Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 39
Date: September 6, 2019
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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I. Introduction

> We believe that the Creator has entrusted us with the sacred responsibility to raise our families…for we realize healthy families are the foundation of strong and healthy communities. The future of our communities lies with our children, who need to be nurtured within their families and communities. (see 1996 report of the *Royal Commission on Aboriginal Peoples (RCAP), Gathering strength,* vol. 3, p. 10 part of the Tribunal's evidence record).

[1] **The Special Place of Children in Aboriginal Cultures**

> Children hold a special place in Aboriginal cultures (...) They must be protected from harm (…). They bring a purity of vision to the world that can teach their elders. They carry within them the gifts that manifest themselves as they become teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the elders young again with their joyful presence.
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> Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations. (see *RCAP, Gathering strength* vol. 3, p. 21).

[2] This Panel recognizes the shame and the pain and suffering experienced by children, families and communities who were deprived of this vital right to live in their families and communities as a result of colonization, racism and racial discrimination.

[3] This shame is not for you to bear, it is one for the entire Nation of Canada to bear, in the hope of rebuilding together and achieving reconciliation.

II. Context

[4] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 (the Decision), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the Canadian Human Rights Act (the *CHRA*).

[5] The Panel generally ordered Aboriginal Affairs and Northern Development Canada, now Department of Indigenous Services Canada (DISC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the Memorandum of Agreement Respecting Welfare Programs for Indians applicable in Ontario (the 1965 Agreement) to reflect the findings in the Decision. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[6] In the 2016 CHRT 2 Decision, at para.485, the Panel wrote:

> Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in willfully or recklessly. Awards of compensation under each of those sections cannot exceed $20,000 under the statute.

[7] The Panel had outstanding questions for the parties in regards to compensation and deferred its ruling to a later date after its questions had been answered. Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[8] The Panel advised the parties it would address the outstanding questions on remedies in three steps.

> First, the Panel will address requests for immediate reforms to the FNCFS Program, the 1965 Agreement and Jordan's Principle. Other mid to long-term reforms to the FNCFS Program and the 1965 Agreement, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Panel will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*. (see 2016 CHRT 10 at, paras.1-5).

[9] The Panel reiterated its desire to move on to the issue of compensation in a 2018 ruling and wrote as follows:

> The Panel reminds Canada that it can end the process at any time with a settlement on compensation, immediate relief and long-term relief that will address the discrimination identified and explained at length in the Decision. Otherwise, the Panel considers this ruling to close the immediate relief phase unless its orders are not implemented. The Panel can now move on to the issue of compensation and long-term relief. (see 2018 CHRT 4 at, para 385). Parties will be able to make submissions on the process, clarification of the relief sought, duration in time, etc. (see 2018 CHRT 4 at, para. 386).
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> Moreover, the Panel added that it took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now. (see 2018 CHRT 4 at, para. 387).

[10] The Panel also said:

> Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here. (see 2018 CHRT 4 at, para. 388).

[11] In terms of the impacts of this case on First Nations children and their families the Panel added:

> In any event, any potential procedural unfairness to Canada is outweighed by the prejudice borne by the First Nations' children and their families who suffered and, continue to suffer, unfairness and discrimination. (see 2018 CHRT 4 at, para. 389).

[12] After having addressed other pressing matters in this case, the Panel provided clarification questions to the parties on the issue of compensation. The Panel allowed the parties to answer those questions, to file additional submissions and to make oral

arguments on this issue. The purpose of this ruling is to make a determination on the issue of compensation to victims/survivors of Canada's discriminatory practices.

III. The Panel's summary reasons and views on the issue of compensation

[13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being $40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which will be discussed further below and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its *Decision* that the Federal First Nations child welfare program is negatively impacting First Nations children and families it undertook to serve and protect. The gaps and adverse effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real

needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws.

[14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.

[15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada. The Panel has made numerous findings since the hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling. It is impossible for the Panel to discuss the entirety of the evidence before the Tribunal in a decision. However, compelling evidence exists in the record to permit findings of pain and suffering experienced by a specific vulnerable group namely, First Nations children and their families. While the Panel encourages everyone to read the 10 rulings again to better understand the reasons and context for the present orders, some ruling extracts are selected and reproduced in the pain and suffering, Jordan's Principle and Special compensation sections below for ease of reference in elaborating this Panel's reasons. The Panel finds the AGC's position on compensation unreasonable in light of the evidence, findings and applicable law in this case. The Panel's reasons will be further elaborated below.

IV. Parties' positions

[16] The Panel carefully considered all submissions from all the parties and interested parties and in the interest of brevity and conciseness, the parties' submissions will not be reproduced in their entirety.

[17] The Caring Society states that the evidence in this case is overwhelming: Canada knew about, disregarded, ignored or diminished clear, cogent and well researched evidence that demonstrated the FNCFS Program's discriminatory impact on First Nations

children and families. Canada also ignored evidence-informed solutions that could have redressed the discrimination well before the complaint was filed, and certainly in advance of the hearings. Indeed, the Tribunal's findings are clear that Canada was reckless and was often more concerned with its own interests than the best interests of First Nations children and their families.

[18] The Caring Society submits that this case embodies the "worst case" scenario that subsection 53(3) was designed for, and is meant to deter. Multiple experts and sources, including departmental officials, alerted Canada to the severe and adverse effects of its FNCFS Program. Over many years, Canada knowingly failed to redress its discriminatory conduct and thus directly and consciously contributed to the suffering of First Nations children and their families. The egregious conduct is more disturbing given Canada's access to evidence-based solutions that it ignored or implemented in a piece-meal and inadequate fashion.

[19] The Caring Society further argues that the evidence is clear that the maximum amount of $20,000 in special compensation is warranted for every First Nations child affected by Canada's FNCFS Program and taken into out-of-home care since 2006. The Government of Canada willfully and recklessly discriminated against First Nations children under the FNCFS Program and it was not until the Tribunal's decision and subsequent compliance orders (2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14 (as amended by 2017 CHRT 35), 2018 CHRT 4 and 2019 CHRT 7) that Canada has slowly started to remedy the discrimination.

[20] As such, the Caring Society submits that Canada ought to pay $20,000 for every First Nation child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 through to the point in time when the Panel determines that Canada is in full compliance with the January 26, 2016 *Decision*.

[21] Also, the Caring Society adds that every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care between 2006 and the point when the FNCFS Program is free from perpetuating adverse impacts is entitled to $20,000 in special compensation under subsection 53(3) of the *CHRA*. Canada is keenly aware

that many of the discriminatory aspects of the FNCFS Program remain unchanged and until long-term reform is complete, First Nations children will continue to experience discrimination. Those children deserve to be recognized and acknowledged, and Canada's continuation of this conduct in this program should be denounced, to (in the words of Mandamin J.) "provide a deterrent and discourage those who deliberately discriminate" in order to prevent continuation and recurrence of such discriminatory conduct in future, including generally in other programs.

[22] The Caring Society contends that from the moment that the House of Commons unanimously passed Motion 296, Canada knew that failing to implement Jordan's Principle would cause harm and adverse impacts for First Nations children. Nonetheless, Canada did not take meaningful steps to implement Jordan's Principle for nearly another decade, after this Tribunal's numerous decisions and non-compliance orders requiring it to do so. By failing to implement it and making the informed choice to deny the true meaning of Jordan's Principle, Canada knowingly and recklessly discriminated against First Nations children. The Caring Society submits that the evidence in this case supports an award for special compensation pursuant to subsection 53(3) of the *CHRA* for the victims of Canada's willfully reckless discriminatory conduct in relation to Jordan's Principle from December 2007 to November 2017.

[23] The Caring Society is of the view that the special compensation ordered for (i) each First Nations individual affected by Canada's FNCFS Program who, as a child, was been taken into out-of-home care, since 2006; and (ii) for every for every First Nations individual who, as a child, did not receive an eligible service or product pursuant to Canada's willful and/or reckless discriminatory approach to Jordan's Principle from December 2007 to November 2017, should be paid into a trust for the benefit of those children.

[24] The Caring Society is requesting an order similar to that granted by this Tribunal in 2018 CHRT 4: an order under section 53(2)(a) of the *CHRA* for the Caring Society, the AFN, the Commission, Chiefs of Ontario, Nishnawbe Aski Nation and Canada to consult on the appointment of seven Trustees. If the parties cannot agree on who the trustees should be, the seven trustees of the Trust would be appointed by order of the Tribunal. The mandate of the Trustees will be to develop a trust agreement in accordance with the

Panel's reasons, outlining among other things: (i) the purpose of the Trust; (ii) who the beneficiaries are; (iii) how a beneficiary qualifies for a distribution; (iv) programs that will be eligible and in keeping with the objective of the Trust; (v) how decisions of the Board of Trustees shall be made; and (vi) how the Trust will be administered.

[25] The Caring Society further requests an order that the parties report back within three months of the Panel's decision, with respect to the progress of the appointment of the Trustees. The Caring Society believes that an in-trust remedy will provide a meaningful remedy for First Nations children and families impacted by the willfully reckless discriminatory impact of the FNCFS Program and Jordan's Principle. It enables persons who were victims of Canada's discriminatory conduct to access services to remediate, in part, the impacts of discrimination.

[26] The Caring Society supports AFN's request for compensation in relation to both pain and suffering (section 53(2)(e)) and willful and reckless discrimination (section 53(3)) of the *CHRA*. Certainly, the victims in this case have experienced pain and suffering, with some First Nations children losing their families forever and some First Nations children losing their lives. In addition, on a principled basis, the Caring Society agrees with the AFN's request for individual compensation. We also recognize that an individual compensation process will require special and particular sensitivities regarding the significant issues of consent, eligibility and privacy. Many of the victims of Canada's discriminatory conduct are children and young adults who are more likely to experience historical disadvantage and trauma.

[27] According to the Caring Society, any process that is put in place will need to adopt a culturally informed child-focused approach that attends to these realities. Such persons may also have their own claims against Canada, whether individually or as part of a representative or class proceeding, and it is not possible for the parties to ascertain the views of all such potential claimants on individual compensation through the Tribunal's process. The Caring Society is also aware of the significant and complex assessment processes required to administer and deliver individual compensation. Best estimates suggest that an order for individual compensation for those taken into out-of-home care could affect 44,000 to 54,000 people. In terms of Jordan's Principle, after the Tribunal

issued its May 26, 2017 Order, the number of approvals significantly increased (indeed, over 84,000 products/services were approved in fiscal year 2018-2019), and Canada's witness regarding Jordan's Principle has acknowledged that these requests reflected unmet needs.

[28] Regarding the Panel's question of "who should decide for the victims", the Caring Society respectfully advances that the Tribunal, assisted by all of the parties, is in the best position to decide the financial remedy at this stage of the proceeding. The Tribunal has experience in awarding financial compensation to victims of discrimination and has a sense, through a common-sense approach, of what is and what is not reasonable. Indeed, this Panel is expertly immersed in this case. It understands the FNCFS Program and Jordan's Principle, the impacts experienced by First Nations children and the importance of ensuring long-term reform. It has also demonstrated that the centrality of children's best interests in decision-making which is essential to justly determining how the victims of discrimination in this case ought to be compensated.

[29] The victims' rights belong to the victims. While the Caring Society supports the request made by the AFN, the Caring Society's request for an in-trust remedy does not detract or infringe on victims' rights to directly seek compensation or redress in another forum. It is for this reason that the Caring Society respectfully seeks an order under subsection 53(3) that Canada pay an amount of $20,000 as compensation, plus interest pursuant to s. 53(4) of the *CHRA* and Rule 19(2) of the Canadian Human Rights Tribunal Rules of Procedure, for every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 until long-term reform is in place and for every for every First Nations child who did not receive an eligible service or product pursuant to Canada's discriminatory approach to Jordan's Principle since December 12, 2007 to November 2017.

[30] The Assembly of First Nations (AFN) is requesting an order for compensation to address the discrimination experienced by vulnerable First Nations children and families in need of child and family support services on reserve.

[31] The AFN submits that the Panel stated in the main decision: “Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Residential Schools system is one of the darkest aspects of Canadian history….the effects of Residential Schools continue to impact First Nations children, families and communities to this day”(see 2016 CHRT 2 at, para 412).

[32] The AFN submits the pain and suffering of the victimized children and families is significant according to the Affidavit of Dr. Mary Ellen Turpel-Lafond affirmed April 3, 2019, and it is also directly linked to the Respondent’s discriminatory practice. Based on the circumstances in this case, the AFN seeks on behalf of individual First Nations children and families the maximum compensation available under s. 53(2)(e) and 53(3) of the *CHRA*, on a per individual basis for any pain and suffering. Given the voluminous evidentiary record before the Tribunal in this matter, and the particular experience to date this Panel has had presiding over this matter, as well as the Panel’s expertise under the *CHRA*, the AFN believes the Tribunal is the appropriate forum to address individual compensation given the unique circumstances of this case and based on an expert panel advisory.

[33] Individuals subjected to the Respondent’s discriminatory practice experienced a great deal of pain and suffering and should receive compensation, in particular those who were apprehended as a result of neglect. The AFN notes that some individuals were apprehended as a result of abuse and access to prevention programs may have prevented such abuse. Thus, in these circumstances a need for a case-by-case approach becomes apparent thereby lending credibility to the AFN’s suggested approach to establishing an expert panel to address individual compensation. With respect to the evidence, the Tribunal is empowered to accept evidence of various forms, including hearsay. Direct evidence from each individual impacted by the Respondent’s discriminatory practice is not necessarily required to issue an award for pain and suffering. Therefore, the Tribunal could find that evidence from some individuals could be used to determine pain and suffering of a group.

[34] The AFN has been mandated by resolution following a vote by Chiefs in Assembly to pursue compensation for First Nations children and youth in care, or other victims of

discrimination, and to request the maximum compensation allowable under the Act based on the fact that the discrimination was wilful and reckless, causing ongoing trauma and harm to children and youth, resulting in a humanitarian crisis (see Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6, 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System).

[35] The AFN submits that compensation be awarded to each sibling, parent or grandparent of a child or youth brought into care as a result of neglect or medical placements resulting from the Respondent's discriminatory practice, and that such compensation be the maximum allowable under the *Act*.

[36] The AFN submits no further evidence is required from the AFN or other parties to support and award the maximum compensation to the victims of discrimination as requested, but that the Tribunal can rely on its findings to date.

[37] Both the Caring Society and the AFN submit it would be a cruel process to require children to testify about their pain and suffering. Moreover, requiring each First Nation child to testify before the Tribunal is inefficient and burdensome.

[38] The AFN further submits that the effects of the Respondent's discriminatory practices are real and they are significant. As the Panel found, the needs of First Nations children and families were unmet in the Respondent's provision of child and family services which the AFN submits has caused pain and suffering for which compensation ought to be awarded. The discrimination as found by the Panel was occurring across Canada.

[39] The AFN recognizes that the payment of compensation to the victims of discrimination may be a significant endeavor, considering the large number of individuals and time period. An independent body, such as the Commission, could facilitate the compensation scheme and payments. Whichever body is tasked with issuing the compensation, such body will require timely, accurate and all relevant records from the Respondent. Provisions will need to be adopted to protect the victims from unscrupulous

money lenders and predatory businesses. Finally, a notice plan may facilitate connecting individuals who are entitled to compensation payments.

[40] The AFN's remedial request suggests that an expert panel be established and mandated to address individual compensation to the victims of the Respondent's discriminatory practice as an option. This function can be carried out by the Canadian Human Rights Commission should they elect to take on this task. If so, the Respondent should be ordered to fund their activities.

[41] Additionally, the AFN states that the request for compensation to be paid directly to the victim of the Respondent's discrimination is not unprecedented, and in fact many parallels can be drawn from the Indian Residential School Settlement Agreement (IRSSA). Parallels such as the Common Experience Payment (CEP) and its surrounding processes, as well as the Independent Assessment Process (IAP), provide guidance in how a body issuing payments could be established to address individual compensation with respect to First Nations children and families discriminated against and victimized in this case.

[42] The AFN also submits that its National Chief and Executive Committee work in collaboration with the Caring Society to ensure the administration and disbursement of any payments to victims of discrimination come from funds other than the awards to the victims, so that no portion of the quantum awarded be rolled back or claimed by lawyers or legal representatives for assisting the victims.

[43] Overall, the AFN is interested in establishing a remedial process that may include both monetary and non-monetary remedies under a process overseen by an independent body. Given the potential for conflicts of interest in such a process, there would be a need to ensure matters dealt with in the remedial process are free from the influence of the parties, in particular Canada. In the IRSSA, the IAP process was isolated from the outside litigation amongst the parties for this reason.

[44] The proposed remedial process to be overseen by the requested independent body would be non-adversarial in nature, which is another hallmark from the IRSSA that the AFN submits could be carried over in this case. Also, it could be based on an application process that is designed to be streamlined and efficient.

[45] The AFN advances that it is aware of the proposed class proceeding filed in Federal Court last month. Currently, the class action is in the beginning stages and is uncertified, and the nature of the action is very similar to the case at hand. The AFN questions the accuracy of paragraph 11 of the statement of claim which reads mid-paragraph: “No individual compensation for the victims of these discriminatory practices has resulted or will result from the Tribunal decision”. It would appear the claimant is anticipating that no individual compensation will result in this case before the Tribunal. In response, the AFN and the other parties have planned all along that compensation was a long-term remedy that should be addressed after the interim and mid-term relief was addressed. The parties are currently carrying out that plan. The AFN submits the Panel ignore that particular submission.

[46] The Chiefs of Ontario (COO) did not make written submissions on the issue of compensation. In their oral submissions, the COO advised it is content with the other parties’ requests for compensation.

[47] The Nishnawbe Aski Nation’s (NAN) goal is to ensure First Nations children receive compensation for the discrimination found by this Tribunal. The NAN is in support of the remedies sought by the Caring Society.

[48] The AGC relying on a number of cases makes several arguments that will not be reproduced in their entirety rather given that the Panel considered all of them it is appropriate to summarize them here and for the same above-mentioned reasons.

[49] The Attorney General of Canada (AGC) submits that remedies must be responsive to the nature of the complaint made, and the discrimination found: that means addressing the systemic problems identified, and not awarding monetary as compensation to individuals. Awarding compensation to individuals in this claim would be inconsistent with the nature of the complaint, the evidence, and this Tribunal’s past orders. In a complaint of this nature, responsive remedies are those that order the cessation of discriminatory practices, redress those practices, and prevent their repetition.

[50] Moreover, the AGC states that the C*HRA* does not permit the Tribunal to award compensation to the complainant organizations in their own capacities or in trust for

victims. The complainants are public interest organizations and not victims of the discrimination; they do not satisfy the statutory requirements for compensation under the Act. A class action claim seeking damages for the same matters raised in this complaint, on behalf of a broader class of complainants and covering a broader period of time, has already been filed in Federal Court (see T-402-19).

[51] The AGC submits this is a Complaint of Systemic Discrimination. In its 2014 written submissions, the Caring Society acknowledged that this is a claim of systemic discrimination, with no individual victims as complainants and little evidence about the nature and extent of injuries suffered by individual complainants. The Caring Society stated that it would be an “impossible task” to obtain such evidence. The absence of complainant victims and the assertion that it would be "impossible” to obtain victims' evidence strongly indicate that this is not an appropriate claim in which to award compensation to individuals. The AFN appears to also acknowledge that this is a claim of systemic discrimination: it alleges that the discriminatory practice is a perpetuation of systemic discrimination and historic disadvantage.

[52] Also, the AGC argues, that complaints of systemic discrimination are distinct from complaints alleging discrimination against an individual and they require different remedies. Complaints of systemic discrimination are not a form of class action permitting the aggregation of a large number of individual complaints. They are a distinct form of claim aimed at remedying structural social harms. This complaint is advanced by two organizations, the AFN and the Caring Society who sought systemic changes to remedy discriminatory practices. It is not a complaint by individuals seeking compensation for the harm they suffered as a result of a discriminatory practice. The complainant organizations were not victims of the discrimination and they do not legally represent the victims.

[53] Additionally, the AGC contends the Canadian Human Rights Commission considers this to be a complaint of systemic discrimination. Then Acting-Commissioner, David Langtry, referred to it as such in his December 11, 2014 appearance before the Senate Committee on Human Rights. In discussing how the Commission allocates its resources, he specifically named this complaint as an example of a complaint of systemic discrimination that merited significant involvement on the part of the Commission.

[54] Furthermore, the AGC submits the evidence of the systemic nature of the complaint is found in the identity of the complainants, the language of the complaint, the Statement of Particulars, and the nature of the evidence provided to the Tribunal. The Tribunal's previous orders in this matter, clearly indicate that the Tribunal also regards this claim as a complaint of systemic discrimination.

[55] Likewise, the AGC adds that in their initial complaint to the Canadian Human Rights Commission, the complainants allege systemic discrimination. The framing of the complaint is important. In the Moore case, the Supreme Court of Canada determined that remedies must flow from the claim as framed by the complainants. In the complainants' joint statement of particulars, they also indicated that this is a claim of systemic discrimination.

[56] Besides, the AGC argues that claims by individual victims provide details of the harms they suffered as a result of the discriminatory practice. If this were a claim alleging discrimination against an individual or individuals, there would be evidence of the harm they suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation. No such evidence exists in this case. With respect to child welfare practices, there is very little evidence in the record regarding the impact of the discriminatory funding practice on individuals, particularly regarding causation, that is, evidence of the link between the discriminatory practices and the harms suffered. The AFN acknowledges that awards for pain and suffering require an evidentiary basis outlining the effects of the discriminatory practice on the individual victims.

[57] According to the AGC, this Tribunal has only awarded compensation to individuals in claims of systemic discrimination where they were complainants and where there was evidence of the harm they had suffered. In this claim, the Tribunal lacks the strong evidentiary record required to justify awarding individual remedies. An adjudicator must be able to determine the extent and seriousness of the alleged harm in order to assess the appropriate compensation and the evidence required to do so has not been provided in this claim. The AGC submits further that no case law supports the argument that compensation to individuals can be payable in claims of systemic discrimination without at

least one representative individual complainant providing the evidence needed to properly assess their compensable damages.

[58] Moreover, the AGC advances that neither of the tools available to the Tribunal to address the deficiency in evidence are appropriate in the circumstances. The Tribunal is entitled to require better evidence from the parties, and to extrapolate from the evidence of a group of representative complainants. However, there are no representative individual plaintiffs in this complaint and no evidence regarding their experiences from which to extrapolate on a principled and defensible basis. The Tribunal's ability to compel further evidence is also not helpful as the Caring Society has stated that it would be an impossible task to obtain such evidence, and would be inconsistent with the fundamental nature of the complaint. Compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court in Canada (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62).

[59] The AGC adds that the Commission's submissions on compensation indicate that this Tribunal declined to award compensation in claims where it would have been impractical to have thousands of victims testify, acknowledging that it could not award compensation ''en masse''. (*Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para. 991 (although other aspects of this decision were judicially reviewed, the Tribunal's refusals to award compensation for pain and suffering, or special compensation for wilful and reckless discrimination, were not).

[60] In making its findings, the Tribunal reproduced passages from another pay equity case that had reached similar conclusions: *Public Service Alliance of Canada v. Canada (Treasury Board),* 1998 CanLII 3995 (C.H.R.T.) at paras. 496-498. The *Canada Post* case involved roughly 2,800 victims. The Treasury Board case involved roughly 50,000 victims).

[61] The AGC further contends that the Complaint is not a Class Action and the remedies claimed by the parties resemble the sort of remedies that may be awarded by a superior court of general jurisdiction rather than a Tribunal with a specific and limited

statutory mandate. A class action claim addressing the subject matter of this complaint has been filed in the Federal Court.

[62] Also, the AGC submits that in *Moore v. British Columbia (Education),* 2012 SCC 61, [Moore]), the B.C. Human Rights Tribunal permitted the complainant to lead evidence regarding systemic issues in a complaint of discrimination against an individual, in that case an individual with dyslexia who claimed discrimination on the basis he was denied access to education. The B.C. Tribunal relied on that evidence to award systemic remedies. However, the Supreme Court of Canada concluded that the systemic remedies are too far removed from the "complaint as framed by the Complainant' [emphasis in original]. The Supreme Court upheld the individual remedies but set aside all of the systemic orders because the remedy must flow from the claim. According to the AGC, while the situation is reversed in this case, the same principle applies. The complainants framed this complaint as one of systemic discrimination and are now bound by that choice. Remedies in this case must be systemic, particularly because there is insufficient evidence to determine appropriate compensation, if any, for individuals. The AGC adds that the lack of evidence of harm suffered by individuals, and the apparent impossibility of obtaining it, clearly indicates that this is not an appropriate claim in which to award individual compensation.

[63] The AGC adds that the *Act* does not permit complaints on behalf of classes of complainants, nor does it permit remedies to be awarded to those same classes. Section 40(1) of the *Act* permits individuals or groups of individuals to file a complaint with the Commission while s.40(2) of the *Act* specifically empowers the Commission to decline to consider complaints, such as this, that are filed without the consent of the actual victims. The lack of an equivalent provision in the *Act* indicates that Parliament chose not to permit class action-style complaints, and it certainly did not grant the Tribunal jurisdiction or provide the tools needed to deal with class complaints.

[64] Furthermore, the AGC adds that given its lack of jurisdiction, the Tribunal should not rely on principles from class action jurisprudence. Québec’s Tribunal des droits de la personne, whose statute is similar to the *Act*, addressed the relationship between class actions and human rights in the civil law context) in *Commission des droits de la personne*

et des droits de la jeunesse c. Québec (Procureur général, 2007 QCTDP 26 (CanLII). The case concerned a settlement agreement reached by Quebec, the Quebec Commission, and the teachers' union. The parties encouraged the Tribunal to rely on class actions principles and to approve the agreement despite opposition from a group of young teachers who felt the deal was disadvantageous to them. The Tribunal declined to do so, noting that a "class action is an extraordinary procedural vehicle that breaks with the principle that no one can argue on behalf of another. That recourse can be exercised only with the prior authorization of the court." The Tribunal rejected the suggestion that class actions principles could apply in the human rights context, noting that in class actions the judge serves an important role in protecting "absent members". Without these procedural protections, the tribunal process should not be used to dispossess victims of their rights in the dispute. The Tribunal also concluded that the procedural mechanism of class actions is legislative, and can only be exercised where statutory conditions are met and therefore cannot, be transplanted into Tribunal proceedings without legislative authority.

[65] The AGC also argues that while not binding on this Tribunal, the Quebec Tribunal's reasoning is compelling. Class action principles do not apply to human rights complaints and should not be injected into them without legislative authority. Where courts are empowered to consider class proceedings, they are equipped with the tools necessary to do so. For example, Rule 334 of the Federal Court Rules, which governs class proceedings in the Federal Court, empowers judges to review and certify class proceedings, dictates the form for a certification order, provides a process for opting out of the class and modifies other processes under the Rules to accommodate class proceedings. The Rule notably requires a class representative, a person who is qualified to act as plaintiff or applicant under the rules. In the absence of such a provision, the Canadian Human Rights Tribunal is not empowered to address class complaints or to treat complaints that purport to be on behalf of unidentified individual complainants like a class claim.

[66] Furthermore, according to the AGC, The Tribunal does not have jurisdiction to award individual compensation in complaints of systemic discrimination, particularly where, as here, there are no individual complainants. The terms of the *Act* and the jurisprudence

of both this Tribunal and the Federal Courts clearly indicate that paying compensation to the complainant organizations or to non-complainant victims would exceed the Tribunal's jurisdiction. Compensation can only be paid where there is evidence of harm suffered by complainant individuals and should only be paid where it advances the goal of ending discriminatory practices and eliminating discrimination.

[67] The AGC contends there is no legal basis for compensating the Complainants. The Tribunal was created by the *Act* and its significant powers to compensate victims of discrimination can only be exercised in accordance with the *Act*. The Tribunal's task is to adjudicate the claim before it. Its inquiry must focus on the complaint and any remedies ordered must flow from the complaint. The requirements of s. 53(2)(e) or 53(3) must be satisfied for the Tribunal to award compensation under the *Act*.

[68] In regards to pain and suffering, the AGC adds that Section 53(2)(e) of the *Act* grants the Tribunal jurisdiction to award up to $20,000 to "the victim" of discrimination for any pain and suffering they experienced as a result of the discriminatory practice. However, the complainant organizations are not victims of the discrimination and did not experience pain and suffering as a result of it. The evidence presented to the Tribunal by the complainants did not speak to "either physical or mental manifestations of stress caused by the hurt feelings or loss of respect as a result of the alleged discriminatory practice." Organizations cannot experience pain and suffering and there is, therefore, no need to "redress the effects of the discriminatory practices'' with regards to the complainants. Redressing the discrimination found was necessary in this case, but the Tribunal's previous orders accomplished this goal.

[69] In regards to pain and suffering, the AGC adds that for discrimination to be found to be willful and reckless, and therefore compensable under s. 53(3) of the *Act,* evidence is required of a measure of intent or of behavior that is devoid of caution or without regard to the consequences of that behavior. Compensation for willful and reckless discrimination is justified where the Tribunal finds that a party has failed to comply with Tribunal orders in previous matters intended to prevent a repetition of similar events from recurring. As with compensation for pain and suffering, compensation for willful and reckless discrimination can only be paid to "victims" of discrimination." The complainant organizations were not

victims of willful and reckless discrimination. Furthermore, there is no evidence of a consistent failure to comply with orders.

[70] The AGC submits this claim raises novel issues. There were no orders requiring the Government to address these issues before the Tribunal's first decision in this matter. The Tribunal's decisions in this matter since 2017 are based on the findings and reasoning of the initial decision and are intended to: "provide additional guidance to the parties". They do not demonstrate that Canada has acted without caution or regard to the consequences of its behavior. Concerns about the adequacy of the Government's response to studies and reports in the past do not provide a basis for awarding compensation under s. 53(3). Canada's funding for child welfare services has consistently changed to address shifts in social work practice and the increasing cost of providing family services. Examples of these changes include the redesign of the funding formula to add an additional funding stream for prevention services and Bill C-92 currently before the House of Commons. Since the AGC's submissions, Bill C-92 received Royal assent.

[71] The AGC argues this Tribunal understands the limitations of its remedial jurisdiction. In its decisions in this matter, the Tribunal has shown a nuanced understanding of both its powers and of the limitations of its remedial jurisdiction. The Tribunal should follow its own guidance in deciding the issue of compensation in this case. In 2016 CHRT 2, the Tribunal concluded that its remedial discretion must be exercised reasonably and on a principled basis considering the link between the discriminatory practice and the loss claimed, the particular circumstances of the case and the evidence presented. In reaching its conclusion, it stated that the goal of issuing an order is to eliminate discrimination and not to punish the government.

[72] Moreover, in 2016 CHRT 16, in declining to order the Government to pay to transfer recordings of the Tribunal hearings into a publicly accessible format at the request of the Aboriginal Persons Television Network (the "APTN"), the Tribunal acknowledged the importance of the link between the discriminatory practice and the loss claimed. The AGC submits that while the Tribunal was respectful of the APTN's mission and recognized the public interest in the recordings, the fact that APTN was neither a party nor a victim meant that the remedial request was not linked to the discrimination and was, therefore, denied.

[73] Also, according to the AGC, the Federal Court of Appeal has recognized that structural and systemic remedies are required in complaints of systemic discrimination. In Re: *C.N.R. and Canadian Human Rights Commission,* 1985 CanLII 3179 (FCA) (*C.N.R*.), the Court found that compensation is limited to victims which made it “impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination” where, as here “by the nature of things individual victims are not always readily identifiable”.

[74] The AGC further submits that remedies in claims of systemic discrimination should seek to prevent the same or similar discriminatory practices from occurring in the future in contrast with remedies for individual victims of discrimination which seek to return the victim to the position they would have been in without the discrimination. As human rights lawyers Brodsky, Day and Kelly state in their article written in support of this complaint: where the breach of a human rights obligation raises structural or systemic issues --- such as longstanding policy practices that discriminate against indigenous women - the underlying violations must be addressed at the structural or systemic level."

[75] The AGC also argues that any compensation must be paid directly to victims of the discrimination. There is no legal basis for the Caring Society's requests that compensation for willful and reckless discrimination be paid into a trust fund that will be used to access services including: language and cultural programs, family reunification programs, counselling, health and wellness programs, and education programs. Compensation is only payable to victims under the term of the Act and paying compensation to an organization on behalf of individual victims could bar that individual from vindicating their own rights before the Tribunal and obtaining compensation. It may also prejudice their recovery in a class action claim as any damages awarded to the victims would be offset against the compensation already awarded to the organization by the Tribunal.

[76] Furthermore, the AGC contends that compensation is inappropriate in claims alleging breaches of Jordan’s Principle in light of the fact there is no basis to award compensation under the *Act* to either the complainant organizations or non-complainant individuals for alleged breaches of Jordan’s Principle. As the Commission notes in its submissions, where Canada has implemented policies that satisfactorily address the discrimination, no further orders are required.

[77] The AGC submits there is no basis to find that the government discriminated willfully or recklessly in this claim. The Tribunal in the Johnstone decision, relied on by the Caring Society, justified its award of compensation under s. 53(3) of the *Act* by pointing to disregard for a prior Tribunal decision that addressed the same points and the government's reliance arbitrary and unwritten policies, among other things, neither of which are the case here.

[78] According to the AGC, the Tribunal has asked whether the expert panel proposed by the AFN is feasible and legal or whether it would be more appropriate for the parties to form a committee (potentially including COO and NAN) to refer individual victims to the Tribunal for compensation. The AGC submits neither of these proposals is feasible or legal. The Tribunal cannot delegate its authority to order remedies to an expert panel and it would not be appropriate to ignore the nature of the complaint by awarding compensation to victims who are not complainants in a claim of systemic discrimination. There are no individual complainants in this claim and little evidence of the harm suffered by victims from which the Tribunal can extrapolate. It would also offend the general objection against awarding compensation to non-complainants in human rights matters.

[79] The Caring Society requests that compensation be paid in to an independent trust similar to the ones established under the IRSSA and the AFN is requesting payment of compensation directly to victims and their families. The AGC says the Tribunal should not, and is not permitted in law, to take either of the approaches proposed by the complainants. As the Tribunal question notes, the Indian Residential Schools settlement is the result of agreement between the parties in settling a class action and the independent trust was not imposed by a Court or tribunal.

[80] Finally, according to the AGC, compensation cannot be paid to victims or their families through this process because there are no victims or family-member complainants in this claim.

[81] The Commission while not making submissions on the remedies sought made helpful legal arguments on the issue of compensation and in response to the AGC’s legal position on this issue which will be summarized here. The Commission agrees that any

award of financial compensation to victims must be supported by evidence. However, it is important to remember that s. 50(3)(c) of the *CHRA* expressly allows the Tribunal to "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be available in a court of law." As a result, in making decisions under the *CHRA*, it is open to the Tribunal to rely on hearsay or other information, alongside any direct testimony from the parties, victims or other witnesses (emphasis ours).

[82] The Commission further submits that awards for pain and suffering under the *CHRA* are compensation for the loss of one's right to be free from discrimination, and for the experience of victimization. The award rightly includes compensation for harm to a victim's dignity interests. The specific amounts to be ordered turn in large part on the seriousness of the psychological impacts that the discriminatory practices have had upon the victim. Medical evidence is not needed in order to claim compensation for pain and suffering, although such evidence may be helpful in determining the amount, where it exists.

[83] Furthermore, the Commission submits the Tribunal has held that a complainant's young age and vulnerability are relevant considerations when deciding the quantum of an award for pain and suffering, at least in the context of sexual harassment. The Commission agrees, and submits that vulnerability of the victim should be a relevant consideration in any context, especially where children are involved. Such a finding would be consistent with (i) approaches taken by human rights decision-makers interpreting analogous remedial provisions in other jurisdictions, and (ii) Supreme Court of Canada case law recognizing that children are a highly vulnerable group.

[84] According to the Commission, the Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA*.

[85] Like all remedies under the *CHRA*, awards for pain and suffering must be tied to the evidence, be proportionate to the nature of the infringement, and respect the wording of the statute. Among other things, this requires that awards for pain and suffering fit

within the $20,000 cap set out in s. 53(2)(e) of the *CHRA*. At the same time, as the Ontario Court of Appeal has cautioned in the context of equivalent head of compensation under the Ontario Human Rights Code, "… Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the [Code] by effectively setting a 'licence fee' to discriminate''.

[86] The Commission adds that the Court of Appeal noted in *Lemire v. Canadian Human Rights Commission,* 2014 FCA 18, (*Lemire*), the wording of s. 53(3) of the *CHRA* does not require proof of loss by a victim. In the context of the former hate speech prohibition under the *CHRA*, awards of special compensation for wilful or reckless conduct were said to compensate individuals identified in the hate speech for the damage "presumptively caused" to their sense of human dignity and belonging to the community at large.

[87] Additionally, the Commission argues that Sections 53(2)(e) and 53(3) of the *CHRA* each allow the Tribunal to order that a respondent pay financial compensation to the "victim of the discriminatory practice."

[88] Also, the Commission advances the argument that in most human rights proceedings, there is one complainant who is also the alleged victim of the discriminatory practice. However, this is not always the case. The *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[89] In light of this potential under the *CHRA*, the Commission submits that it is within the discretion of the Tribunal to award financial remedies to victims of discriminatory practices, and to determine who those victims are – always having regard to the evidence before it. For example, if the specific identities of victims are known to the Tribunal, it might order payments directly to those victims. If the Tribunal does not have evidence of the specific identities of the victims, but has enough evidence to believe that the parties

would be capable of identifying them, it might make orders that (i) describe the class of victims, (ii) give the parties time to collaborate to identify the victims, and (iii) retain the Tribunal's jurisdiction to oversee the process.

[90] The Commission further submits that in *Walden et al. v. Attorney General of Canada* (2010), the Federal Court (i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[91] The Commission notes that in questions posed to the parties regarding compensation, the Panel Chair appears to have raised concerns about having the Tribunal order the creation of a panel that would effectively be making decisions about appropriate remedies under the *CHRA*. With the greatest of respect to the AFN, the Commission shares those concerns. Parliament has assigned the responsibility of deciding compensation to the specialized Tribunal, created under the *CHRA*. Nothing in the statute authorizes the Tribunal to sub-delegate that responsibility to another body. Without statutory authority, any sub-delegation of this kind would likely be contrary to principles of administrative law.

[92] The Commission further notes that in her questions, the Panel Chair asked if it might instead be preferable to have an expert panel do the preliminary work of identifying victims, and present their circumstances to the Tribunal for determination. If the Tribunal is inclined to go in this direction, the Commission simply observes that the Tribunal's remedial powers only allow it to make orders against the person who infringed the *CHRA* here, Canada. As a result, any order regarding an expert panel should not purport to bind the Commission or any other non-respondent to participate on an expert panel.

[93] Speaking only for itself, the Commission has concerns that it would not have sufficient resources to allow for timely and effective participation in an expert panel procedure of the kind under discussion. An order that allows for the Commission's

participation, but does not require it, would allow the Commission to consider the resource implications of any process that may be put in place, and advise at that time of its ability to participate.

V. The Tribunal's authority under the Act and the nature of the claim

[94] The Tribunal's authority to award remedies such as compensation for pain and suffering and special damages for wilful and reckless conduct is found in the *CHRA* characterized by the Supreme Court of Canada on numerous occasions, to be quasi-constitutional legislation (see for *example Robichaud v. Canada (Treasury Board),* 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at pp. 89-90 [*Robichaud];* Canada (House of Commons) v. Vaid, 2005 SCC 30 (CanLII) at para. 81; and Canada (*Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53 (CanLII) at para. 62 [Mowat]).

[95] The principle that the *CHRA* is paramount was first enunciated in the *Insurance Corporation of British Columbia v. Heerspink* 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, 158, and further articulated by the *Supreme Court of Canada in Winnipeg School Division No. 1 v. Craton* 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156 where the court stated:

[96] Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended or appealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. (at p. 577) (see also 2018 CHRT 4 at, para. 29).

> It is through the lens of the *CHRA* and Parliament's intent that remedies must be considered (…) (see 2018 CHRT 4 at, para. 30).

[97] It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the *Act*. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the *Act* are obtained. Applying a

purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134; and, in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 at, paras. 25 and 55), (see also 2016 CHRT 2 at, para.469).

[98] Moreover, the Tribunal's broad remedial discretion is to be exercised on a principled and reasonable basis, taking into account the circumstances of the case, the link between the discriminatory practices and the losses claimed, and the evidence presented. (see *Tanner v. Gambler First Nation,* 2015 CHRT 19 at para. 161 (citing *Chopra v. Canada (Attorney General),* 2007 FCA 268 (CanLII), at para. 37; and *Hughes v. Elections Canada,* 2010 CHRT 4 at para. 50).

[99] When the Tribunal analyzes the claim, it reviews the complaint and also the elements contained in the Statement of Particulars in accordance with rule 6(1)d) of the Tribunal's rules of procedure (see *Lindor c. Travaux publics et Services gouvernementaux Canada*, 2012 TCDP 14 at para.4, Translation).

[100] In fact, when the Tribunal examines the complaint, it does so in light of the principles above mentioned and in a flexible and non-formalistic manner:

> ''Complaint forms are not to be perused in the same manner as criminal indictments''. (*Translation, see Canada (Procureur général) c. Robinson,* [1994] 3 CF 228 (CA) cited in *Lindor* 2012 TCDP 14 at para.22).
>
> « Les formules de plainte ne doivent pas être scrutées de la même façon qu'un acte d'accusation en matière criminelle. »

[101] Furthermore, this Tribunal has determined that the complaint is but one element of the claim, a first step therefore, the Tribunal must look beyond the complaint form to determine the nature of the claim:

> Pursuant to Rule 6(1) of the Tribunal's Rules of Procedure (03-05-04) (the "Rules"), each party is to serve and file a Statement of Particulars ("SOP") setting out, among other things,

> (a) the material facts that the party seeks to prove in support of its case; (b) its position on the legal issues raised by the case (...) (see *Kanagasabapathy v. Air Canada* 2013 CHRT 7, at para.3).

[102] It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway, 2017 CHRT 6 at para. 9 [Casler]; see also Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:

> . . [I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the *Act*. As the Tribunal stated in *Gaucher*, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement". As explained in *Gaucher* and *Casler*, cited above, the complaint filed with the Commission only provides a synopsis; it will essentially become clearer during the course of the process. The conditions for the hearing are defined in the Statement of Particulars. (see also *Polhill v. Keeseekoowenin,* see also, *First Nation* 2017 CHRT 34 at, paras. 34 and 36).

[103] It is useful to look at the claim in this case which in this case includes the complaint, the Statement of Particulars and the specific facts of the case to respond to the AGC's argument that this is a systemic claim and not suited for awards of individual remedies.

[104] The complaint form in this case alleges that: ''the formula drastically underfunds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures''. These services are vital to ensuring the First Nations children have the same chance to stay safely at home with support services as other children in Canada (see Complaint form at, pages 2-3).

[105] The Panel already found in past rulings that it is the First Nations children who suffer and are adversely impacted by the underfunding of prevention services within the federal funding formula. The Panel considered the claim including the complaint, Statement of Particulars as well as the entire evidentiary record, arguments, etc. to arrive at its findings. As exemplified by the wording above, the complaint specifically identifies First Nations children and the AFN and the Caring Society advanced the complaint on their behalf.

[106] Furthermore, the Statement of Particulars of the Caring Society and the AFN of January 29, 2013: “request pain and suffering and special compensation remedies under section 53(2) (e) of the *CHRA* and f…’’ (see page 7 at para.21 reproduced below):

Relief requested:

> Pursuant to sections 53(2)(d), (e) and (f), requiring compensation and special compensation in the form of payment of one hundred and twelve million dollars into a trust fund to be administered by FNCFCS and to be used to: (a) As compensation, subject to the limits provided in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989 and thereby experienced pain and suffering;

[107] In this case, the fact that there is no section 53 (2) (f) in the *CHRA* but rather a paragraph 3 is a small error that does not change the nature of the requested remedies. Moreover, this error was later corrected in the Caring Society’s final submissions.

[108] It is clear from reviewing the Complainants’ Statement of Particulars that they were seeking compensation from the beginning and also before the start of the hearing on the merits. The Tribunal requests parties to prepare statements of particulars in order to detail the claim given that the complaint form is short and cannot possibly contain all the elements of the claim. It also is a fairness and natural justice instrument permitting parties to know their opponents’ theory of the cause in advance in order to prepare their case. Sometimes, parties also present motions seeking to have allegations contained in the Statement of Particulars quashed in order to prevent the other party from presenting evidence on the issue.

[109] The AGC responded to these compensation allegations and requests both in its updated Statement of Particulars of February 15, 2013 demonstrating it was well aware that the complainants the Caring Society and the AFN were seeking remedies for pain and suffering and for special compensation for individual children as part of their claim.

[110] As shown by the AGC’s position on the relief requested by the Complainants:

> With respect to the relief sought in paragraphs 21(2), 21(3) (insofar as the relief requested in 21(3) seeks the establishment of a trust fund to provide compensation to certain unnamed First Nations persons for pain and suffering and for certain services and 21(5) of the Complainants Statement

> of particulars, the requested relief is beyond the jurisdiction of the Tribunal (...) No compensation should be awarded under section 53(2)(e) of *Canadian Human Rights Act* as neither Complainant meet the definition of victim within the section. In the alternative, any compensation awarded under s.53(2)(e) should be limited to a maximum of $40,000 (calculated as follows: the maximum available, $20,000, multiplied by the number of Complainants, two, equals $40,000). (See AGC particulars at page 15, para. 64 and 66).

[111] The Panel finds this demonstrates that the AGC was fully aware that compensation remedy for victims/survivors who were not the Complainants was part of the Complainants' claim before the Tribunal. Moreover, it admitted that compensation was an issue to be determined by the Tribunal in a Consultation Protocol signed in these proceedings by all parties and by Minister Jane Philpott, as she then was, on behalf of Canada:

> WHEREAS, the Tribunal retained jurisdiction to ensure the implementation of its Decision, and subsequently directed that implementation be done in three steps, namely: (1) immediate relief; (2) mid to long term relief; and (3) compensation, and has reserved its ruling regarding the Complainants' motion for an award against Canada in relation to the costs of its obstruction of the Tribunal's process in relation to document disclosure and production (see Consultation Protocol, signed March 2, 2018 at page. 2)
>
> The Tribunal has directed that the implementation of its *Decision* be done in three steps, namely: (1) immediate relief, (2) mid to long term relief and (3) compensation. Canada commits to consult in good faith with the Complainants, the Commission and Interested Parties on all the three steps, to the extent of their respective interests and mandates. (see Consultation Protocol, signed March 2, 2018 at, para.4, page. 7)

VI. Victims under the CHRA

[112] Nothing in the *Act* suggests that the Tribunal lacks jurisdiction and cannot order remedies benefitting victims who are not Complainants. The Panel disagrees with the AGC's argument and interpretation including of section 40 paras. (1) and (2) summarized above. Section 40 (1) and (2) is reproduced here:

> 40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is

> engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.
>
> Consent of victim
>
> (2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

[113] This wording suggests that complaints on behalf of victims made by representatives can occur and the Commission has the discretion to refuse to deal with the complaint if the victim does not consent.

[114] In this case, the Commission referred the complaint to the Tribunal and does not oppose the remedy sought on behalf of victims.

[115] Consequently, the Panel agrees with the Commission that the *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[116] Additionally, the Federal Court of Appeal's decision in *Singh (Re),* [1989] 1 F.C. 430 at 442, discussed the meaning of the term victim where the Court stated:

> The question as to who is the "victim" of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect. That effect is by no means limited to the alleged "target" of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences that are sufficiently direct and immediate to justify qualifying as a "victim" thereof persons who were never within the contemplation or intent of its author.

[117] The Tribunal has already distinguished complainants from victims who are not complainants within the *CHRA* framework:

> On the third ground, I am satisfied that the proceeding will have an impact on the interests of PIPSC's members. PIPSC is the bargaining agent for the Complainants and non-complainant Medical Adjudicators who may be

> deemed as "victims" under the *CHRA* and entitled to compensation. On this basis alone, I find that PIPSC has an interest in this phase of the proceeding. (see *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada),* 2011 CHRT 19 at, para.25).

[118] This speaks against the AGC's argument that the Tribunal cannot make awards to individuals that are not complainants and to the other AGC's argument that the Tribunal has no jurisdiction to award remedies for a "group" of victims represented by an organization.

[119] In *Walden,* both the Tribunal's liability and remedy decisions were judicially reviewed, unsuccessfully in the case of the former and successfully in the latter. The remedy matter was referred back on two issues to be resolved: one involving compensation for pain and suffering; and the other, involving compensation for wage loss including benefit. The parties have negotiated a settlement on the pain and suffering component and have asked the Tribunal for a Consent Order disposing of this issue (see [*Walden v. Canada (Social Development),* 2007 CHRT 56 (CanLII), at para.3).

[120] While the end result in that case was a consent order on pain and suffering remedies, the Tribunal could not make orders that would fall outside its jurisdiction under the *Act*.

[121] The AGC relies also on a Federal Court case to support its position that compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court in Canada (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62.

[122] The Panel disagrees with the AGC's interpretation and application of the Federal Court decision to our case. The analysis, the factual matrix and the findings from the Federal Court are different from the case at hand. The Panel finds it does not support the AGC's position to bar the Tribunal from awarding compensation to non-complainant victims in this case.

[123] This case was always about children as exemplified by the claim written in the complaint and in the Statement of Particulars and the Tribunal's decisions. Moreover, the AGC is aware that the Tribunal views this case is about children. What is more, the Panel agrees that AFN and the Caring Society filed the complaint on behalf of a representative group who are identifiable by specific characteristics if not by name. Furthermore, the Panel believes it is important to consider the nature of this case where the victims/survivors are part of a group composed of vulnerable First Nations children.

[124] While there are other forums available for filing representative actions, the AFN stated that Tribunal was carefully chosen in this case due to the nature of the claim, but, also due to the means of redress available under the *CHRA* for members of a vulnerable group on whose behalf the AFN has advanced a case of discrimination contrary to the *Act*.

VII. Pain and suffering analysis

[125] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *CHRA*. In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General),* 2010 FC 1135 (CanLII) at paras. 61 and 67, aff'd 2011 FCA 202 (CanLII) [*"Walden"]).* In determining the present motions, this is the situation in which the Panel finds itself. (see 2017 CHRT 14 (CanLII) at para. 27), (see 2019 CHRT 7 at, para.47). Therefore, in the presence of sufficient evidence and a remedy that flows from the claim, the Tribunal may make the orders it finds appropriate.

[126] In a recent Tribunal decision, *Lafrenière v. Via Rail Canada Inc.,* 2019 CHRT 16, at para.193 Member Perreault wrote about the pain and suffering award under section. 53(2) (e) of the *CHRA*:

> However, $20,000 is the maximum that may be awarded under the legislation and it is usually awarded by the Tribunal in more serious cases, i.e. when the scope and duration of the Complainant's suffering from the discriminatory practice justify the full amount.

[127] The Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA (see Jane Doe v. Canada (Attorney General),* 2018 FCA 183 (*Jane Doe*), at para. 29, citing (among others): *Grant v. Manitoba Telecom Services Inc., 2012 CHRT 10 at para. 115); and Alizadeh-Ebadi v. Manitoba Telecom Services Inc*., 2017 CHRT 36 at para. 213).

[128] Furthermore, when someone endures pain and suffering, there is no amount of money that can remove that pain and suffering from the Complainant. Moral pain related to discrimination (…) varies from one individual to another. Psychological scars often take a long time to heal and can affect a person's self-worth. From the point of view of the person that suffered discrimination, large amounts of money should be granted to reflect what they lived through and to provide justice. This being said, when evidence establishes pain and suffering an attempt to compensate for it must be made. However, $20,000 is the maximum amount that the Tribunal can award under section 53(2)(e) and the Tribunal only awards the maximum amount in the most egregious of circumstances (see *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 10 at, para.115 recently cited in *Jane Doe,* at, para.29).

[129] The pain and suffering remedy sought as part of this ruling is found at para. 53 (2) (e) of the *CHRA*. Section 53 (2) reads as follows:

> Complaint substantiated
>
> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

> (ii) making an application for approval and implementing a plan under section 17;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

[130] Section 53 imposes a logical requirement for any award of remedies that is, the remedy should flow from a finding that the complaint is substantiated. If this is the case, an array of remedies is available to the victim of the discriminatory practice. The wording of section 53(2) is unambiguous and allows the victim of the discriminatory practice to obtain any remedies listed in section 53 as the member or panel finds appropriate: ‘’(..) and include in the order any of the following terms that the member or panel considers appropriate’’. It is clear that the language of the *CHRA* does not prevent awards of multiple remedies even if systemic remedies have been ordered.

[131] The AGC’s argument that systemic discrimination requires systemic remedies is correct. However, the AGC’s argument that it precludes other awards of remedies as the Panel deems appropriate in light of the facts and the evidence before the Tribunal is incorrect.

[132] The way to determine the issue is to look at the Statute first:

> The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; see also *Rizzo & Rizzo Shoes Ltd*.

> (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para. 21, see also *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 at, para.12).

[133] The special nature of human rights legislation is also taken into account in its interpretation:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the *Act* must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (see *CN v. Canada (Canadian Human Rights Commission), 1987 CanLII 109 (SCC),* [1987] 1 SCR 1114, at, p. 1134) cited in 2015 CHRT 14 at, para.13).

[134] Consequently, analyzing the specific facts of the case and weighing the accepted evidence in the Tribunal record is of paramount importance.

> Indeed, the Federal Court of Appeal recently described the exercise of statutory interpretation:
>
> To discern the meaning of “compensate”, the Board is therefore required to conduct an exercise in statutory interpretation. For the interpretation to be reasonable, the Board is obliged to ascertain the intent of Parliament by reading paragraph 53(2)(e) in its entire context, according to the grammatical and ordinary meaning of its text, understood harmoniously with the object and scheme of the *Act*. The Board must also be mindful that human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect. (see *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 at, paras.23).

[135] The proper legal analysis is fair, large and liberal and must advance the *Act*'s objective and account for the need to uphold the human rights it seeks to protect. As mentioned above, one should not search for ways and means to minimize those rights and to enfeeble their proper impact.

[136] The AGC relies on the *Moore* case to support its assertion that individual remedies cannot be awarded in a systemic case. However, the Panel disagrees with the AGC's interpretation of this case.

[137] The Supreme Court decision in *Moore* did not say that both systemic and individual remedies cannot be awarded to victims of discriminatory practices rather it emphasizes the need for the remedy to be connected to the claim and the need for an evidentiary basis to make orders. The case of Jeffery Moore was a complaint of individual discrimination where the Tribunal went beyond the claim and made findings of systemic discrimination. This is the issue discussed by the Supreme Court which described the case as follows:

> This case is about the education of Jeffrey Moore, a child with a severe learning disability who claims that he was discriminated against because the intense remedial instruction he needed in his early school years for his dyslexia was not available in the public-school system. Based on the recommendation of a school psychologist, Jeffrey's parents enrolled him in specialized private schools in Grade 4 and paid the necessary tuition. The remedial instruction he received was successful and his reading ability improved significantly.

[138] Jeffrey's father, Frederick Moore, filed a human rights complaint against the School District and the British Columbia Ministry of Education alleging that Jeffrey had been discriminated against because of his disability and had been denied a "service (…) customarily available to the public", contrary to s. 8 of the Human Rights Code, R.S.B.C. 1996, c. 210 ("Code"). (see *Moore* at paras. 1-2).

[139] Additionally, the Supreme Court discussed the remedy as follows: ''But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centered on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether Jeffrey was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission''. (see *Moore* at paras.64).

[140] The case at hand on the contrary, is one of systemic racial discrimination as admitted by Canada in its oral and written submissions on compensation and, also a case where the Tribunal found that the system caused adverse impacts on First Nations children and their families.

[141] It is worth mentioning that the *Decision* on the merits begins with this important finding: **This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.** (see 2016 CHRT 2, at para.1).

[142] In claiming there is no evidence in the record to support compensation to individual victims who are not complainant in this case, the Panel finds that the AGC does not consider section 50 (3)c of the *CHRA*: ‘’(c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law’’. The only limitation in relation to evidence is found at section 50 (4) of the *CHRA*, the member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

[143] The word “may” suggests that this limitation is imposed or not at the discretion of the Member or Panel.

[144] The Panel finds it is unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it. The AGC in making its submissions does not consider the Tribunal’s findings in 2016 accepting numerous findings in reliable reports as its own. The AGC omits to consider the Tribunal’s findings of the children's suffering in past and unchallenged decisions in this case.

[145] In *Canada (Social Development) v. Canada (Human Rights Commission*), 2011 FCA 202 at para.73 (“*Walden* FCA’’), as mentioned by the Commission, the Federal Court

(i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[146] The Panel does not accept that a systemic case can only prompt systemic remedies. As mentioned above, nothing in the *CHRA* prohibits the Tribunal's discretion to order systemic remedies along with individual remedies if the complaint is substantiated and the evidence supports it.

[147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case.

[148] As it will be discussed below, the evidence is sufficient to make a finding that each child who was unnecessarily removed from its home, family and community has suffered. Any child who was removed and later reunited with its family has suffered during the time of separation.

[149] The use of the ‘’words unnecessarily removed’’ account for a distinction between two categories of children those who did not need to be removed from the home and those who did. If the children are abused sexually, physically or psychologically those children have suffered at the hands of their parents/caregivers and needed to be removed from their homes. However, the children should have been placed in kinship care with a family member or within a trustworthy family within the community. Those First Nations children suffered egregious and compound harm as a result of the discrimination by being removed from their extended families and communities when they should have been comforted by safe persons that they knew. This is a good example of violation of substantive equality.

[150] The Panel believes that in those situations only the children should be compensated and not the abusers. The Panel understands that some of the abusers have themselves been abused in residential or boarding schools or otherwise and that these unacceptable crimes of abuse are condemnable. The suffering of First Nations Peoples was recognized by the Panel in the *Decision*. However, not all abused children became abusers even without the benefit of therapy or other services. The Panel believes it is important for the children victims/survivors of abuse to feel vindicated and not witness financial compensation paid to their abusers regardless of the abusers' intent and history.

[151] Additionally, the Panel also recognizes that the suffering can continue for life for First Nations children and their families even when families are reunited given the gravity of the adverse impacts of breaking families and communities.

[152] Besides, there is sufficient evidence before the Tribunal to make findings of pain and suffering experienced by victims/survivors who are the First Nations children and their families.

[153] Throughout all the *Decision* and rulings, references were made to First Nations children and their families. The Panel did not focus on the complainants when analyzing the adverse impacts. The Panel analyzed the effects/impacts of the discriminatory practices on First Nations children and clearly expressed this. The findings focused on the agencies' abilities to deliver services and most importantly, the First Nations children, their families and their communities who are the victims/survivors of the discriminatory practices. First Nations children and families are referenced continuously throughout the *Decision*. The *Decision* starts with: ''**This decision concerns children.** More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities''.

[154] Furthermore, an analysis of the Tribunal's findings makes it clear that the Tribunal's orders are aimed at improving the lives of First Nations children and that the First Nations children and Families are the ones who suffer from the discrimination. The Tribunal made findings of systemic racial discrimination and agrees this case is a case of systemic racial

discrimination. The Panel also made numerous findings of adverse impacts toward First Nation children and families, adverse impacts that cause serious harm and suffering to children the two are interconnected. While a finding of discrimination and of adverse impacts may not always lead to findings of pain and suffering, in these proceedings it clearly is the case. A review of the 2016 CHRT 2 and subsequent rulings demonstrates this. There is no reason not to accept that both coexist in this case. The individual rights that were infringed upon by systemic racial discrimination warrant remedies alongside systemic reform already ordered by the Tribunal (see 2016 CHRT 2, 10, 16 and 2017 CHRT 7, 14, 35 and 2018 CHRT 4).

[155] Also, the Tribunal has already made numerous findings relating to First Nations children and their families' adverse impacts and suffering in past rulings. Some of these findings can be found in the compilation of citations below:

> The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts **perpetuate the historical disadvantage and <u>trauma suffered</u> by Aboriginal people,** in particular as a result of the Residential Schools system (see 2016 CHRT 2 at, para.459). (…)
>
> **The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves** (see 2016 CHRT 2 at, para.467).
>
> Overall, AANDC's method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective**. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon**, including a denial of adequate child and family services, by the application of AANDC's FNCFS

Program, funding formulas and other related provincial/territorial agreements (see 2016 CHRT 2 at, para. 393).

As will be seen in the next section, **the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.** (see 2016 CHRT 2 at, para.394).

The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC's FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that **these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.**

The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today. (see 2016 CHRT 2 at, para. 404).

[…] To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this (...) (see 2016 CHRT 2 at, para.411).

In the spirit of reconciliation, the Panel also acknowledges the suffering caused by Residential Schools. Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Resident Schools system is one of the darkest aspects of Canadian history. As will be explained in the following section, the effects of Residential Schools continue to impact First Nations children, families and communities to this day (see 2016 CHRT 2 at, para.412).

Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless (…) With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity (see 2016 CHRT 2 at, para. 425).

Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma. (see 2016 CHRT 2 at, para. 426).

(…) On that point, the Panel would like **to stress how important it is to address the issue of mass removal of children today.** While Indigenous communities may have different views on child welfare, there is no evidence that they oppose actions to stop removing the children from their Nations. Indeed, it would be somewhat surprising if they did as it would amount to a colonial mindset. In any event, assertions from Canada on this point do not constitute evidence and do not assist us in our findings. Moreover, Indigenous communities have obligations to their children such as keeping them safe in their homes whenever possible. While there may be different views from one Nation to another, surely the need to keep the children in their communities as much as possible is the same (see 2018 CHRT 4 at, para.62).

This being said, the Panel fully supports Parliament's intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament's goal (see *Daniels v. Canada (Indian Affairs and Northern Development*, [2016] 1 SCR 99), and commends it for adopting this approach. The Panel ordered that the specific needs of communities be addressed and this involves consulting the communities. However, the Panel did not intend this order to delay addressing urgent needs. It foresaw that while agencies would have more resources to stop the mass removal of children, best practices and needs would be identified to improve the services while the program is reformed, and ultimately child welfare would reflect what communities need and want, and the best interest of children principle would be upheld. It is not one or the other; it is one plus the other. (see 2018 CHRT 4 at, para.66).

This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under policy. While the necessity to account for public funds is certainly legitimate it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it.

There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some

> of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings (see 2018 CHRT 4 at, para. 121).
>
> Ms. Lang's evidence, over a year after the *Decision*, establishes the fact that aside from discussions, no data or short-term plan was presented to address this matter. **The focus is on financial considerations and not the best interests of children nor addressing liability and preventing mass removals of children** (see 2018 CHRT 2 at, para.132).
>
> The Panel finds (…) There is a real need to make further orders on this crucial issue to **stop the mass removal of Indigenous children, and to assist Nations to keep their children safe within their own communities** (…) (see 2018 CHRT 4 at, para. 133).
>
> It is important to remind ourselves that this is about children experiencing **significant negative impacts on their lives**. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the *Decision* at paras.341-347), (see also 2018 CHRT 4 at, para.166).
>
> Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the Decision and rulings. **It incentivizes the removal of children** rather than assisting communities to stay together. (see 2018 CHRT 4 at, para. 230).
>
> It is important to look at this case in terms of bringing Justice and not simply the Law, especially with reconciliation as a goal. **This country needs healing and reconciliation and the starting point is the children and respecting their rights.** If this is not understood in a meaningful way, in the sense that it leads to real and measurable change, then, the TRC and this Panel's work is trivialized and unfortunately t**he suffering is born by vulnerable children** (see 2018 CHRT 4 at, para. 451).

VIII. The Evidence in the Tribunal record

[156] In order to respond to the AGC's argument that there is a lack of evidence in the record to support a pain and suffering remedy, a review of some relevant elements of the evidence before this Tribunal follows:

> Mr. Dufresne: Why did you file the complaint?
>
> DR. BLACKSTOCK: I filed the complaint as a last resort. I -- I'm one of those people that believes that you have to try and work towards solutions first. And we did that not only once but we did that twice over a period of many years. We got to the place of documenting the inequality. In my view there was consensus that that inequality existed. We talked about and I believe with the respondent agreed with the harms to children that were a result of not taking action, that being there growing numbers of children in care and hardships for families, and the unequal access of services or the denial of services to children.
>
> We developed solutions to that, first in the National Policy Review and secondly in the Wen:de reports. We even in the Wen:de reports took the time to present those results to central authorities in October of 2005, and nothing had changed remarkably at the level of the child. We felt that there was no other alternative than to bring a human rights complaint. And even as we brought it, I was very hopeful that that would be incentive enough for the respondent to take the action needed on behalf of the children, but we find ourselves here today. (See Testimony of Dr. Cindy Blackstock, StenoTran transcripts February 28, 2013, page 3, lines 17-25 and page 4, lines 1-19 vol 4) (emphasis added).

[157] Dr. Blackstock testified before the Tribunal and the Panel finds her testimony to be reliable and to speak to the issue of harm suffered by First Nations children as a result of the discrimination.

[158] Mr. Dubois is the Executive Director Touchwood agency and has a Bachelor of Social Work degree from the University of Calgary and also testified before the Tribunal:

> (…) MR. DUBOIS: I raised the issue with Indian Affairs.
>
> MR. POULIN: Why?
>
> MR. DUBOIS: Because I wanted to get away from just being limited to having to -- it was a situation where you kind of -- **you had to break up a family under Directive 20-1 before you could provide the services. It's only when you took a child into care that you could start to rebuild the family.** I wanted to be proactive. And this goes back to our history as a First Nations people, including my history where, you know, having to endure boarding school, like my dad, my late father was in boarding school, and the damage it did to us or the interference that back then that the church had on our family systems, so I wanted to **get away from that. Like having lived that experience, we don't need more interference. We don't need more -- for lack of a better word, wreaking havoc on our families. I come with**

> **the frame of mind that our families need healing and I, as a trained professional, and others out there in Saskatchewan and the other agencies, you know, like there has to be a different way to do child welfare other than breaking families up. We want to heal. We need to heal.** We have to do things differently, which is why when I referenced the SDM it was really appealing to me because it focuses on our strengths, you know, it builds on what we are and what we have. (see Testimony of Derald Richard Dubois, April, 8, 2013, StenoTran transcript a, pp. 60-61 lines 7-24; 1-11, vol 9). See also testimony of Mr. Derald Richard Dubois, StenoTran transcripts April 8, 2013, page lines and page 4 lines vol 9).

[159] Mr. Dubois who is a child welfare professional refers to the Federal funding formula Directive 20-1 that was found discriminatory by this Panel causing significant adverse impacts to First Nations children and their families. What is more, he testifies of one of the worst of those adverse impacts being the unnecessary removal of children from their homes, families and communities.

[160] This is a reliable and powerful testimony that exemplifies the pain and suffering and harm done to First Nations children, families and communities as a result of the racial and systemic discrimination that is perpetuating historical wrongs.

[161] The Panel finds that unnecessarily removing a child from its family and community is a serious harm causing great suffering to that child, the family and the community.

[162] There is also evidence of harm/suffering to First Nations children and families in several reports forming part of the evidentiary record already considered and relied upon by the Panel in arriving to its findings of adverse impacts in the 2016 *Decision*. The Wen:de we are coming to the light of day, 2005 report (WEN DE) was filed into evidence before the Tribunal. The AGC had the opportunity to make submissions on this report and the Panel made findings on the reliability of this report. Moreover, the Tribunal accepted the findings in WEN DE as its own findings (See *Decision* 2016 CHRT 2 at, para.257): ''The Panel finds the NPR and WEN DE reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN''. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this

Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program in a piece meal fashion.

[163] Additionally, Canada was part of this study and fully aware of its findings and impact of its practices on First Nations children which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in the 2005 year of the report which will also be revisited in the wilful and reckless section below. The Panel had reviewed all the WEN DE reports before accepting it as its own and included some references of those findings in the *Decision*. The following additional findings support the issue of compensation for pain and suffering of children and their families and inform the Panel in drafting its orders:

> Secondary analysis of the Aboriginal data in CIS-98 revealed that although Aboriginal children were less likely to be reported to child welfare authorities for physical or sexual violence they were twice as likely to experience neglect (Blackstock, Trocme & Bennett, 2004). When researchers unpacked neglect by controlling for various care giver functioning and socio-demographic factors – they determined that the **key drivers of neglect for First Nations children were poverty, poor housing, and substance misuse** (Trocme, Knoke & Blackstock, 2004). It is important to note that two of these three factors are arguably outside of the domain of parental influence – poverty and poor housing. As they are outside of the locus of control of parents is unlikely that parents will be able to redress these risks in the absence of social investments targeted to poverty reduction and housing improvement. **The limited ability for parents to influence the risk factors can mean that their children are more likely to stay in care for prolonged periods of time. This is particularly a concern in regions where statutory limits on the length of time a child is being put in care are being introduced. If parents alone cannot influence the risk and there are inadequate social investments to reduce the risk – children can be removed permanently.** The **third factor, substance misuse, is within the personal domain for change but requires access to services.** Overall, CIS- 98 results suggest **that targeted and sustained investments in neglect focused services that specifically consider substance misuse, poverty and poor housing would likely have a positive impact on the safety and well-being of these children.** (emphasis ours).

[164] The Panel finds that First Nations children and families are harmed and penalized for being poor and for lacking housing. Those are circumstances that are most of the time beyond the parents' control.

[165] The WEN De report goes on to say that:

> (...) providing an adequate range of neglect focused services is likely more complicated on reserve than off reserve due to existing service deficits within the government and voluntary sector. A study conducted by the First Nations Child and Family Caring Society in 2003 found that First Nations children and families receive very limited benefit from the over 90 billion dollars in voluntary sector services provided to other Canadians annually. Moreover, there are far fewer provincial or municipal government services than off reserve. This means that First Nations families are less able to access child and family support services including addictions services than their non-Aboriginal counterparts (Nadjiwan & Blackstock, 2003). Deficits in support services funding were also found in the federal government allotment for First Nations child and family services (MacDonald & Ladd, 2000.) **This report found that the federal government funding for least disruptive measures (a range of services intended to safely keep First Nations children who are experiencing or at risk of experiencing child maltreatment safely at home) is inadequately funded. When one considers the key drivers resulting in First Nations children entering care (substance misuse, poverty and poor housing) and couples that with the dearth in support services, unfavorable conditions to support First Nations families to care for their children emerges** (see WEN DE at, pp.13-14) (emphasis ours).
>
> Although there has been no longitudinal studies exploring the experiences of Aboriginal children in care throughout the care continuum (from report to continuing custody), data suggests that Aboriginal children are much more likely to be admitted into care, stay in care and become continuing custody wards. It is possible that the over representation of Aboriginal children in child welfare care is a result of the structural risk factors (poverty, poor housing and substance misuse) not being adequately addressed through the provision of targeted least disruptive measures at both the level of the family and community. The lack of service provision may result in minimal changes to home conditions over the period of time the child remains in care and thus it is more likely the child will not return home (see WEN DE pp.13-14).
>
> **The lack of services, opportunities and deplorable living conditions characterizing many of Canada's reserves has led to mass urbanization of Aboriginal peoples** (…)
>
> Funding First Nations have made a direct connection between the state of children's health and the colonization and attempted assimilation of Aboriginal peoples: The legacy of dependency, cultural and language impotence, dispossession and helplessness created by residential schools and **poorly thought out federal policies continue to have a lasting**

> **effect.** - **Substandard infrastructure and services have been made worse by federal-provincial disagreements over responsibility.**
>
> The most profound impact of the lack of clarity relating to jurisdiction results in what **many commentators have suggested are gaps in services and funding –resulting in the suffering of First Nations children.** As articulated by McDonald and Ladd in their comprehensive Joint Policy Review (prepared for the Assembly of First Nations and DIAND): First Nations agencies are expected through their delegation of authority from the provinces, the expectation of their communities, and by DIAND, to provide a comparable range of services on reserve with the funding they receive through Directive 20.1. The formula, however, provides the same level of funding to agencies regardless of how broad, intense or costly, the range of services is (see WEN DE at, pp.90-91).
>
> The issues raised by FNCFS providers demonstrate the tangible effects of funding limitations on the ability of agencies to address the needs of children. **Without funding for provision of preventative services many children are not given the service they require or are unnecessarily removed from their homes and families.** In some provinces the option of removal is even more drastic as children are not funded if placed in the care of family members. The limitations placed on agencies quite clearly jeopardize the well-being of their clients, Aboriginal children and families. As a society we have become increasingly aware of the social devastation of First Nations communities and have discussed at length the importance of healing and cultural revitalization. **Despite this knowledge, however, we maintain policies which perpetuate the suffering of First Nations communities and greatly disadvantage the ability of the next generation to effect the necessary change.** (see WEN DE at, p.93).

[166] The Supreme Court of Canada found that the removal of a child from a parent's custody affects the individual dignity of that parent:

> In *Godbout v. Longueuil,* La Forest J. held that: …the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to **enjoy individual dignity and independence**… choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.
> Although the liberty to choose where one resides is clearly not an inalienable right, it may be considered **a strong argument that children should only be forced to leave their family homes in the most extreme circumstances. This is not the case here as Aboriginal children are removed from their homes in far greater numbers than non-Aboriginal children for the purposes of receiving services.**

> **Alternatively, it may be argued that placement of children in care, due to lack of services, amounts to an infringement of the parent's right to security of the person, under s.7.** (see WEN DE at, pp.96-97) (emphasis ours).

[167] According to the Supreme Court of Canada, the removal of a child from a parent's custody adversely impacts the psychological integrity of that parent causing distress, in *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46.

> The Supreme Court of Canada found the right to security of the person encompasses psychological integrity and may be infringed by state action which causes significant emotional distress:
> Moreover, it was held that the **loss of a child constitutes the kind of psychological harm** which may found a claim for breach of s.7. Lamer J., for the majority, held: **I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent**…As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.
>
> The Court went on to state that there are circumstances where loss of a child will not found a prima facie breach of s.7, including when a child is sent to prison or conscripted into the army. Clearly, these circumstances can be distinguished from the removal of a child from his/her home due to the government's failure to provide adequate funding and services (see WEN DE at, pp.96-97) (emphasis ours).
>
> **The federal funding formula, directive 20-1, impacts a very vulnerable segment of our society, Aboriginal children.** The protection of these children from state action, infringing on their most fundamental rights and freedoms, is clearly in line with the spirit of ss.7 and 15 of the Charter. Research conducted on the issue of child welfare plainly shows differentiation in the quality of services provided on and off reserve and to aboriginal and non-aboriginal children. This type of differentiation is unacceptable in a society that prides itself on protection of the vulnerable. (WEN DE at, pp.96-97) (emphasis ours).

[168] Furthermore, compelling evidence in other reports filed in evidence also discuss the psychological damage, pain and suffering endured by First Nations children and their families:

> WE BEGIN OUR DISCUSSION of social policy with a focus on the family because it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centres around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life. (see RCAP, vol. 3, at, p. 8).
>
> **Many experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging, in and of itself…. The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart.** Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The Native child is placed in a position of triple jeopardy (see RCAP, Gathering strength, vol. 3, at, pp. 23-24).

[169] The Panel finds there is absolutely no doubt that the removal of children from their families and communities is traumatic and causes great pain and suffering to them:

> At our hearings in Kenora, Josephine Sandy, who chairs Ojibway Tribal Family Services, explained what moved her and others to mobilize for change:
>
> Over the years, I watched the pain and suffering that resulted as non-Indian law came to control more and more of our lives and our traditional lands. I have watched my people struggle to survive in the face of this foreign law.
>
> **Nowhere has this pain been more difficult to experience than in the area of family life**. I and all other Anishnabe people of my generation have seen the pain and humiliation created by non-Indian child welfare agencies in removing hundreds of children from our communities in the fifties, sixties and the seventies. My people were suffering immensely as we had our way of life in our lands suppressed by the white man's law.
>
> **This suffering was only made worse as we endured the heartbreak of having our families torn apart by non-Indian organizations created under this same white man's law.**
>
> **People like myself vowed that we would do something about this. We had to take control of healing the wounds inflicted on us in this tragedy.**

> Josephine Sandy Chair, Ojibway Tribal Family Services Kenora, Ontario, 28 October 1992,
>
> (see RCAP, Gathering strength, vol. 3, at, p. 25) (emphasis ours).

[170] Another report filed in evidence supports the existence of pain and suffering of First Nations children and their families. Several experiences of massive loss have disrupted First Nations families and have resulted in identity problems and difficulties in functioning. In 1996, more than 10% of Aboriginal children (age 0-14) were not living with their parents. see p. 7 Joint National policy review (NPR) exhibit filed into evidence. Akin to the WEN DE report, the Tribunal accepted the findings in the NPR as its own findings (See 2016 CHRT at, para.257) Additionally, Canada was part of this study and fully aware of its findings which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in 2000, year of the report. This will also be discussed later.

[171] More Recently, the Panel made findings that support the findings for pain and suffering of First Nations children and their families when the families are torn apart:

> Ms. Marie Wilson, one of the three Commissioners for the TRC mandated to facilitate truth-telling about the residential school experience and lead the country in a process of ongoing healing and reconciliation, swore an affidavit that was filed into evidence in the motions' proceedings. **She affirms that she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard.** (see 2018 CHRT 4 at, para.122).
>
> Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. **The day they remember most vividly was the day they were taken from their home**. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system. (see 2018 CHRT 4 at, para.123).

> Ms. Wilson affirms that they, (the TRC), intentionally centered their 5 first calls to Action specifically on child welfare. This was to shed a focused and prominent light on the fact that **the harms of residential schools happened to children, that the greatest perceived damage to them was their removal from their home and family; and that the legacy of residential schools is not only continuing but getting worse, with increasing numbers of child apprehensions through the child welfare system**. (see 2018 CHRT 4 at, para.124).
>
> In addition to the Legacy calls to action pertaining to child welfare, she explains that they also articulated child welfare goals in the subsequent Reconciliation section. Call to Action 55 underscores the importance of creating and tracking honest measurements of the numbers of Indigenous children still apprehended and why, and the support being provided for them, based on comparative spending in prevention and care. (see 2018 CHRT 4 at, para.125).
>
> According to Ms. Wilson, it is imperative that the child welfare system, which is driving Indigenous children into foster care at disproportionate rates, be immediately addressed. **She has learned firsthand that children who are severed from their families will forever carry with them a lasting and detrimental sense of loss, along with other negative issues that may change the course of their lives.** (see 2018 CHRT 4 at, para.126).
>
> The Panel has made findings on this issue in the *Decision* and we echo Ms. Wilson's call to action to immediately address the causes that drive Indigenous children into foster care. (see 2018 CHRT 4 at, para.127).

[172] The Panel received Ms. Wilson's evidence in 2017-2018 and has relied upon it in its ruling. The ruling was accepted by Canada in its submissions following receipt of an advanced confidential copy of the ruling and the Panel included Canada's submissions and the Panel's comments in the ruling:

> Finally, on the same day, the AGC (…) indicated that Canada is fully committed to implement all the orders in this ruling and understands that its funding approach needs to change, which includes providing agencies the funding they need to meet the best interests and needs of First Nations children and families.
>
> The Panel is delighted to read Canada's commitment and openness. This is very encouraging and fosters hope to a higher degree (see 2018 CHRT 4 at, paras.449-450).

[173] This was reiterated later on, as part of a consultation protocol with all parties in this case and signed by Minister Jane Philpott as she then was (see Consultation Protocol signed March 2, 2018).

[174] Moreover, Canada has accepted the TRC's report authored by the 3 Commissioners including Ms. Wilson, and undertook to implement all 94 calls to action (see 2018 CHRT 4 at, para.61). It is unlikely that Canada would accept the recommendations yet not the findings that led to those recommendations.

[175] What is more, the Panel believes that the highly credible TRC Commissioner like other adults referred to above speak on behalf of children and voice the harm and suffering endured by First Nation children who are vulnerable and need not to testify before this Tribunal for the Panel to make a determination of their suffering of being unnecessarily removed from their homes and the harms caused as a result of the systemic and racial discrimination.

[176] Furthermore, as mentioned above, the Tribunal has already recognized the need and importance for First Nations children, communities and Nations for urgent action to eliminate the removal of First Nations children from their families and communities as a result of the discrimination and Canada's part in remedying it in the March 2, 2018 Consultation protocol signed by Minister Philpott:

> To address what the Tribunal in paragraph 47 of the February 1st Ruling refers to as the "mass removal of children". As the Tribunal states: "There is urgency to act and prioritize the elimination of the removal of children from their families and communities". (Consultation protocol signed March 2, 2018 at, section d, page 5)
>
> To promote substantive equality for First Nations children, families and communities on reserves and in the Yukon in the delivery of child and family services, particularly in light of their higher level of needs because of historical disadvantages suffered by First Nations families, children and communities as a result of the legacy of colonialism and Indian Residential Schools. (Consultation protocol at, section g, page 5).

[177] Also, to the question what if the child was unnecessarily removed as a result of multiple factors and not solely because of Canada's actions? The Panel answers that while the Panel acknowledges that child welfare issues are multifaceted and may involve

the interplay of numerous underlying factors (see for example, 2016 CHRT 2 *Decision* at, para. 187) this does not alleviate Canada's responsibility in the suffering of First Nations children and their families who bore the adverse impacts of Canada's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program.

[178] Moreover, the Panel found that in this case we are in a unique constitutional context namely, Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act*, 1867. Furthermore, Canada, is in a fiduciary relationship with Aboriginal Peoples. What is more, Canada has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, the Panel found that more has to be done by Canada to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children (see 2016 CHRT 2 *Decision* at, para. 427).

[179] This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples. Also, the Panel found that Canada provides a service through the FNCFS Program and other related provincial/territorial agreements and method of funding the FNCFS Program and related provincial/territorial agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

[180] Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner (see 2016 CHRT 2 *Decision* at, paras. 111; 113; 349).

[181] The Panel already found the link between the removal of children and Canada's responsibility in numerous findings including the following: ''Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same,

preventative services aren't funded, and all these children are being put into care." (See 2016 CHRT 2 *Decision* at, para.197).

[182] The pain and suffering caused by the unnecessary removal of First Nations children and their families and Canada's role is at least reasonably quantifiable to $20,000. While it is the maximum compensation allowed under section 53 (2) (e) of the *CHRA,* it is not much in comparison to the egregious harm suffered by the First Nations children and their families as a result of the racial discrimination and adverse impacts found in this case. Other pain and suffering caused by other actors could potentially be sought in other forums. The Panel's role is to quantify as best as possible the appropriate remedy to compensate victims/survivors as part of these proceedings with the evidence available.

[183] Furthermore, the AGC relies also on the *Public Service Alliance of Canada v. Canada Post Corporation case* (see 2005 CHRT 39 at para. 991) to suggest that the Tribunal cannot award remedies for pain and suffering to the non-complainant victims "en masse". The *Canada Post* case made a finding that there was a lack of evidence before the Tribunal and that there was no systemic case. This is different from this case where there is sufficient evidence to support findings of systemic discrimination and findings of suffering borne by the victims/survivors in this case, the First Nations children and their families.

[184] The evidence is ample and sufficient to make a finding that each First Nation child who was unnecessarily removed from its home, family and community has suffered. Any child who was removed and later reunited with its family has suffered during the time of separation and from the lasting effects of trauma from the time of separation.

[185] The evidence is ample and sufficient to make a finding that each parent or grand-parent who had one or more child under her or his care who was unnecessarily removed from its home, family and community has suffered. Any parent or grand-parent if the parents were not caring for the child who had one or more child removed from them and later reunited with them has suffered during the time of separation. The Panel intends to compensate one or both parents who had their children removed from them and, if the parents were absent and the children were in the care of one or more grand-parents, the

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

[186] The Panel also recognizes that the suffering can continue even when families are reunited given the gravity of the adverse impacts of breaking apart families and communities.

[187] The Panel addressed the adverse impacts to children throughout the *Decision*. The Panel found a connection between the systemic racial discrimination and the adverse impacts and that those adverse impacts are harmful to First Nations children and their families. All are connected and supported by the evidence. The Panel acknowledged this suffering in its unchallenged *Decision*. It did not have individual children who testified to the adverse impacts that they have experienced nevertheless the Panel found that they did suffer those adverse impacts and found systemic racial discrimination based on sufficient evidence before it. The adverse impacts identified in the *Decision* and suffered by children and their families were found to be the result of the systemic racial discrimination in Canada's FNCFCS Program, funding formulas, authorities and practices.

[188] The Panel need not to hear from every First Nation child to assess that being forcibly removed from their homes, families and communities can cause great harm and pain. The expert evidence has already established that. The *CHRA* regime is different than that of a Court where a class action may be filed. The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not see section 50 (3) (c) of the *CHRA.* We are talking about the mass removal of children from their respective Nations. (see 2018 CHRT 4 at, paras. 47,62,66,121,133). The Tribunal's mandate is within a quasi-constitutional statute with a special legislative regime to remedy discrimination. This is the first process to employ when deciding issues before it. If the *CHRA* and the human rights case law are silent, it may be useful to look to other regimes when appropriate. In the present case, the *CHRA* and human rights case law voice a possible way forward. The

novelty and unchartered territory found in a case should not intimidate human rights decision-makers to pioneer a right and just path forward for victims/survivors if supported by the evidence and the Statute. As argued by the Commission, sufficiency of evidence is a material consideration.

[189] Furthermore, the impracticalities and the risk of revictimizing children outweigh the difficulty of establishing a process to compensate all the victims/survivors and the need for the evidence presented of having a child testify on how it felt to be separated from its family and community.

[190] The Panel rejects the AGC's argument that there is no evidence of harm the victims suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation.

[191] The evidence is sufficient to establish a connection between the systemic racial discrimination and the First Nations children who did not receive services or did receive services that were inadequate and harmful. This was all explained in the *Decision* and it is now too late to challenge those findings. The children should not be penalized because the Panel had outstanding questions concerning compensation which prompted further submissions from the parties.

[192] Finally, on this point, the Panel rejects the assertion made by the AGC that there is no evidence permitting the Panel to determine the extent and seriousness of the harm in order to assess the appropriate compensation for the individual victims. Furthermore, the AGC's argument that there is no evidence of pain and suffering from children and families as a result of the discrimination is simply not true. This is a similar assertion that Canada has made on the evidence to prove the complaint on its merits. In fact, such a conclusion by Canada is concerning to say the least. It also raises questions from this Panel. The harm done to First Nations children who are vulnerable and to families and communities is precisely why the Panel issued numerous rulings requesting immediate action. This Panel recognizes, as described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special

circumstances. This is also recognized by all levels of Courts in Canada and was discussed in this Panel's *Decision* on the merits 2016 CHRT at, para.346:

> A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 (CanLII) at para. 9; and, Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 75 [Baker]). As explained by Professor Nicholas Bala:
>
> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators (see 2016 CHRT 2 at, para.346).
>
> Child welfare services, or child and family services, are services designed to protect children and encourage family stability. Hence the best interest of the child is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children (2016 CHRT 2 at, para.3).

[193] This is where the urgency of remedying systemic racial discrimination comes from. It is clearly expressed in the Panel's rulings. Removing children from their homes, families, communities and Nations destroys the Nations' social fabric leading to immense consequences, it is the opposite of building Nations. That is trauma and harm to the highest degree causing pain and suffering.

[194] The Panel's urging Canada to act on a number of occasions was not expressed without a reason. It was for the reason that this case is about children and there is urgency to act and the Panel understood it.

[195] In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 239 [Baker] an appeal against deportation based on the position of Baker's Canadian born children, the Supreme Court held procedural fairness required the decision-maker to consider international law and conventions, including the United Nations' *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the UNCRC). The

Court held the Minister's decision should follow the values found in international human rights law.

[196] The AGC should not be allowed to avoid this principle in Canada, a country who professes to uphold the best interest of the child and who signed and ratified the *Convention on the Rights of the Child* (see 2016 CHRT 2 at, para.448). Also, the *CHRA* is a result of the implementation of international human rights principles in domestic law (see the Decision at paras 437-439).

[197] The Panel agrees that remedies **under section 53 (2) (e) of the *Act*** are not to punish the Respondent however, they serve the purpose to deter the authors of discriminatory practices to continue or to repeat the same patterns. They are also some form of vindication for the victims/survivors reminding society that there is also a price to fostering inequalities which is a strong component of justice leading to some measure of healing for victims/survivors.

IX. Organizations cannot receive compensation and do not represent victims' argument

[198] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have, are First Nations children (see 2017 CHRT 14 at, para.116).

[199] The Panel sees no merit in accepting the AGC's argument that if the Tribunal finds it has jurisdiction to award remedies under section 53 (2) (e) the AFN and the Caring Society should be awarded the remedies and not the First Nations children. This contradicts the AGC's own argument that acknowledges that the AFN and the Caring Society are organizations not victims (see para.110 above).

[200] In a previous ruling, the Panel discussed the AFN and the Caring Society's roles in representing First Nations children's rights:

> To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations

> representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials (see 2017 CHRT 14 at, para.118).

[201] However, it is true that the Complainants do not have a legal representation mandate given by each FN child and parent living on reserve to seek remedy on their behalf at the Tribunal. What they do have is a resolution from the Chiefs in Assembly of the AFN mandating the AFN to seek remedies for Members of First Nations who are represented by their elected First Nations Chiefs. Some First Nations Peoples may disagree to have the AFN or others to advocate on their behalf and request individual remedies in front of the Tribunal, this is their right and the Panel believes they should be able to opt-out. The opting-out possibility will form part of the compensation process discussed below.

[202] This being said, for those who would accept, the Panel finds that the AFN mandated by resolution by Chiefs of First Nations should be able to speak on behalf of their children and voice their needs and seek redress for compensation which should go directly to victims/survivors following a culturally safe and independent process, protecting sensitive information and privacy with the option to opt-out. The Panel believes also that the COO and the NAN should be able to speak on behalf of their children and voice their needs and seek redress for compensation. Also, the Caring Society directed by Dr. Cindy Blackstock has worked tirelessly for numerous years to represent the best interest of children with an Indigenous lens and has invaluable expertise to assist the Panel and the parties in this process.

[203] This being said the Panel does not believe that it has jurisdiction to create another Tribunal to delegate its responsibilities under the *CHRA* to it. The compensation process will be discussed below.

X. The right to exercise individual rights, class action and victims' identification

[204] The Panel believes that individuals have the right to exercise their individual rights and for those who chose to do so, they should be able to opt-out from receiving the compensation ordered in this ruling.

[205] The Panel also notes that the class action has not yet been certified by the Federal Court. Moreover, the possibility of a future certified class action and, if successful, orders made for punitive damages remedies under the Charter amongst other things being offset by the capped remedies orders under the *CHRA made b*y this Tribunal is not a convincing argument to refrain from awarding compensation in these proceedings. Additionally, the Tribunal's orders below do not cover years 1991 to 2005. The Tribunal's orders below also cover First Nations children and First Nations parents or grandparents.

[206] The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy the discrimination and if applicable as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors in this case.

[207] In regards to identification of victims/survivors, as explained by the Caring Society, some of the children can be identified by the Indian Registry and following a process agreed upon by the parties who wish to participate. Therefore, their identities are not impossible to obtain and are readily available contrary to the situation in the *C.N.R*. case from the Federal Court of Appeal that the AGC relies upon. The AGC argues the Court concluded that compensation for individuals is not an appropriate remedy in complaints of systemic discrimination. The AGC added the Court found that compensation is limited to victims which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, as here "by the nature of things individual victims are not always readily identifiable". Again, this is not the case here.

[208] The Panel finds this is a case where it is appropriate to compensate victims/survivors since the systemic racial discrimination and the adverse impacts found by

the Panel in its *Decision* subsequent rulings and this ruling, caused serious harm to victims/survivors. While the task to identify all the individuals is a complex one, it is not impossible given the Indian Registry and the Jordan's Principle process and records.

XI. Class actions and representative of the victims

[209] On one hand, the AGC contends the Tribunal is not the right forum to deal with class actions and on another hand it uses some of the class action criteria to support its position that there is no representative of the group of victims before the Tribunal. With respect, the AGC cannot have it both ways. Accepting the proposition that the Tribunal is not the right forum for class actions in light of its statute requires one to look at what can be done under the statute and not impose the class action criteria to the Tribunal process. While it can be useful to look at class action requirements, the rules of statutory interpretation require the Tribunal to first look at the *CHRA* given that its jurisdiction is derived from it. In addition, the *CHRA* is quasi-constitutional in nature which would supersede any law conflicting with the *CHRA*. If the *CHRA* is silent on an issue, the Tribunal can then use a number of useful tools at its disposition.

[210] In any event, even proof by presumption of facts subject to being provided that such presumptions are sufficiently serious, precise and concordant, applies to class actions (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, para.132). More so in front of a Human Rights Tribunal allowed to receive any type of evidence under the *Act.*

XII. Jordan's Principle remedies

[211] There is no doubt that Jordan's Principle has always been part of the claim from the complaint to the Statement of Particulars to the presentation of evidence and the Tribunal's findings and orders. This question was answered and cannot be revisited.

[212] In sum, in honor and memory of Jordan River Anderson, Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete

short-term issues creating critical needs for health and social supports or affecting their activities of daily living (see 2017 CHRT 35 at, para.19, i).

[213] Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy. (see 2017 CHRT 35 at, para.19, ii).

[214] What is more, the Panel rejects the AGC's argument that compensation is inappropriate in Jordan's Principle cases since the Tribunal already ordered Canada to retroactively review the cases that were denied. The retroactive review of cases ensures the child receives the service if not too late and eliminate discrimination. It does not account for the suffering borne by children and their parents while they did not receive the service.

[215] On the issue of there being no basis in the *Act* to award compensation to complainant organizations or non-complainant individuals under Jordan's Principle, the Panel applies the same reasoning outlined above. On the argument advanced by Canada that when it has implemented policies that satisfactorily address discrimination no further orders are required, the Panel also relies on its reasons above where it says that systemic and individual remedies can co-exist if the evidence in the specific case supports it and is deemed appropriate by the Panel.

[216] Also, the Panel ordered the use of a broad definition of Jordan's Principle that applies to all First Nations services across all services. It is worth mentioning that many Jordan's Principle cases involve vulnerable children who experience mental and/or physical disabilities. We will return to this right after a review of the purpose of the *CHRA* below:

> The purpose of the *CHRA* is to give effect to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as

> members of society, without being hindered in or prevented from doing so by discriminatory practices.
>
> (Section 2 of the *CHRA*).

[217] In the same vein with this principle, the *Covenant on the Rights of Persons with Disabilities,* adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 signed by Canada on March 30th, 2007 and ratified by Canada on March 11, 2010, in its Preamble mentions:

> Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person. (see *Grant* at paras.103-104). Moreover, article 1 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at. 71 (1948), which provides that all human beings are born free and equal in dignity and in rights.

[218] The concept of objective appreciation of dignity when vulnerable mentally disabled persons who are not always in a position to appreciate their own self-dignity or breach there of as been recognized by the Supreme Court of Canada:

> Having regard to the manner in which the concept of personal "dignity" has been defined, and to the principles of large and liberal construction that apply to legislation concerning human rights and freedoms, I believe that s. 4 of the *Charter* addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself. In the case before us, it appears to me that the majority of the Court of Appeal properly pointed out that, in considering the situation of the mentally disabled, the nature of the care that is normally provided to them is of fundamental importance. We cannot ignore the fact that the general objective of the services provided at the Hospital goes beyond meeting the patients' primary needs (see *Commission des droits de la personne v. Coutu*, 1995 CanLII 2537 (QC TDP), [1995] R.J.Q. 1628 (H.R.T.), at pp. 1652-53). This is apparent from, inter alia, the legislator's intention (see An Act respecting health services and social services, R.S.Q., c. S-4.2) and the fact that there is a certain level of social consensus concerning what sort of support services are required in order for the needs of these people to be met.

[219] This being said, the fact that some patients have a low level of awareness of their environment because of their mental condition may undoubtedly influence their own conception of dignity. As Fish J.A. observed:

> '' (…) however, when we are dealing with a document of the nature of the Charter, it is more important that we turn our attention to an objective appreciation of dignity and what that requires in terms of the necessary care and services. In the case at bar, I believe that the trial judge's findings of fact indicate, beyond a shadow of a doubt, that, although the discomfort suffered by the patients of the Hospital was transient, it constituted interference with the safeguard of their dignity, a right guaranteed by s. 4 of the Charter, despite the fact that, as the trial judge noted, these patients might have had no sense of modesty''. (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, paras. 105 and 106-108), (Public Curator).

[220] Furthermore, the Supreme Court found that disrupting services was an interference of the service recipients' dignity and causing them a moral prejudice under rules of civil liability and under the Charter:

> Moreover, the pressure that the appellants wanted to bring to bear on the employer inevitably involved disrupting the services and care normally provided to the patients of the Hospital, and necessarily involved intentional interference with their dignity (Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand, [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, paras. 109 and 124) *(Public Curator).*

[221] While this is not a class action or a civil liability or Charter case, the principle can be applied here to support the finding that the disruption of services offered to a vulnerable group of peoples, in this case First Nations children and families, amounts to a breach of their dignity applying the objective appreciation of dignity principle. Under the *CHRA* this would be covered under section 53 (2) (e). This reasoning also apply to First Nations children and families in the case of the removal of a child from the home, family and community.

[222] What is more, the Tribunal has already made findings in past rulings in regards to gaps, delays and denials of essential services to First Nations children under Jordan's Principle and also its connection to child welfare, some of them are reproduced here:

> **Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating**

dedicated funds and resources to address some of these issues (see Decision at para. 356) (…) (see 2017 CHRT 14, at para.78).

The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: **that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve.** The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program (see 2016 CHRT 2 at, para.369).

Another medical related expenditure identified as a **concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist** (see Gaps in Service Delivery to First Nation Children and Families in BC Region at pp. 2-3). (see 2016 CHRT 2 at, para.372).

In the Panel's view, **it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families.** Such an approach defeats the purpose of Jordan's Principle and results in **service gaps, delays and denials** for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need (see 2016 CHRT 2 at, para.381).

More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made (see 2016 CHRT 2 at, para.381).

AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements **have resulted in denials of services and created various adverse impacts for many First Nations children and**

families living on reserves. Non-exhaustively, the **main adverse impacts** found by the Panel are: (…) **The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children** (see 2016 CHRT 2 at, para.458).

In January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact amongst a group of young children and youth. This information was contained in a July 2016 detailed proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle'' (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16). The Panel acknowledges how inappropriate this response is in such circumstances and the additional suffering it must have caused (See 2017 CHRT 7 para. 9).

Tragically, in February 2017, two other youths aged 11 and 21 took their own lives in NAN communities of Deer Lake and Kitchenuhmaykoosib Inninuwug (see affidavit of Sol Mamakwa, February 13, 2017, at para. 5) (See 2017 CHRT 7 para. 10).

The Panel would like to acknowledge and extend our condolences to the families and communities of these youths and to all those who have lost children in similar tragic circumstances (See 2017 CHRT 7 para. 11).

The loss of our children by suicide in Nishnawbe Aski Nation (NAN) has created untold pain and despair for families, communities and all of our people. Health Canada's commitment "to establish a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative funding" establishes an important route for our communities in crisis to access Jordan's Principle funds (See 2017 CHRT 7 Annex A letter Re: Choose Life Pilot Working Group, dated March 22, 2017 from Nishnawbe Aski Nation Grand Chief Alvin Fiddler to Dr. Valerie Gideon, Assistant Deputy Minister Regional Operations First Nations and Inuit Health Branch Health Canada).

At the October 30-31, 2019 hearing (October hearing), Canada' witness, Dr. Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada,

admitted in her testimony that the Tribunal's May 2017 CHRT 14 ruling and orders on **Jordan's Principle definition and publicity measures caused a large jump in cases for First Nations children**. In fact, from July 2016 to March 2017 there were approximately 5,000 Jordan's Principle approved services. **After the Panel's ruling, this number jumped to just under 77,000 Jordan's Principle approved services in 2017/2018. This number continues to increase. At the time of the October hearing, over 165 000 Jordan's Principle approved services have now been approved under Jordan's Principle as ordered by this Tribunal. This is confirmed by Dr. Gideon's testimony and it is not disputed by the Caring Society. Furthermore, it is also part of the new documentary evidence presented during the October hearing and now forms part of the Tribunal's evidentiary record. Those services were gaps in services that First Nations children would not have received but for the Jordan's Principle broad definition as ordered by the Panel.**

In response to Panel Chair Sophie Marchildon's questions, Dr. Gideon also testified that **Jordan's Principle is not a program, it is considered a legal rule by Canada.** This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018 at exhibit 4, at page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

No sun-setting of Jordan's Principle. Jordan's Principle is a legal requirement not a program and thus there will be no sun-setting of Jordan's Principle (…) There cannot be any break in Canada's response to the full implementation of Jordan's Principle (see 2019 CHRT 7 at, para. 25).

The Panel is delighted to hear that **thousands of services have been approved since it issued its orders. It is now proven, that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable. While there is still room for improvement, it also fosters hope.** We would like to honor Jordan River Anderson and his family for their legacy. We also acknowledge the Caring Society, the AFN and the Canadian Human Rights Commission for bringing this issue before the Tribunal and for the Caring Society, the AFN, the COO, the NAN, and the Canadian Human Rights Commission for their tireless efforts. We also honor the Truth and Reconciliation Commission for its findings and recommendations. Finally, the Panel recognizes that while there is more work to do to eliminate discrimination in the long term, Canada has made substantial efforts to provide services to First Nations children under Jordan's Principle especially since November 2017. Those efforts are made by people such as Dr. Gideon and the Jordan's Principle team and the Panel believes it is noteworthy. This is also recognized by the

> Caring Society in an April 17, 2018 letter filed in the evidence (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at Exhibit A). This is not to convey the message that a colonial system which generated racial discrimination across the country is to be praised for starting to correct it. Rather, it is recognizing the decision-makers and the public servants' efforts to implement the Tribunal's rulings hence, truly impacting the lives of children. (see 2019 CHRT 7 at, para. 26).
>
> The Panel finds the outcome of S.J.'s case is unreasonable. The coverage under Jordan's Principle was denied because S.J.'s mother registered under 6(2) of the Indian Act and could not transmit status to her in light of the second-generation cut-off rule. This is the main reason why S.J.'s travel costs were refused. The second reason is that it was not deemed urgent by Canada when in fact the situation was not assessed appropriately. Finally, no one seems to have turned their minds to the needs of the child and her best interests. There is no indication that a substantive equality analysis has been employed here. Rather a bureaucratic approach was applied for denying coverage for a child of just over 18 months (Canada's team described the child has being 1 year and a half old, see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, email chain at Exhibit F), who has been waiting for this scan from birth. This type of bureaucratic approach in Programs was linked to discrimination in the *Decision* (see at, paras. 365-382 and 391) (see 2019 CHRT 7 at, para.73).

[223] All the above findings support a finding that First Nations children and their families experienced pain and suffering and a breach of their dignity as a result of gaps, delays and denials of essential services.

[224] Other evidence in the record further exemplifies that delays, gaps and denials cause real harm and suffering to the Frist Nations children and their families:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline at 30 degrees in order to alleviate the respiratory distress that resulted from her condition. AANDC, Jordan's Principle Chart Documenting Cases, October 6, 2013 (see HR, Vol 15, tab 422, p 2).
>
> MR. WUTTKE: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that correct?
>
> MS BAGGLEY: Well, it said the summer of 2008.
>
> MR. WUTTKE: Okay.

> MS BAGGLEY: "Tomatoe/tomato".
>
> MR. WUTTKE: Between half a year and three quarters of a year?
>
> MS BAGGLEY: Yes, yes.
>
> MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?
>
> MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons. (see Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).

[225] The Panel finds there is sufficient evidence in the record as demonstrated above to justify findings that pain and suffering of the worst kind warranting the maximum compensation under section 53 (2) (e) of the *CHRA* is experienced by First Nations children and families as a result of Canada's approach to Jordan's Principle that led to the Tribunals' rulings in this case.

[226] First Nations Children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them. The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.

XIII. Special compensation wilful and reckless

[227] The special compensation remedy sought as part of this ruling is found at para. 53 (3) of the *CHRA*:

> (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand

> dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[228] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

> The Tribunal in *Duverger v. 2553-4330 Québec Inc. (Aéropro),* 2019 CHRT 18 (CanLII), recently reiterated this Panel's legal reasons on the special compensation, member Gaudreault wrote:
>
> In the decision rendered in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 (CanLII) [Family Caring Society], at paragraph 21, members Sophie Marchildon, Réjean Bélanger and Edwards P. Lustig addressed the special compensation provided under subsection 53(3) of the CHRA:
>
> The Federal Court has interpreted this section as being a ". . .punitive provision intended to provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Johnstone,* 2013 FC 113 (CanLII), at para. 155, aff'd 2014 FCA 110 (CanLII) [*Johnstone* FC]). A finding of wilfulness requires "(…) the discriminatory act and the infringement of the person's rights under the *Act* is intentional" (*Johnstone* FC, at para. 155). Recklessness involves ". . .acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (Johnstone FC, at para. 155), (see *Duverger* at para.293).

[229] The objective of the *CHRA* is to remedy discrimination (*Robichaud* at para.13). As opposed to remedies under section 53 (2) (e) which are not meant to punish the author of the discrimination, as mentioned above, the Federal Court in *Johnstone* found that section 53 (3) of the *CHRA* is a punitive provision.

[230] In order to be wilful or reckless, "…some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168 (CanLII), at para. 33). Again, the award of the maximum amount under this section should be reserved for the very worst cases. (see *Grant* at, para.119).

[231] The Panel finds that Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families both in regard to the child welfare program and Jordan's Principle. Canada was aware of the discrimination and of some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the WEN DE report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunal's orders. As the Panel already found in previous rulings, Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.

[232] When looking at the issue of wilful and reckless discriminatory practice, the context of the claim is important. In this case we are in a context of repeated violations of human rights of vulnerable First Nations children over a very long period of time by Canada who has international, constitutional and human rights obligations towards First Nations children and families. Moreover, the Crown must act honourably in all its dealings with Aboriginal Peoples:

> First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (Wewaykum at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in Haida Nation, at paragraph 17:
> Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": Delgamuukw, supra, at para. 186, quoting Van der Peet, supra, at para. 31, (see *Decision* 2016 CHRT 2 at, para. 95).

[233] In light of Canada's obligations above mentioned, the fact that the systemic racial discrimination adversely impacts children and causes them harm, pain and suffering is an aggravating factor than cannot be overlooked.

[234] The Panel finds it has sufficient evidence to find that Canada's conduct was wilful and reckless resulting in what we have referred to as a worst-case scenario under our *Act*.

[235] What is more, many federal government representatives of different levels were aware of the adverse impacts that the Federal FNCFS Program had on First Nations children and families and some of those admissions form part of the evidence and were referred to in the Panel's findings. A review of the Panel's findings contained in the *Decision* and rulings supports this.

[236] The Panel rejects Canada's position that the reports in the evidentiary record and findings cannot lead to a finding of wilful and reckless conduct by this Tribunal's findings because they were improving the services over time. WEN DE specifically cautioned against a piece meal implementation of the recommendations and that is precisely what Canada did. This was also explained in the *Decision.*

[237] In addition, the Tribunal already made findings about Canada's conduct and awareness of the adverse impacts to First Nations children and their families in past rulings although too numerous to reproduce them entirely in this ruling, some are above mentioned and some will be mentioned here and those findings cannot be challenged now:

> In another presentation, AANDC describes Directive 20-1 as "broken":
>
> **The current system is BROKEN, i.e. piecemeal and fragmented**
>
> **The current system contributes to dysfunctional relationships, i.e. jurisdictional issues (at federal and provincial levels), lack of coordination, working at cross purposes, silo mentality**
>
> […]
>
> **The current program focus is on protection (taking children into care) rather than prevention (supporting the family)**
>
> […]
>
> **Early intervention/prevention has become standard practice in the provinces/territories, numerous U.S. states, and New Zealand**
>
> **INAC CFS has been unable to keep up with the provincial changes**
>
> **Where prevention supports are common practice, results have demonstrated that rates of children in care and costs are stabilized and/or reduced**

> (Annex, ex. 35 at pp. 2-3 [Putting Children and Families First in Alberta presentation]) (see 2016 CHRT 2 at, para.270).
>
> Putting Children and Families First in Alberta presentation touts prevention as the ideal option to address these problems at page 4:
>
> **Early prevention and child-centered outcomes are the missing pieces of the puzzle for FN children and families living on reserve**
>
> **Early prevention supports the agenda for improving quality of life for children and families thereby leading to improved outcomes in the areas of early childhood development, education, and health** (see 2016 CHRT 2 at, para.271).
>
> Finally, the Putting Children and Families First in Alberta presentation states at page 5:
>
> The facts are clear:
>
> **Wen:De Report - Early intervention/prevention is KEY**
>
> […]

[238] The above citations were presentations prepared by staff in the Federal Government supporting the fact that they were well aware of what needed to be done to stop the systemic racial discrimination and that prevention is a key component. This being said, while Canada increased prevention funds, it applied an insufficient and piece meal approach and the Panel also found this in the *Decision.*

[239] First Nation agencies have been lobbying Canada since 1998 to change the system (see 2016 CHRT 2 at, para.272). Ten years later, in a 2018 CHRT 4 ruling, the Tribunal had to order Canada to fund prevention services:

> Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. **Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the Decision and rulings**. **It incentivizes the removal of children rather than assisting communities to stay together** (see 2018 CHRT at, para. 230). All this time Canada knew the benefit of prevention services to keep children safe within their homes and families yet it did not sufficiently fund and reform the system to foster this shift. This is contrary to the Tribunal's order to provide services based on need, which requires

> Canada to obtain each First Nation agency and First Nation's specific needs. Finally, allowing those agencies that confirm they lack capacity to keep the budget funds from year to year instead of returning them could potentially assist in addressing the issue. As far as other agencies that do have capacity are concerned, **Canada is unilaterally deciding for them and delaying prevention services and least disruptive measures under a false premise. Proceeding in this fashion is harming children** (see 2018 CHRT 4 at para.143). [161] The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services. (see 2018 CHRT 4 at, para.161).
>
> **The Panel finds it problematic that again, Canada's rationale is based on the funding cycle not the best interests of children, and not on being found liable under the *CHRA*.** Moreover, there is a major problem with Budget 2016 being rolled out over 5 years. The Panel did not foresee it would take that long to address immediate relief. Leaving the highest investments for years 4 and 5, the Panel finds it does not fully address immediate relief (see 2018 CHRT 4 at para.146).
>
> This being said, the Panel is encouraged by the steps made by Canada so far on the issue of immediate relief and the items that needed to be addressed immediately, However, we also find Canada not in full-compliance of this Panel's previous orders for least disruptive measures/prevention, small agencies, intake and investigations and legal costs. Additionally, at this time, the Panel finds there is a need to make further orders in the best interest of children (see 2018 CHRT 4 at para.195).

[240] The Panel made numerous findings on the need for prevention services to reverse the removal of First Nations children from their homes, families and communities:

> Furthermore, several jurisdictional issues were identified as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In this regard, the evaluation noted that a common implementation challenge for FNCFS Agencies was the need for specialized services at the community level (for example, Fetal Alcohol Spectrum Disorder assessments, therapy, counselling and addictions support). **Moreover, the evaluation found of key importance the availability and access to supportive services for prevention. According to the evaluation, these services are not available through AANDC funding, though they are provided by other government departments and programs either on reserve or off reserve** (see AANDC Evaluation of the Implementation of the EPFA in Alberta at pp. 16-18, 21-24) (see 2016 CHRT at, para.286).

Difficulties based on remoteness were also identified as a main challenge in Saskatchewan and Nova Scotia. One third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner. In Nova Scotia, where there is only one FNCFS Agency with two offices throughout the province, the evaluation noted it can take two to three hours to reach a child in the southwestern part of the province. On the other hand, the provincial model is structured so that its agencies are no more than a half-hour away from a child in urgent need. In extreme cases, the Nova Scotia FNCFS Agency has had to rely on the provincial agencies for assistance. According to the evaluation, because of these issues the province of Nova Scotia has recommended that AANDC provide funding to support a third office in the southwestern part of the province (see AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia at pp. 35-36) (see 2016 CHRT 2 at, para.291).

AANDC's Departmental Audit and Evaluation Branch also performed its own evaluation of the FNCFS Program in 2007 (see Annex, ex. 14 [2007 Evaluation of the FNCFS Program]). The findings and recommendations of the 2007 Evaluation of the FNCFS Program reflect those of the NPR and Wen:De reports. Of note, at page ii, the 2007 Evaluation of the FNCFS Program makes the following findings:

Although the program has met an increasing demand for services, it is not possible to say that is has achieved its objective of creating a more secure and stable environment for children on reserve, nor has it kept pace with a trend, both nationally and internationally, towards greater emphasis on early intervention and prevention.

The program's funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care and Program expenditures because it has had the effect of steering agencies towards in-care options - foster care, group homes and institutional care because only these agency costs are fully reimbursed (see 2016 CHRT 2 at, para.273).

(…) correct the weakness in the First Nations Child and Family Services Program's funding formula, which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. Well-being and safety of children must be agencies' primary considerations in placement decisions (see 2016 CHRT 2 at, para.274).

In a September 11, 2009 response to questions raised by the Standing Committee on Aboriginal Affairs and Northern Development, Deputy Minister Michael Wernick described the EPFA as an "…approach that will result in better outcomes for First Nation children" (Annex, ex. 36). Mr. Wernick's response indicates AANDC's awareness of the impacts that the structure

> and funding for the FNCFS Program under Directive 20-1 has on the outcomes for First Nations children (see 2016 CHRT 2 at, para.276).
>
> However, as the 2008 Report of the Auditor General of Canada, the 2009 Report of the Standing Committee on Public Accounts, the 2011 Status Report of the Auditor General of Canada, and the 2012 Report of the Standing Committee on Public Accounts pointed out, while the EPFA is an improvement on Directive 20-1, it still relies on the problematic assumptions regarding children in care, families in need, and population levels to determine funding. Furthermore, many provinces and the Yukon remain under Directive 20-1 despite AANDC's commitment to transition those jurisdictions to the EPFA (see 2016 CHRT 2 at, para.278).
>
> Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the 1965 Agreement in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve (see 2016 CHRT 2 at, para. 461).

[241] One of the most tragic and worst-case scenarios in this case and in the Jordan's Principle context is one of unreasonable delays in providing prevention and mental health services as exemplified in the situation in the Nation of Wapekeka. This delay was intentional and justified by Canada according to financial and administrative considerations. It was devoid of caution and without regard for the serious consequences on the children and their families. Some extracts of the Panel's findings are reproduced here:

> The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16) (see 2017 CHRT 14 at, para. 89).

While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle (see 2017 CHRT 14 at, para. 90).

Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see Transcript of Cross-Examination of Ms. Buckland at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16). (see 2017 CHRT 14 at, para. 91).

If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay was part of the process, as there was no clarity surrounding what the process actually was [see "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (Affidavit of Robin Buckland, January 25, 2017, Exhibit F, at p. 3); see also Transcript of Cross-Examination of Ms. Buckland at p. 82, lines 1-12] (see 2017 CHRT 14 at, para. 92).

More significantly, Ms. Buckland's comments suggest the focus of Canada's Jordan's Principle processing remains on Canada's administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan's Principle. The Panel finds Canada's new Jordan's Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process. (see 2017 CHRT 14 at, para. 93).

> The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the Decision (see 2017 CHRT 14 at, para. 94).

[242] The evidence and findings above support the finding that Canada was aware of the discrimination adversely impacting First Nations children and families in the contexts of child welfare and/or Jordan's Principle and therefore, Canada's conduct was devoid of caution and without regard for the consequences on First Nations children and their parents or grand-parents which amounts to a reckless conduct compensable under section 53 (3) of the *CHRA*. The Panel finds that Canada's conduct amounts to a worst-case scenario warranting the maximum compensation of $20,000 under the *Act*.

[243] The AFN filed affidavit evidence on the Indian Residential School Settlement Agreement (IRSSA) as part of these proceedings and the Panel opted to adopt a similar approach in determining the remedies to victims/survivors in this case so as to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped at a $20,000$ under the *CHRA*. The dispositions of the IRSSA found in Mr. Jeremy Kolodziej's affidavit affirmed on April 4, 2019 and reproduced below illustrate the rationale behind the lump sum payment to those victims/survivors who attended Residential School:

> "CEP" and "Common Experience Payment" mean a lump sum payment made to an Eligible CEP Recipient in the manner set out in Article Five (5) of this Agreement;
>
> 5.02 Amount of CEP
>
> The amount of the Common Experience Payment will be:
>
> (1) ten thousand dollars ($10,000.00) to every Eligible CEP Recipient who resided at one or more Indian Residential Schools for one school year or part thereof; and
>
> (2) an additional three thousand ($3,000.00) to every eligible CEP Recipient who resided at one or more Indian Residential Schools for each school year or part thereof, after the first school year; and (3) less the amount of any advance payment on the CEP received
>
> Recommendations

> 1.0 To ensure that the full range of harms are redressed, we recommend that a lump sum award be granted to any person who attended an Indian Residential School, irrespective of whether they suffered separate harms generated by acts of sexual, physical or severe emotional abuse.
>
> The Indian Residential School Policy was based on racial identity. It forced students to attend designated schools and removed them from their families and communities. The Policy has been criticized extensively. The consequences of this policy were devastating to individuals and communities alike, and they have been well documented. The distinctive and unique forms of harm that were a direct consequence of this government policy include reduced self-esteem, isolation from family, loss of language, loss of culture, spiritual harm, loss of a reasonable quality of education, and loss of kinship, community and traditional ways. These symptoms are now commonly understood to be "Residential School Syndrome." Everyone who attended residential schools can be assumed to have suffered such direct harms and is entitled to a lump sum payment based upon the following:
>
> 1.1 A global award of sufficient significance to each person who attended Indian Residential Schools such that it will provide solace for the above losses and would signify and compensate for the seriousness of the injuries inflicted and the life-long harms caused.
>
> 1.2 An additional amount per each additional year or part of a year of attendance at an Indian Residential School to recognize the duration and accumulation of harms, including the denial of affection, loss of family life and parental guidance, neglect, depersonalization, denial of a proper education, forced labour, inferior nutrition and health care, and growing up in a climate of fear, apprehension, and ascribed inferiority.
>
> **As attendance at residential school is the basis for recovery, a simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. (emphasis ours).**

[244] The Panel believes that the above rationale is applicable in this case. As for the process, it needs to be discussed further as it will be explained in the next section.

XIV. Orders

All the following orders will find application once the compensation process referred to below has been agreed to by the Parties or ordered by the Tribunal.

Compensation for First Nations children and their parents or grand-parents in cases of unnecessary removal of a child in the child welfare system

[245] The Panel finds there is sufficient evidence and other information (see section 50 (3) (c) of the *CHRA*), in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse were unnecessarily apprehended and placed in care outside of their homes, families and communities and especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA.* Canada is ordered to pay $ 20,000 to each First Nation child removed from its home, family and Community between **January 1, 2006** (date following the last WEN DE report as explained above) until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

[246] The Panel believes there is sufficient evidence and other information to find that even if a First Nation child has been apprehended and then reunited with the immediate or extended family at a later date, the child and family have suffered during the time of separation and that the trauma outlasts the time of separation.

[247] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's Decisions 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations parents or grand-parents living

on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse had their child unnecessarily apprehended and placed in care outside of their homes, families and communities and, especially in regards to of substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to keep their child safely in their homes, families and communities. Those parents or grand-parents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*.

[248] Canada is ordered to pay $ 20,000 to each First Nation parent or grand-parent of a First Nation child removed from its home, family and Community between **January 1, 2006** and until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below. This order applies for each child removed from the home, family and community as a result of the above-mentioned discrimination. For clarity, if a parent or grand-parent lost 3 children in those circumstances, it should get $60,000, the maximum amount of $20,000 for each child apprehended.

Compensation for First Nations children in cases of necessary removal of a child in the child welfare system

[249] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of abuse were necessarily apprehended from their homes but placed in care outside of their extended families and communities and therefore, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their extended families and

communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nation child removed from its home, family and Community from **January 1, 2006** until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

Compensation for First Nations children and their parents or grand-parents in cases of unnecessary removal of a child to obtain essential services and/or experienced gaps, delays and denials of services that would have been available under Jordan's Principle

[250] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4, resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out of home care were denied services and therefore did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 17 and 35 (for example, mental health and suicide preventions services, special education, dental etc.). Finally, children who received services upon reconsideration ordered by this Tribunal and children who received services with unreasonable delays have also suffered during the time of the delays and denials. All those children above mentioned experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $ 20,000 to each First Nation child removed from its home and placed in care in order to access services and for each First Nations child who

was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of the Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[251] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4, resulted in harming First Nations parents or grand-parents living on reserve or off reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services for their child and had their child placed in care outside of their homes, families and communities in order to receive those services and therefore, did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 17 and 35. Those parents or grand-parents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the CHRA. Canada is ordered to pay $ 20,000 to each First Nation parent or grand-parent who had their child removed and placed in out-of-home care in order to access services and for each First Nations parent or grand-parent who's child was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of the Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[252] It should be understood that the pain and suffering compensation for a First Nation child, parent or grand-parent covered under the Jordan's Principle orders cannot be combined with the other orders for compensation for removal of a home, a family and a community rather, the removal of a child from a home is included in the Jordan's Principle orders.

[253] The Panel finds as explained above there is sufficient evidence and other information in this case to establish on a balance of probabilities that Canada was aware

of the discriminatory practices of its child welfare Program offered to First Nations children and families and also of the lack of access to services under Jordan's Principle for First Nations children and families. Canada's conduct was devoid of caution and without regard for the consequences experienced by First Nations children and their families warranting the maximum award for remedy under section 53(3) of the *CHRA* for each First Nation child and parent or grand-parent identified in the orders above.

[254] Canada is ordered to pay $ 20,000 to each First Nation child and parent or grand-parent identified in the orders above for the period between **January 1, 2006** and until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased and effective and meaningful long term relief is implemented; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order for all orders above except Jordan's Principle orders given that the Jordan's Principle orders are for the period between **December 12, 2007** and **November 2, 2017** as explained above and, following the process discussed below.

[255] The term parent or grand-parent recognizes that some children may not have parents and were in the care of their grand-parents when they were removed from the home or experienced delays, gaps and denials in services. The Panel orders compensation for each parent or grand-parent caring for the child in the home. If the child is cared for by two parents, each parent is entitled to compensation as described above. If two grand-parents are caring for the child, both grand-parents are entitled to compensation as described above.

[256] For clarity, parents or grand-parents who sexually, physically or psychologically abused their children are entitled to no compensation under this process. The reasons were provided earlier in this ruling.

[257] A parent or grand-parent entitled to compensation under section 53 (2) (e) of the *CHRA* above and, who had more than one child unnecessarily apprehended is to be

compensated $20,000 under section 53 (3) of the *CHRA* per child who was unnecessarily apprehended or denied essential services.

XV. Process for compensation

[258] The Panel in considering access to justice, efficiency and expeditiousness has opted for the above orders to avoid a case-by-case assessment of degrees of pain and suffering for each child, parent or grand-parent referred to in the orders above. As stated by the NAN, there is no perfect solution on this issue, the Panel agrees. The difficulty of the task at hand does not justify denying compensation to victims/survivors. In recognizing that the maximum of $20,000 is warranted for any of the situations described above, the case-by-case analysis of pain and suffering is avoided and it is attributed to a vulnerable group of victims/survivors who as exemplified by the evidence in this case have suffered as a result of the systemic racial discrimination. Some children and parents or grand-parents may have suffered more than others however, the compensation remedies are capped under the *CHRA* and the Panel cannot award more than the maximum allowed even if it is a small amount in comparison to the degree of harm and of racial discrimination experienced by the First Nations children and their families. The maximum compensation awarded is considered justifiable for any child or adult being part of the groups identified in the orders above.

[259] This type of approach to compensation is similar to the Common Experience Payment compensation in the IRSSA outlined above. The Common experience payment recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The CEP compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language culture, etc. (see Affidavit of Mr. Jeremy Kolodziej's dated April 4 2019 at, para.10).

[260] The Panel prefers AFN's request that compensation be paid to victims directly following an appropriate process instead of being paid in a fund where First Nations children and families could access services and healing activities to alleviate some of the effects of the discrimination they experienced. The Panel is not objecting to a trust fund

per se, rather it objects that the compensation be paid in a trust fund to finance services and healing activities in lieu of financial compensation as suggested by the Caring Society. Such meaningful activities should be offered by Canada however, not in replacement of financial compensation to victims/survivors. Financial Compensation belongs to the victims/survivors who are the ones who should be empowered to decide for themselves on how best to use this financial compensation.

[261] However, the Panel also acknowledges the Caring Society's argument that it is not appropriate to pay $40,000 to a 3-year-old. Therefore, there is a need to establish a process where the children who are under 18 or 21 years old have the compensation paid to them secured in a fund that would be accessible upon reaching majority.

[262] In terms of Jordan's Principle, many children who were denied services and who are still living with their parents could have the compensation funds administered by their parents or grand-parents until the age of majority.

[263] For all the other children who have no parents, grand-parents or responsible adult family members and who are underage, a trust fund could be an option amongst others that should be part of the discussions referred to below.

[264] Special protections for mentally disabled children and parents or grand-parents who abuse substances that may affect their judgment should be considered in the process.

[265] It would be preferable that the Social benefits of victims/survivors not be affected by compensation remedies. This can form part of the process for compensation discussions.

[266] The possibility for individual victims/survivors to opt-out should form part of this compensation process.

[267] Given that the parties and interested parties in this case are all First Nations except the Commission and the AGC and, that they all have different views on the appropriate definition of a First Nation child in this case, it is paramount that this form part of the discussions on the process for compensation. The Panel reiterates that it recognizes the First Nations human rights and Indigenous rights of self-determination and self-governance.

[268] If a trust fund and/or committee is proposed, it may be valuable to also include non-political members on the trust fund and/or committee such as adult victims/survivors, Indigenous women, elders, grandmothers, etc.

[269] Additionally, the Panel recognizes the need for a culturally safe process to locate the victims/survivors identified above namely, First Nations children and their parents or grand-parents. The process needs to respect their rights and their privacy. The Indian registry and Jordan's Principle process and record are tools amongst other possible tools to assist in locating victims/survivors. There is also a need to establish an independent process for distributing the compensation to the victims/survivors. The AFN and the Caring Society have both expressed an interest to assist in that regard. Therefore, Canada shall enter into discussions with the AFN and the Caring Society on this issue. The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to. The Panel is not making a final determination on the process here rather, it will allow parties to discuss possible options and return to the Tribunal with propositions if any, no later than **December 10, 2019**. The Panel will then consider those propositions and make a determination on the appropriate process to locate victims/survivors and to distribute compensation.

[270] As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added.

XVI. Interest

[271] Pursuant to section 53(4) of the *Act*, the Complainants seek interest on any award of compensation made by the Tribunal.

[272] Section 53(4) allows for the Tribunal to award interest at a rate and for a period it considers appropriate:

> (4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[273] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

[274] Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[275] As such, the Panel grants interest on the compensation awarded, at the current Bank of Canada rate, as follows:

[276] The compensation for pain and suffering and special compensation includes an award of interest for the same periods covered in the above orders. This approach was used by the Tribunal in the past see for example, *Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 20 at, para.21).

XVII. Retention of jurisdiction

[277] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Edward P. Lustig
Tribunal Members

Ottawa, Ontario
September 6, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: September 6, 2019

Date and Place of Hearing: April 25 and 26, 2019
Gatineau, Québec

Appearances:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

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Maggie Wente, counsel for the Chiefs of Ontario, Interested Party

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