Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

WRITTEN SUBMISSIONS OF THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA REGARDING COMPENSATION

April 3, 2019

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I. Overview

1. On August 29, 2014, the First Nations Child and Family Caring Society (the "**Caring Society**") filed its Memorandum of Fact and Law in this matter. Amongst the various remedies sought by the Caring Society, a request for compensation pursuant to section 53(3) *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "***CHRA***") was made on p. 215.[1]

2. Pursuant to s. 53(3) of the *CHRA*, the Caring Society sought (and continues to seek) an Order that Canada:

1) Pay an amount of $20,000 as compensation under s. 53(3) of the *CHRA*, 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 the First Nations Child and Family Services Program ("**FNCFS Program**") who was placed in out-of-home care since 2006;

2) Provide to the Tribunal and the parties a detailed account of the number of First Nations children affected by the FNCFCS Program who were placed in out-of-home since 2006; and

3) Pay this compensation, plus interest, into a trust fund that:

    a. Will be used to the benefit of First Nations children who have experienced pain and suffering as a result of Canada's discriminatory treatment;

    b. Will provide First Nations children with access to services, such as culture and language programs, family reunification programs, counselling, health and wellness programs and education programs; and

    c. Will be administered by a board of seven Trustees appointed jointly by the Complainant, the Commission and Canada or, if the latter fail to agree, by the Tribunal.

3. The Caring Society is also seeking compensation for those First Nations children who experienced discrimination pursuant to Canada's narrow and discriminatory interpretation of

[1] A copy of the Caring Society's submissions regarding compensation made on August 29, 2014, upon which the Caring Society continues to rely, are attached hereto as **Annex "A"**.

Jordan's Principle, placing that compensation in the trust referenced above. Pursuant to s. 53(3) of the *CHRA*, the Caring Society seeks an order that:

1) Canada pay an amount of $20,000 as compensation under s. 53(3) of the *CHRA*, 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 who did not receive an eligible service or product pursuant to Canada's discriminatory approach to Jordan's Principle since December 12, 2007;

2) Canada provide to the Tribunal and the parties a detailed account of the number of First Nations children who were denied an eligible service or product pursuant to Jordan's Principle since December 12, 2007; and

3) Canada pay this compensation, plus interest, into a trust fund that:

    a. Will be used to the benefit of First Nations children and families who have experienced pain and suffering as a result of Canada's discriminatory treatment;

    b. Will provide First Nations children and families with access to services, such as culture and language programs, family reunification programs, counselling, health and wellness programs and education programs;

    c. Will provide a direct distribution in the amount of $20,000 to the estate of any First Nations children who have passed away;

    d. Will be administered by the board of seven Trustees appointed jointly by the Complainant, the Commission and Canada referenced above or, if the latter fail to agree, by the Tribunal; and

4) In addition to the payment referenced in (3) above, Canada fund all costs to establish and operate the trust.

4. The purpose of these submissions is to further clarify, update and focus the Caring Society's position regarding compensation, given that it has been four and a half years since the Memorandum of Fact and Law was filed and more than three years since the Tribunal delivered

its findings and reasons in this case.[2] In addition, these submissions address compensation for the victims of Canada's discriminatory interpretation of Jordan's Principle and the questions raised by the Panel on March 15, 2019 in relation to compensation.

II. Victims of Discrimination Are Entitled to Compensation as a Result of Canada's Wilful or Reckless Discrimination

5. Section 53(3) of the *CHRA* provides for awards of "special compensation" for wilful and reckless discrimination, to a maximum of $20,000. Since the filing of the submissions in 2014, the relevant law has evolved, with the Canadian Human Rights Tribunal continuing to award special compensation in cases where a complainant demonstrates that the respondent's conduct was particularly egregious, involved some element of intent, or where the respondent had knowledge of the adverse impact(s) of its conduct and failed to address same.

6. The case often cited as the starting point for special compensation is this Tribunal's decision in *Johnstone v Canada Border Service Agency*.[3] In that case the Tribunal ordered the respondent to pay the maximum award based on its wilful and reckless conduct. The Tribunal commented that CBSA knew that its conduct gave rise to a discriminatory impact as it had apologized for similar conduct in the past and had done little to remedy it. Moreover, CBSA was aware of the Tribunal's prior decision in *Brown v. National Revenue (Customs & Excise)*,[4] which dealt with discrimination based on sex (pregnancy) and family status contrary to the *CHRA* by the CBSA's predecessor. The Tribunal held that CBSA had direct knowledge of its discriminatory practice and knowingly failed to redress it, thus meriting an award of special compensation. Both the Federal Court and the Federal Court of Appeal endorsed the Tribunal's approach, with Mandamin J., of the Federal Court, noting as follows:

> In making an order for special compensation under subsection 53(3) of the *Act*, the Tribunal must establish the person is engaging or has engaged in discriminatory practice wilfully and recklessly. This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the *Act* is intentional. Recklessness usually denotes acts that disregard or

[2] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, Tab 3 of the Joint Record of Documents ("JRD") (Vol. 1).
[3] *Johnstone v Canada Border Service Agency*, 2010 CHRT 20.
[4] *Brown v. National Revenue (Customs & Excise)*, 1993 CanLII 683 (CHRT).

> show indifference for the consequences such that the conduct is done wantonly or heedlessly.[5]

7. A respondent may be intentionally and/or recklessly discriminatory in its conduct. This is a disjunctive requirement: both need not be present for the Tribunal to make an award under s. 53(3) of the *CHRA*. Where there is indifference, ignorance or a clear disregard for the complainant's hardship, the Tribunal has the jurisdiction to award the maximum $20,000 in special compensation.[6]

8. As the Tribunal noted in its decision regarding Canada's retaliation against Dr. Cindy Blackstock, special compensation is often reserved for the "worst cases". In finding that Canada's conduct established a basis for special compensation, the Tribunal noted as follows:

> In the present case, Dr. Blackstock's feelings of shame and humiliation resulting from this public professional rejection, in front of the Chiefs of Ontario whom she was seeking to advise, are understandable and warrants some form of compensation. Moral pain and suffering is difficult to quantify. This being said, when evidence establishes pain and suffering, an attempt to compensate for it must be made (see *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10 (CanLII), at para. 115). The Tribunal finds that $10 000 constitutes a reasonable award for the prejudice Dr. Blackstock experienced.
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> As for the section 53(3) of the *Act*, there is no doubt that the Respondent's actions had a wilful and reckless nature. Dr. Blackstock was the only individual excluded from the meeting, which supports her contention that she was singled out. Not only did Mr. McArthur admit that he was aware of the Complaint, but he expressed that he was afraid that it would be discussed during the meeting if Dr. Blackstock was allowed to attend. His testimony revealed a desire to exclude her because she had filed a human rights complaint and a disregard for the rights protected in the *Act*. These are precisely the kinds of circumstances which section 14.1 of the *Act* seeks to deter. In the Panel's view, this conduct also warrants a $10 000 award.[7]

9. Canada did not seek judicial review of the Tribunal's decisions in relation to retaliation against Dr. Blackstock. Those findings are binding.

10. The Tribunal must be guided by common sense when considering an award of special compensation and must be satisfied that the respondent had some awareness of the adverse

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[5] (*Canada (Attorney General) v. Johnstone*, 2013 FC 113 at para. 155, var'd on other grounds, 2014 FCA 110.
[6] *Hicks v. Human Resources and Skills Canada*, 2013 CHRT 20 at paras. 105-106, affirmed 2015 FC 599.
[7] 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 paras. 124-125.

impact(s) of its discriminatory actions on the victims of the discrimination.[8] Indeed, as noted above, special compensation is to be reserved for the worst cases of discriminatory conduct, wherein the respondent's infringement of the victim's rights under the *CHRA* was intentional or where the consequences were ignored or discounted. Where the evidence demonstrates a respondent's awareness, knowledge or intention in relation to its conduct, special compensation is warranted.

III. The Tribunal's Findings Demonstrate Canada's Wilful and/or Reckless Conduct under the FNCFS Program

11. The evidence in this case is overwhelmingly in favour of an award for special compensation for every First Nations child subject to Canada's First Nations Child and Family Service Program (the "**FNCFS Program**") who has been taken into out-of-home care since 2006. As this Panel has found, the evidence clearly shows that Canada knew its flawed and inequitable funding of the FNCFS Program was driving First Nations children into child welfare care, and knew of the harms to First Nations children arising from being removed from their families and communities. Yet Canada repeatedly chose not to remedy the problem. Canada failed to act on multiple solutions, which were co-developed with, or presented to, it by First Nations experts, Officers of Parliament, House of Commons Committees, and the Canada's own public servants. These solutions could have and would have redressed the discriminatory inequities in the FNCFS Program and assisted vulnerable First Nations children who were placed in and grew up in out-of-home care over the course of more than a decade. Canada's abject failure to act in the face of this knowledge remains unexplained on the evidence.

12. Amplifying Canada's repeated choice to not fix the inequities and flaws in the FNCFS Program is its direct involvement in residential schools and the 60's Scoop, and related litigation. As with the FNCFS Program, each of these cases involved the systemic removal of First Nations children from their families, Nations and cultures. The Truth and Reconciliation Commission of Canada characterized the residential schools as "cultural genocide." Canada's deep involvement in both of these human rights abuses provides compelling evidence that Canada knew, or ought to

[8] *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36, at paras. 214 and 218.

have known, that its failure to remedy the discrimination in the FNCFS Program would give rise to similar multi-generational harms.

13. On January 26, 2016, the Tribunal determined that Canada's FNCFS Program and approach to Jordan's Principle discriminated against First Nations children and families contrary to section 5 of the *CHRA*. The Tribunal generally ordered Aboriginal Affairs and Northern Development Canada, now Indigenous Services Canada ("**ISC**") to cease its discriminatory practices and reform the FNCFS Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the "**1965 Agreement**"). ISC 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 Jordan's Principle.

14. The Tribunal made a number of findings demonstrating that Canada knew its FNCFS Program was resulting in, or contributing to, undue suffering for First Nations children and their families. First, Canada funded and partnered in many of the initial research studies identifying the funding disparity and the adverse impacts experienced by First Nations children and their families:

- The First Nations Child and Family Services Joint National Policy Review, 2000 (the "**NPR**"): a collaborative report by Indian and Northern Affairs Canada and the Assembly of First Nations. The study examined the impacts of Directive 20-1 and made findings regarding the inequity perpetuated by the FNCFS Program.[9]
- The *Wen:De* Reports: funded by INAC, these three reports were commissioned by the National Advisory Committee (which included ISC officials) regarding the FNCFS Program, identifying new options for FNCFS agency funding. The *Wen:De* reports clearly outlined and analyzed the disparity in the funding for FNCFS Agencies and addressed some of the discriminatory impacts of the FNCFS Program.[10]

15. Second, Canada was provided with strong and reliable evidence before and after the complaint was filed that the FNCFS Program caused detrimental impacts to First Nations children and their families:

[9] 2016 CHRT 2 at paras. 150-154, Tab 3 of the JRD (Vol. 1); Book of Documents of the Canadian Human Rights Commission (the "***CBD***"), Vol. 1, Tab 3.
[10] 2016 CHRT 2 at paras. 155-185, Tab 3 of the JRD (Vol. 1); CBD, Vol. 1, Tabs 5 and 6.

- 2008 Report of the Auditor General of Canada: this report echoed the thematic findings of the NPR and the *Wen:De* reports, finding that "current funding practices do not lead to equitable funding among Aboriginal and First Nations communities."[11]

- 2009 Report of the House of Commons Standing Committee on Public Accounts: in February 2009, the House of Commons Standing Committee on Public Accounts held hearings regarding the 2008 Report of the Auditor General. These hearings included participation from officials from the Office of the Auditor General and AANDC. In its report, the committee expressed concern regarding the FNCFS Program and made seven recommendations of its own, including that AANDC ensure its funding formula is based on need.[12]

- 2011 Status Report of the Auditor General of Canada: the Auditor General noted that in response to the 2008 report, AANDC agreed to define reasonably comparable services in the FNCFS Program, but it had failed to do so. The Auditor General noted that funding disparities continued under the FNCFS Program.[13]

- 2012 Report of the Standing Committee on Public Accounts: the Committee again noted that AANDC needed to address the shortcomings in the funding and structure of the FNCFS Program.[14]

16. Finally, Canada's own internal documents demonstrated the disparity in services available for First Nations children and families and the impact of that deprivation. Indeed, Canada measured and tracked the inequality experienced by First Nations children and their families. Some of that evidence includes the following:

- October 2006 Fact Sheet: INAC acknowledged the impacts and findings of the NPR and the *Wen:De* reports. This "fact sheet" was posted on INAC's website and notes that "First Nations children are disproportionately represented in the child welfare system. Placement

[11] 2016 CHRT 2, at paras. 186-192, Tab 3 of the JRD (Vol. 1); CBD, Vol. 3, Tab 11.
[12] 2016 CHRT 2, at paras. 193-204, Tab 3 of the JRD (Vol. 1); CBD, Vol. 3, Tab 15.
[13] 2016 CHRT 2, at paras. 205-210, Tab 3 of the JRD (Vol. 1); CBD, Vol. 5, Tab 53.
[14] 2016 CHRT 2, at paras. 211-215, Tab 3 of the JRD (Vol. 1); CBD, Vol. 4, Tab 45.

rates on reserve reflect a lack of available prevention services to mitigate family crisis [emphasis added]."[15]

- 2005 Policy Committee Presentation: INAC notes that despite maintenance expenditures increasing by 7% to 10% annually, the Department only receives a 2% annual adjustment: "additional investments are now required for further stabilization for basic supports."[16]

- First Nations Child and Family Services Qs and As: This document states: "Circumstances are dire. Inadequate resources may force individual agencies to close down if their mandates are withdrawn, or not extended by the provinces [emphasis added]."[17]

- 2005 National Program Manual: this document outlines some of the cost pressures experienced by FNCFS Agencies in terms of their operational funding.[18]

- Explanations on Expenditures of Social Development Programs: this document notes that, despite the federal government acting as a province in the provision of social development programs on reserve, federal policy for social programs has not kept pace with provincial proactive measures and thus perpetuates the cycle of dependency.[19]

- 2006 Social Programs Presentation: with specific regard to the FNCFCS Program, the presentation states that "efforts have been concentrated on child protection and removal of the child from the parental home with the result that the children in care rate continues to increase [emphasis added]".[20]

- Putting Children and Families First In Alberta: in this document, AANDC describes Directive 20-1 as "broken", further noting that the "current system contributes to dysfunctional relationships [emphasis added]".[21]

- 2007 Evaluation of the FNCFS Program: the findings and recommendations of AANDC's Departmental Audit and Evaluation Branch reflect those of the NPR and the *Wen:De* reports.[22]

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[15] 2016 CHRT 2, at para. 258, Tab 3 of the JRD (Vol. 1); CBD, Vol. 4, Tab 38.
[16] 2016 CHRT 2, at para. 262, Tab 3 of the JRD (Vol. 1); CBD, Vol. 14, Tab 353.
[17] 2016 CHRT 2, at para. 265, Tab 3 of the JRD (Vol. 1); CBD, Vol. 6, Tab 64.
[18] 2016 CHRT 2, at para. 266, Tab 3 of the JRD (Vol. 1); CBD, Vol. 3, Tab 29.
[19] 2016 CHRT 2, at para. 267, Tab 3 of the JRD (Vol. 1); CBD, Vol. 13, Tab 330.
[20] 2016 CHRT 2, at para. 268, Tab 3 of the JRD (Vol. 1); CBD, Vol. 13, Tab 354.
[21] 2016 CHRT 2, at paras. 270-271, Tab 3 of the JRD (Vol. 1); CBD, Vol. 6, Tab 81.
[22] 2016 CHRT 2, at paras. 273-275, Tab 3 of the JRD (Vol. 1); CBD, Vol. 13, Tab 303.

17. In the face of clear and cogent evidence that the FNCFS Program was causing adverse effects for First Nations children and families, Canada argued that the Tribunal should not place great weight on the evidence noted above. The Tribunal refused to accept this argument, finding:

> [305] Overall, on the issue of the relevance and reliability of the reports on the FNCFS Program, the Panel finds that from the years 2000 to 2012 many reliable sources have identified the adverse effects of the funding formulas and structure of the FNCFS Program. AANDC was involved in the *NPR* and Wen:De reports, and acknowledged and accepted the findings and recommendations in the Auditor General and Standing Committee on Public Account's reports, including developing an action plan to address those recommendations. As the internal evaluations and other relevant and reliable AANDC documents demonstrate, those studies and reports became the basis for reforming Directive 20-1 into the EPFA and, subsequently, recommendations to reform the EPFA. It is only now, in the context of this Complaint, that AANDC raises concerns about the reliability and weight of the various reports on the FNCFS Program outlined above. Moreover, the internal documents discussed above support those reports and are AANDC's own evaluations, recommendations and presentations prepared by its high ranking employees. For these reasons, the Panel does not accept AANDC's argument that the reports on the FNCFS Program have little or no weight and accepts the findings in those reports, along with the corroborating information in documents relied on above.[23] [Emphasis added]

18. 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. The Tribunal has found as follows:

- AANDC knew that Directive 20-1 created incentives to remove children from their homes and communities[24];
- Despite being aware of the incentive to take children into care, AANDC incorporated this shortcoming into the EPFA[25];

[23] 2016 CHRT 2, at para. 305, Tab 3 of the JRD (Vol. 1).
[24] 2016 CHRT 2, at paras. 168, 385, 386 and 458, Tab 3 of the JRD (Vol. 1).
[25] 2016 CHRT 2, at para. 386, Tab 3 of the JRD (Vol. 1).

- AANDC was aware, through various reports and evaluations of the FNCFS Program, that the FNCFS Program is not adapted to provincial/territorial legislation and standards, creating funding deficiencies for such items as salaries, benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures[26]; and

- Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC did not significantly modify the program since its inception in 1990.[27]

19. 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.[28]

20. 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.

21. 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.

[26] 2016 CHRT 2, at para. 389, Tab 3 of the JRD (Vol. 1).
[27] 2016 CHRT 2, at para. 461, Tab 3 of the JRD (Vol. 1).
[28] As noted by the Auditor General, the ushering in of the EPFA did little to redress the discriminatory impact of Directive 20-1.

22. Moreover, recent research demonstrates that the FNCFS Program continued to perpetuate many discriminatory aspects of the program after the Tribunal's 2016 decision. In December of 2018, the Institute of Fiscal Studies and Democracy ("**IFSD**") released its report entitled *Enabling First Nations Children to Thrive* (the "**IFSD Report**"). The IFSD Report analyzes FNCFS Agency funding per the Tribunal's January 26, 2016 Decision. The IFSD Report demonstrates that as of fiscal year 2017/18 many agencies still struggled to provide adequate preventative services and could not remunerate their employees at provincial standards.[29] Information technology is also severely underfunded[30] and sixty percent of agencies needed new capital and capital repair and maintenance.[31] Meanwhile, the most significant cost driver continued to be the number of children in care, which correlates tightly to agency total budgets.[32]

23. The IFSD Report makes a number of important recommendations geared towards addressing some of the most prevalent and serious funding issues facing FNCFS Agencies. In addition, the IFSD Report recommends further research to develop a range of funding options to support an enhanced performance framework.[33] At both the National Advisory Committee (the "**NAC**") and through the CCCW, the Caring Society and the First Nations members of the NAC have called on Canada to implement the next phase of the research to enable long-term FNCFS Program reform. This request has been rebuffed by Canada, with little to no meaningful justification or explanation nor has Canada proposed a meaningful and evidence based alternative approach to achieve long term reform.[34] The Caring Society submits that Canada's stalling on long term reform is reminiscent of its response to recommendations from previous studies.

24. 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). 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

[29] IFSD Report; Affidavit of Lorri Warner, dated January 29, 2019, Exhibit "2" at pp. 2, 4, 78, and 93.
[30] IFSD Report; Affidavit of Lorri Warner, dated January 29, 2019, Exhibit "2" at pp. 2, 8, 72-77, and 93.
[31] IFSD Report; Affidavit of Lorri Warner, dated January 29, 2019, Exhibit "2" at pp. 2-4, 70-72, and 93.
[32] IFSD Report, Affidavit of Lorri Warner, dated January 29, 2019, Exhibit "2" at pp. 2 and 40.
[33] IFSD Report; Affidavit of Lorri Warner, dated January 29, 2019, Exhibit "2" at pp. 5 and 96.
[34] Affidavit of Spenser Chalmers, affirmed April 3, 2019 ("**Chalmers Affidavit**") at Exhibit "D" (Draft Record of Decision of the January 17, 2019 Meeting of the Consultation Committee on Child Welfare); Chalmers Affidavit at Exhibits "E", "F", and "G" (Correspondence between the Caring Society and Canada).

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"[35] in order to prevent continuation and recurrence of such discriminatory conduct in future, including generally in other programs.

IV. The Evidence Demonstrates Canada's Wilful and Reckless Conduct in Relation to Jordan's Principle

25. Jordan River Anderson, a citizen of Norway House Cree Nation, was born in 1999 with complex medical needs. After spending the first two years of his life in hospital, Jordan's medical team determined that he could leave the hospital to live in a specialized foster home close to the hospital in Winnipeg. However, for two years, Canada and Manitoba argued over payment for Jordan's at home care costs. Meanwhile, Jordan remained in hospital for these two years, before sadly dying at age 5. He never left the hospital because he was a First Nations child and governments prioritized their needs above his.

26. In recognition of Jordan, Jordan's Principle ensures First Nations children receive the public services they need when they need them, free of adverse differentiation or denials related to their First Nations identity. On December 12, 2007, the House of Commons unanimously passed a motion that the federal government should immediately adopt a child-first principle based on Jordan's Principle, to resolve jurisdictional disputes for First Nations children.[36]

27. The Caring Society submits 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.[37] 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

[35] (*Canada (Attorney General) v. Johnstone*, 2013 FC 113 at para. 155, var'd on other grounds, 2014 FCA 110.
[36] 2016 CHRT 2, at para. 353, Tab 3 of the JRD (Vol. 1).
[37] See for example the *Wen:De Reports:* CBD, Vol. 1, Tabs 5 and 6.

the *CHRA* for the victims of Canada's willfully reckless discriminatory conduct in relation to Jordan's Principle from December 2007 to November 2017.

28. On January 26, 2016, the Tribunal determined that the federal government's application of Jordan's Principle was discriminatory under the *CHRA*, finding Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. The Tribunal ordered Canada to immediately implement the full meaning and scope of Jordan's Principle.[38]

29. The Tribunal made a number of findings in the January 2016 Decision which demonstrate that Canada had long known that First Nations children and families were suffering the effects of discrimination owing to its failure to implement Jordan's Principle:

- *Wen:De Reports:* Both *Wen:De* reports reference Jordan's Principle and jurisdictional disputes. The third *Wen:De* report specifically recommends the implementation of the full scope and meaning Jordan's Principle, noting that jurisdictional disputes were causing detrimental impacts for First Nations Children;[39]
- 2008 Report of the Auditor General of Canada: this report noted that jurisdictional disputes within the federal government were negatively impacting First Nations children, causing delay, availability timing and level of services to First Nations children;[40]
- November 29, 2012 Request: this request was made to AANDC by the family of a four-year-old First Nations child who had suffered cardiac arrest and anoxic brain injury during a routine dental examination. The child required significant medical equipment following her discharge from hospital. AANDC and Health Canada argued about which equipment would be covered and eventually failed to provide the service/products the child needed. Eventually an anonymous donor stepped in to help the child;[41]
- INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nations Children and Families in BC Region, June 3, 2009: this document identifies gaps based on

[38] 2016 CHRT 2, at paras. 458 and 481, Tab 3 of the JRD (Vol. 1).
[39] 2016 CHRT 2, at paras. 362-363, Tab 3 of the JRD (Vol. 1). See also the NPR found at CBD Vol. 1, Tab 3.
[40] 2016 CHRT 2 at para. 365, Tab 3 of the JRD (Vol. 1).
[41] 2016 CHRT 2 at paras. 366-367, Tab 3 of the JRD (Vol. 1).

the first-hand experience of AANDC officials and FNCFS Agencies. It clearly demonstrates the adverse impacts faced by First Nations children denied services that would have been covered had Jordan's Principle been properly implemented;[42]

30. Canada's own evaluation of the FNCFS Program underlined the detrimental impact of unwarranted jurisdictional disputes on First Nations children, including the 2007 Evaluation of the FNCFS Program and the 2010 AANDC Evaluation of the Implementation of the EPFA in Alberta.[43] Similar to the FNCFCS Program, Canada tracked its own discriminatory conduct in relation to Jordan's Principle[44] while simultaneously nominating the public servants charged with implementing Canada's discriminatory approach to Jordan's Principle for the Deputy Minister's award.[45] Canada rewarded its public servants while children lost hope and in some cases lost their lives, never having received the help they needed and deserved.

31. As also noted by the Tribunal in its January 2016 Decision, Canada was well aware of its discriminatory conduct in relation to Jordan's Principle following the 2013 Federal Court decision in *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Federal Court found Canada's interpretation of Jordan's Principle to be narrow and its failure to apply Jordan's Principle unreasonable. Quoting the Court's findings directly:

> I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The *SAA* and *Regulations* require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC. […]
>
> Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and costs that meet the needs of the on reserve First Nation child.[46] [Emphasis added]

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[42] 2016 CHRT 2, at paras. 368-373, Tab 3 of the JRD (Vol. 1); CBD, Vol. 6, Tab 78.
[43] 2016 CHRT 2, at paras. 374-376, Tab 3 of the JRD (Vol. 1); CBD, Vol. 15, Tab 420.
[44] See for example AANDC Record of Decision, February 8, 2010, CBD, Vol. 15, Tab 421; JP Chart – FN Children with Disabilities August 31, 2009, CBD, Vol. 15, Tab 422; Federal Focal Points Tracking Reference Chart – January 2013, Exhibit "C" to the Chalmers Affidavit.
[45] 2011 Deputy Ministers' Recognition Award Nomination Form, CBD, Vol. 13, Tab 327.
[46] *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342, at paras. 111 and 116.

32. Nonetheless, following the January 2016 Decision, Canada continued to implement a discriminatory definition of Jordan's Principle. The Tribunal can, and ought to, find that Canada intentionally carried out this discrimination. Canada accepted the Tribunal's findings that its interpretation and application of Jordan's Principle was discriminatory, and did not pursue a judicial review. Canada also knew that the Tribunal did not confine Jordan's Principle to First Nations children living on reserve with multiple disabilities or children with short term illnesses. As the Tribunal held in its January 2016 decision:

> Jordan's Principle is a child-first principle and provides that were a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.[47] [Emphasis in original]

33. In the following years, the Tribunal has rendered several non-compliance orders against Canada in relation to Jordan's Principle.[48]

34. In 2016 CHRT 10, the Tribunal specified that its January 2016 Decision required Canada to immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term. Canada was ordered to immediately consider Jordan's Principle as including all jurisdictional disputes and involving all First Nations children. The Tribunal further ordered that services should be made available without the need for policy review or case conferencing.[49]

35. In 2016 CHRT 16, the Tribunal cautioned that Canada's "new formulation" of Jordan's Principle once again appeared to be more restrictive than the one formulated by the House of Commons. The Tribunal ordered Canada to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve.[50] Again, however, Canada did not comply.

[47] 2016 CHRT 2, at para. 351, Tab 3 of the JRD (Vol. 1).
[48] 2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14 (as amended by 2017 CHRT 35), and 2019 CHRT 7.
[49] 2016 CHRT 10, at paras. 30-34, Tab 6 of the JRD (Vol. 1).
[50] 2016 CHRT 16, at paras. 102-120, Tab 8 of the JRD (Vol. 1).

36. In 2017 CHRT 14, (as amended by 2017 CHRT 35), the Panel found, based on Canada's own witnesses and own internal documents, that Canada's definition did not fully address the findings of the January 2016 Decision and was not sufficiently responsive to the previous orders of the Tribunal. The Caring Society submits that Canada had knowledge that its lack of progress in implementing Jordan's Principle caused detrimental impacts for First Nations children. Indeed, the Panel found as follows:

> Despite the findings in the *Decision*, Canada has repeated its pattern of conduct and narrow focus with respect to Jordan's Principle. In February 2016, a few weeks after the release of the *Decision*, Canada considered various new definitions of Jordan's Principle. […][51]
>
> Ultimately, it was "option one" that was selected for implementation, an option that *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document considers to be not fully responsive to the Tribunal's order.[52]
>
> [T]he fact that it is considered an "exception" to go beyond the normative standard of care is concerning given the findings in the *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the *Decision*. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan's Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination.[53] […]
>
> Canada's current approach to Jordan's Principle is similar to the strategy it employed from 2009-2012 and as described in paragraph 356 of the *Decision*. During that time, Canada allocated $11 million to fund Jordan's Principle. The funds were provided annually, in $3 million increments. No Jordan's Principle cases were identified and the funds were never accessed and lapsed. The Panel determined it was Health Canada and INAC's narrow interpretation of Jordan's Principle that resulted in there being no cases

[51] 2017 CHRT 14 at para. 50, Tab 13 of the JRD (Vol. 2).
[52] 2017 CHRT 14 at para. 52, Tab 13 of the JRD (Vol. 2).
[53] 2017 CHRT 14 at para. 73, Tab 13 of the JRD (Vol. 2).

> meeting the criteria for Jordan's Principle (see *Decision* at paras. 379-382).[54] [Emphasis added]

37. The Caring Society submits that Canada's conduct following the January 2016 decision is particularly egregious, ignoring the clear direction of the Tribunal and knowingly failing to redress its discriminatory approach to Jordan's Principle. It must be denounced and deterred.

V. The Special Compensation Ought to be Placed in a Trust

38. 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;[55] 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. The Caring Society proposes that the Trust be called the Spirit Bear Trust.

39. The purpose of the Spirit Bear Trust will be to provide access to services through the funds placed in trust, for services such as culture and language programs, family reunification programs, counselling, health and wellness programs, and education programs. The Caring Society is not suggesting that it would develop or deliver any of these programs. Instead, the Caring Society plans to leave this important work in the hands of the Trustees.

40. The beneficiaries of the Spirit Bear Trust shall be (a) First Nations individuals affected by Canada's FNCFS Program who, as children, were taken into out-of-home care since 2006 until a date to be determined by the Tribunal, which date shall be determined on the basis that the FNCFS Program is free from discrimination and (b) for every First Nations individual who, as a child, did not receive an eligible service or product pursuant to Canada's discriminatory approach to Jordan's Principle from December 2007 to November 2017.

41. 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

[54] 2017 CHRT 14 at para. 77, Tab 13 of the JRD (Vol. 2).
[55] The most current estimate available to the parties runs to the end of the 2017/18 fiscal year, see Chalmers Affidavit at Exhibits "A" and "B".

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 Spirt Bear Trust would be appointed by order of the Tribunal.

42. 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 Spirit Bear 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 Spirit Bear Trust; (v) how decisions of the Board of Trustees shall be made; and (vi) how the Spirit Bear Trust will be administered. 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.

43. 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.

VI. Individual Compensation as opposed to In-Trust Compensation

44. The Panel has reviewed the 2014 submissions of the AFN, which request individual compensation for pain and suffering as well as willful acts of discrimination, and those of the Caring Society. The Panel poses the following important questions:

1. Why not do both individual compensation and a trust?
2. Who should decide for the victims?
3. The victims' rights belong to the victims do they not?

45. 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)). 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.

46. 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. 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.

47. 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.[56] 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 2018-2019), and Canada's witness regarding Jordan's Principle has acknowledged that these requests reflected unmet needs.[57]

48. Recently a class action was filed in the Federal Court: *Xavier Moushoom v. Attorney General of Canada*, Court File No. T-402-19, seeking individual compensation for (i) First Nations individuals who were under the applicable provincial/territorial age of majority between April 1,1991 and March 1, 2019 and were taken into out-of-home care while they or at least one of their parent(s) were ordinarily resident on reserve; and (ii) all First Nations individuals who were under the applicable provincial/territorial age of majority between April 1,1991 and March 1, 2019 and were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, on the grounds of lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department (the "**Class Action**"). The Class Action alleges that the underfunding of child and family services for First Nations children living on reserve and in the Yukon gives rise to liability on the part of the Crown such that damages are owing. The Class Action makes similar allegations respecting Jordan's Principle.

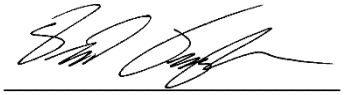
[56] Exhibits "A" and "B" to the Chalmers Affidavit. See also Exhibit "H" to the Chalmers Affidavit, being Tab 297 of the CBD, which is a table titled "First Nations Child & Family Services (FNCFS) Total Number of Children in Care (includes CFS, CSS, and Provincial data).

[57] Tab 5 to the Exhibit Brief of the Cross Examination of Dr. Valerie Gideon, October 30-31, 2018; Cross-examination of Dr. Valerie Gideon, October 30, 2018 at p 191 lines 15-25, Tab 41 of the JRD (Vol. 7).

49. Regarding the Panel's question of "who should decide for the victims", the Caring Society respectfully submits 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.

50. 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 interests 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.

All of which is respectfully submitted this 3rd day of April, 2019.



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