this conclusion.

[304] Finally, the Applicant has not succeeded in establishing that it was denied procedural fairness. The record indicates that the Applicant was afforded numerous opportunities to challenge the various decisions but did not. The record also shows that the Applicant, as well as each party before the Tribunal, was afforded an opportunity to make submissions on any issues that the Tribunal requested. All of this was in accordance with the broad authority the Tribunal has under the *CHRA*. No one was taken by surprise.

[305] The Applicant has not sought costs in either of these two applications for judicial review and neither has CAP. All of the Respondents, aside from the Commission and Amnesty, seek their costs. In light of this, the Respondents, aside from the Commission and Amnesty, will file their respective written submissions on costs within 45 days of the Order below and the Applicant will file its written reply within 90 days of the Order below. The parties, of course, are encouraged to discuss this and to file a joint submission. In the event a joint submission is not filed, the matter of costs will be disposed of based on written submissions.

JUDGMENT in T-1559-20 and T-1621-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review concerning the Compensation Decision in T-1621-19 is dismissed.
2. The application for judicial review concerning the Eligibility Decision in T-1559-20 is dismissed.
3. The Respondents, aside from the Commission and Amnesty, will provide their submissions on costs within 45 days of the date of this Order. The Applicant will provide its submissions on costs within 90 days of this Order. The matter of costs will be dealt with in writing.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1559-20 AND T-1621-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL AND NISHNAWBE ASKI NATION AND CONGRESS OF ABORIGINAL PEOPLES
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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DATED:	SEPTEMBER 29, 2021

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