Tribunal File: 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 CANADA
and NISHNAWBE ASKI NATION

Interested Parties

WRITTEN SUBMISSIONS OF THE ASSEMBLY OF FIRST NATIONS REGARDING COMPENSATION (Returnable April 25-26, 2019)

ORIGINAL TO: **Canadian Human Rights Tribunal**
c/o Judy Dubois, Registry Officer
240 Sparks Street, 6th Floor West
Ottawa, ON K1A 1J4

AND TO: **Attorney General of Canada**
(representing the Minister of Indigenous Services Canada)

Per: Robert Frater, QC
Jonathan Tarlton
Patricia MacPhee
Kelly Peck
Max Binnie
Department of Justice Canada
500-50 O'Connor Street
Ottawa, ON K1A 0H8
T: (613) 670-6289
F: (613) 954-1920
rfrater@justice.gc.ca
Jonathan.Tarlton@justice.gc.ca
Patricia.MacPhee@justice.gc.ca
Kelly.Peck@justice.gc.ca
Max.Binnie@justice.gc.ca

Counsel for the Respondent, Attorney General of Canada

AND TO: **First Nations Child & Family Caring Society of Canada**

Per: David P. Taylor
Conway Baxter Wilson LLP/s.r.l.
Suite 400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9
T: (613) 691-0368
dtaylor@conway.pro

Sarah Clarke
Clarke Child & Family Law
Suite 950 – 36 Toronto Street
Toronto, ON M5C 2C5
T: (416) 260-3030
sarah@childandfamilylaw.ca

Counsel for the Complainant, First Nations Child & Family Caring Society of Canada

AND TO: **Canadian Human Rights Commission**

Per: Brian Smith
Daniel Poulin
Jessica Walsh
344 Slater Street, 8th Floor
Ottawa, ON K1A 1E1
T: (613) 943-9532
F: (613) 993-3089
Brian.Smith@chrc-ccdp.gc.ca
Daniel.Poulin@chrc-ccdp.gc.ca
Jessica.walsh@chrc-ccdp.gc.ca

Counsel for the Commission

AND TO: **Chiefs of Ontario**

Per: Maggie E. Wente
Kaitlin Ritchie
Sinéad Dearman
Olthuis, Kleer, Townshend LLP
250 University Avenue, 8th Floor
Toronto, ON M5H 3E5
T: (416) 981-9330
F: (416) 981-9350
MWente@oktlaw.com
KRitchie@oktlaw.com
SDearman@oktlaw.com

Counsel for the Interested Party, Chiefs of Ontario

AND TO: **Amnesty International Canada**

Per: Justin Safayeni
Stockwoods LLP Barristers
77 King Street West, Suite 4130
Toronto, ON M5K 1H1
T: (416) 593-3494
F: (416) 593-9345
justins@stockwoods.ca

Counsel for the Interested Party, Amnesty International Canada

AND TO: **Nishnawbe Aski Nation**

Per: Julian Falconer
Akosua Matthews
Molly Churchill
Falconers LLP
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A9
T: (416) 964-0495
F: (416) 929-8179
julianf@falconers.ca
akosuam@falconers.ca
mollyc@falconers.ca

Counsel for the Interested Party, Nishnawbe Aski Nation

Contents

I. OVERVIEW

1. The Respondent, Attorney General of Canada (representing the Minister of Indian and Northern Development Canada), was found to have engaged in a discriminatory practice contrary to section 5 the *Canadian Human Rights Act*. Specifically, the Respondent was found to discriminate in the provision of child and family services, on the basis of race and/or national or ethnic origin, by denying equal child and family services and/or differentiating adversely in the provision of child and family services, against First Nations children and families living on reserve and in the Yukon.[1] Where a complaint is substantiated, such as in this case, the Tribunal has considerable statutory discretion[2] and broad remedial powers[3] in fashioning an appropriate remedy, which includes compensation for any pain and suffering the victims experience as a result of the discriminatory practice pursuant to s. 53(2)(e) and 53(3).

II. FACTS

2. The AFN relies on the facts as stated in the Panel's decision in 2016 CHRT 2 issued on January 26, 2016, and subsequent six (6) decisions, namely, 2016 CHRT 10 (April 26, 2016), 2016 CHRT 16 (September 14, 2016), 2017 CHRT 14 (May 26, 2017), 2017 CHRT 35 (November 2, 2017), 2018 CHRT 4 (February 1, 2018), and 2019 CHRT 1 (January 7, 2019).

III. ISSUE

3. The AFN submits the issue to be determined is the appropriateness of an order granting an award of compensation under s. 53(2)(e) to the victim of discrimination for any pain and suffering the victim experienced as a result of the Respondent's discriminatory practice, and under s. 53(3), the appropriateness of an order for an award of compensation to the victim because the discriminatory practice was engaged in willfully and recklessly.

---

[1] 2016 CHRT 2, paras 456-467.
[2] *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FC 56, para 296.
[3] *Canada (AG) v. Mowat*, 2009 FCA 309, para 25.

IV. SUBMISSIONS

A. AFN's Remedial Request for Compensation

4. The Tribunal's remedial jurisdiction lies in subsection 53(2) of the Act that establishes several broad remedies made available to the Tribunal, that includes compensation, when a complaint is substantiated.[4]

5. The AFN submitted to the Panel on August 29, 2014 the following remedial request: "An Order that AANDC, AFN, FNCFCS and the Commission form an expert panel to establish appropriate individual compensation (pain and suffering as well as wilful acts of discrimination), for children, parents and siblings impacted by the discriminatory First Nation child welfare practices between 2006 and the date of the Tribunal's Order in this matter, which AFN and the FNCFCS participation will be funded by AANDC."

6. The 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[5], and to attempt to make the victims of the discrimination whole again.[6] The Respondent's discriminatory practice is a perpetuation of systemic discrimination against First Nations people, as well as the perpetuation of historic disadvantage and prejudice committed against by Canada against First Nations peoples and communities.

7. The very nature of systemic discrimination raises special difficulties and requires creative measures in order to prevent it from occurring in the future. In these circumstances, the Respondent's systemic discrimination against First Nations peoples has historically been intentional, and it is rooted in a complicated relationship that goes back many decades. The systemic discrimination is also rooted in the Respondent's attitudes, prejudices, mind sets and habits against First Nations people which it has acquired,

[4] *Taylor v. Canada (AG)*, [2000] 3 FC 298, 2000 CanLII 17120 (FCA), para 70.
[5] 2016 CHRT 1, para 105.
[6] *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FC 56, para 299.

fostered and maintained over generations. [7] 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".[8] The Panel also stated the following:

> With specific regard to the circumstances of this case, section 53(2)(a) of the CHRA has been described as being designed to meet the problem of systemic discrimination (see *Action Travail des Femmes* at p. 1138 referring to the CHRA, S.C. 1976-77, c. 33 s. 41(2)(a) [now s. 53(2)(a)]). To combat systemic discrimination, "it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged" (*Action Travail des Femmes* at p. 1139). That is, for the Tribunal to redress and prevent systemic discriminatory practices, it must consider any historical patterns of discrimination in order to design appropriate strategies for the future (see *Action Travail des Femmes* at p. 1141).[9]

8. It was found by the Panel that residential schools transformed into an aspect of the child welfare system whereby "[t]he primary role of many Residential Schools changed from a focus on "education" to a focus on "child welfare".[10] Dr. Amy Bombay testified on the impacts of individual and collective trauma experienced by Aboriginal peoples, that the Panel found highly relevant to this case.[11] The Panel stated:

> Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor

[7] *CN v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, pp. 1138-1146.
[8] 2016 CHRT 2, para 412.
[9] 2016 CHRT 10, para 18.
[10] 2016 CHRT 2, 413-414.
[11] 2016 CHRT 2, 415.

infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.[12] (emphasis added)

9. 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), 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.

B. Compensation for Pain and Suffering

10. Section 53(2)(e) of the CHRA provides the Tribunal with the authority to award compensation for any pain and suffering experienced as a result of the discriminatory practice. In *Walden*, Member Karen Jensen for the Tribunal found an award for pain and suffering requires an evidentiary basis outlining the effects of the discriminatory practice on the individuals concerns, in this case, First Nations children and families living on reserve and in the Yukon.[13]

11. Likewise, section 53(3) provides the Tribunal with authority to award special compensation for wilful or reckless discrimination, which is intended to serve as a

[12] 2016 CHRT 2, para 422.

[13] *Walden et al v. Social Development, Treasury Board of Canada and Public Service Human Resources Management Agency of Canada*, 2009 CHRT 16, paras 155-166. *Walden v. Social Development Canada*, 2007 CHRT 56, affirmed in 201 FC 490, and *Walden v. Social Development Canada*, 2009 CHRT 16, judicial review allowed in 2010 FC 1135 and affirmed in 2011 FCA 202 regarding the Tribunal breaching the complainant's right to natural justice and a fair hearing by directing that no additional evidence was required from the complainants on pain and suffering and then dismissing their claim for pain and suffering because they did not present any additional evidence.

deterrent and to discourage any deliberate acts of discrimination. The Tribunal recently held that:

> "A finding of willfulness requires that the discriminatory act and the infringement of the person's rights under the Act is intentional. A finding of recklessness generally denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly. The award of the maximum under the section should be reserved for the very worst cases."[14]

12. 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, that is discussed further below in response to the Panel's questions.

13. Establishing quantum for an award for pain and suffering also requires an evidentiary basis outlining the effects of the discriminatory practice on the individuals concerned. The FCA stated in *PSAC v. Canada (DND)*[15] that it is well settled in law that once it is known that a plaintiff has suffered a loss, a court cannot refuse to make an award simply because the proof of the precise amount of the loss is difficult or impossible. The judge must do the best he or she can with the evidence that is available.[16]

---

[14] *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.* 2017 CHRT 36 at para 214.
[15] *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FC 789, [1996] FCJ No. 842, para 44.
[16] *Walden et al v. Social Development, Treasury Board of Canada and Public Service Human Resources Management Agency of Canada*, 2009 CHRT 16, paras 69-75, referring to *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FC 789, [1996] FCJ No. 842.

14. In addition, under the CHRA, the Tribunal has the authority to grant retroactive relief under the Act, and based on the philosophy of the Act that is designed to make whole victims of discrimination.[17]

15. With respect to the evidence, the Tribunal is empowered to accept evidence of various forms, including hearsay.[18] 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.[19]

C. Compensation for Wilful and Reckless

16. The AFN has been mandated 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.[20]

17. 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.[21]

---

[17] *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FC 789 (FCA), paras 31-33; *Walden et al v. Social Development, Treasury Board of Canada and Public Service Human Resources Management Agency of Canada*, 2009 CHRT 16, para 72.
[18] Section 50(3)(c) of the CHRA; also, 2019 CHRT 7, para 61; *Big River First Nation v. Dodwell*, 2012 FC 766, paras 69, 87, and 92.
[19] *Canadian Human Rights Commission v. Canada (AG)*, 2010 FC 1135, paras 68-75. See, *Teather v. Kawashima*, 2016 BCSC 2231, paras 27-34.
[20] 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.
[21] *Ibid*.

18. 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.[22]

19. The AFN submits as well 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.[23]

D. Effects of the Respondent's Discriminatory Practice

20. 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 including in British Columbia.[24]

21. Service gaps in terms of the delivery of services and the interprovincial movement of children as part of child welfare services continues to be a national issue surrounding the provision of services to First Nations youth, and from an international perspective, a humanitarian crisis is happening in Canada with respect to its child welfare system.[25]

22. Aboriginal children are disproportionately involved in the child protection system. In 2010, one in five Aboriginal children in British Columbia would have some involvement of the child welfare system in their life at some point. These issues continue to persist on a national level today.[26] In some cases, there is an apparent disconnect between announced changes to the child welfare system and what is occurring on the ground.[27] It

[22] *Ibid*.
[23] *Ibid*.
[24] Affidavit of Dr. Mary Ellen Turpel-Lafond, paras 7-10.
[25] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 12.
[26] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 13.
[27] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 15.

would appear that commitments to fundamental changes to the child welfare system may be hollow.[28]

23. A significant number of reports of injuries have been reported that children and youth experienced who were in some way involved in the child welfare system. Included among these injuries are unwanted sexual contact, which is significantly underreported, this issue being particularly worrisome given level of vulnerability for Aboriginal girls. The exposure of Aboriginal boys and girls to violence is acute, and the frequency and dose of violence, including sexual violence, in their lives is the most acute of all categories reported.[29] According to Dr. Turpel-Lafond:

> "The [2016] review identified that years of government policies, including the forced removal of Indigenous children to residential schools, the experience of neglect and physical and sexual abuse for many of the children in these institutional settings and their resulting intergenerational harm, have created the conditions where some Indigenous children and youth are at heightened risk for sexual abuse."[30]

24. Aboriginal children and youth continue to experience discrimination. For example, they continue to face barriers in the provision of services being identified as a participant in violence rather than the victim. [31] They were also over-represented in a recent cohort reviewed with respect to self-harm and suicide, which the AFN submits is reflective of a national scale. With respect to infant deaths while in care, a significant majority of them are Aboriginal, primarily First Nations and Metis, which speaks to the interplay of poverty and lack of support services for Aboriginal women of reproductive age. The level of support to counter the barriers and risk factors faced by Indigenous families is largely insufficient.[32]

25. Deep-seated intergenerational patterns continue to persist with respect to child welfare.[33] Included in these patterns are professional indifference. A systemic level of

[28] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 16.
[29] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 17-18
[30] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 19.
[31] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 20.
[32] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 27-28.
[33] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 28.

discrimination continues with respect to Aboriginal children involved in the child welfare system, which has a high component of First Nations yet a child welfare system with lots of indifference and poor representation by Indigenous people.[34]

26. The impacts of being in the child welfare system often remain with young people who transition out of the system. There remains much to be done to assist them to become full, contributing members of society. Many face longer-term difficulties in their lives. In the opinion of Dr. Turpel-Lafond, there is a humanitarian crisis with respect to the removal of First Nations children and issues with the child welfare system, particularly when viewed at through an international lens and the prohibition of racial discrimination espoused under international law. These are serious issues which require evaluation from a human rights perspective.[35]

E. Guidance from the Indian Residential School Settlement

27. The AFN's 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 Canadian Human Rights 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.

28. 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.

[34] Affidavit of Dr. Mary Ellen Turpel-Lafond, para 31.
[35] Affidavit of Dr. Mary Ellen Turpel-Lafond, paras 40-41.

29. The AFN's 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.

30. The IRSSA came into effect on September 19, 2007 but it was borne from an Alternative Dispute Resolution process that began 4 years prior.[36] From that process, a study was conducted towards achieving a better process that addressed compensation and reconciliation matters. It was found that compensation alone would not achieve the goals of reconciliation and healing sought by the IRS survivors. Similarly, in this case, there may be non-monetary needs to assist in making the victims of discrimination whole again.[37]

31. 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 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.[38]

32. 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.[39]

[36] Affidavit of Jeremy Kolodziej, para 6.
[37] Affidavit of Jeremy Kolodziej, paras 7-8.
[38] Affidavit of Jeremy Kolodziej, para 15.
[39] Affidavit of Jeremy Kolodziej, paras 19-22.

33. There are other parallels to consider as well such as those set out in the Affidavit of Jeremy Kolodziej. The AFN submits that a remedial process overseen by an independent body could function efficiently and effectively for the victims of discrimination. In the case of the IRSSA, the process managed to provide compensation to thousands of claimants.[40] A similar process is envisioned under the AFN's remedial request in this case.

F. Uncertified Class Action in Federal Court

34. The AFN 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".[41] 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.

G. Major Capital

35. The AFN supports the submissions of the Caring Society and adds the following.

36. In its initial Decision, this Panel found that the funding structure under the FNCFS Program provided deficiencies funding for capital infrastructure. Such deficiencies hindered "the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families."[42]

---

[40] Affidavit of Jeremy Kolodziej, para 26.
[41] Statement of Claim, *Xavier Moushoom v. AGC, Federal Court of Canada*, Court File No. T-402-19, paragraph 11.
[42] 2016 CHRT 2 at para 458.

37. As noted by the Caring Society at para 16 of their submissions dated February 4, 2019, the Parties have discussed major capital at the Consultation Committee on Child Welfare (CCCW) and little progress has been made on addressing this matter. To date, the Respondent has not provided any meaningful commitment to meet the needs of First Nation child welfare agencies which continue to provide services out of facilities that do not meet provincial standards.

38. On December 15, 2019 the Institute of Fiscal Studies and Democracy (IFSD) produced its report to the AFN which reasserts a need for Canada to provide proper capital funding allocations to First Nations child welfare agencies. The IFSD suggests that an immediate infusion of investments in the range of $116 million to $175 million is required for these agencies to meet basic standards set by the provincial governments.[43]

39. The AFN submits an Order requiring the Respondent to work with the Parties to develop a long-term solution to address capital infrastructure by a fix date is both desirable and necessary.

H. Restitution for downward scaling for small FNCFS Agencies not otherwise covered by the Panel's orders with respect to reimbursement at actuals

40. The AFN supports the submissions of the Caring Society.

V. ORDER REQUESTED

41. The AFN seeks an Order that AANDC, AFN, FNCFCS and the Commission form an expert panel to establish appropriate individual compensation (pain and suffering as well as wilful acts of discrimination), for children, parents and siblings impacted by the discriminatory First Nation child welfare practices between 2006 and the date of the

[43] Affidavit of Lorri Warner, Exhibit "2", Institute of Fiscal Studies and Democracy, Enabling First Nations Children to Thrive, Report to the Assembly of First Nations pursuant to Contract No. 19-00505-001, December 15, 2018, p. 3.

Tribunal's Order in this matter, which AFN and the FNCFCS participation will be funded by AANDC.

VI. RESPONSE TO PANEL'S QUESTIONS

42. In response to the Panel's **first question**, which is directed at the AFN, the AFN still intends to pursue the same remedial request as set out in its earlier submissions dated August 29, 2014. To explain, the AFN sees individual compensation for any pain and suffering as an important matter that can be dealt with under the Tribunal's jurisdiction and process. We understand that this remedial request is potentially grand in scale, however there is information and guidance to be taken from the IRSSA that managed to process and resolve thousands of cases. Indeed, any Court or Tribunal would potentially view the AFN's request as being grand in scale, however we don't believe this is a reason not to grant the request.

43. The process would certainly have to be negotiated with Canada and the parties in determining how to execute individual compensation. There are many details to sort out which go beyond the scope of the requested answer, but the AFN believes resolving individual compensation through the Tribunal is achievable under the CHRA and that the request is sufficiently connected to s. 53(2)(e) and 53(3).

44. The AFN sees the expert panel or independent body as an advisory board for the Tribunal, not as a separate tribunal. The expert panel would be empowered under a settlement agreement between Canada and the parties, to be endorsed by the Tribunal, wherein a process is established to address individual compensation. Undoubtedly, there could be great variation in the types of individual cases, and so any process to be established should approach compensation on a case-by-case basis, like the IRSSA, addressing the unique circumstances of each case with the findings of the Tribunal. Cases could be addressed by adjudicators empowered under the settlement agreement who answer to the Tribunal, thereby keeping their designations narrow and avoiding overlap with the Tribunal.

45. The AFN is concerned about harm to First Nations children and families. For example, removals of children from their homes and communities requires special care by a process that is aware of the discrimination experienced by First Nations children and families. The AFN believes an expert panel constituted by individuals who are experienced and learned in this case, the discriminatory practices of the Respondent, and the Panel's findings is an appropriate answer to resolving compensation.

46. The AFN is willing to consider expert panel members who are not the parties in this matter. To clarify, it may be more appropriate to establish an expert panel with individuals endorsed by the parties, rather than the parties themselves. By endorsing the panel, the parties are endorsing the process, and establishing a commitment to seeing that compensation is addressed through an agreed upon process that is specifically tailored to the unique circumstances in this case.

47. The AFN is open to suggestions from the Tribunal. For example, it may be appropriate to establish a committee of the parties to identify the victims of discrimination and then submit this account to the Panel. However, the AFN would remain concerned in such a situation about addressing any unique circumstances of the victims, and would be reluctant to broadly categorize victims, thereby possibly overlooking important aspects of any individual victim. The AFN agrees it would be appropriate to include the COO and NAN given their specific expertise.

48. In response to the Panel's **second question**, this is directed at NAN and the AFN has not comment to offer.

49. In response to the Panel's **third question**, the AFN is open to establishing a trust as submitted by the Caring Society, as well as individual compensation, and that the two could be pursued collectively and simultaneously. However, the AFN prefers direct compensation to the individual families and children based on a case-by-case assessment that responds to their unique circumstances. We believe this preferable because it responds more directly to any pain and suffering and avoids broad categories that do no

address unique circumstances. In the alternative, general damages could be placed in a trust such as the Caring Society has submitted, with damages for pain and suffering going to individuals. In the further alternative, any entitlement to compensation could be addressed through a trust.

50. The AFN's process through an expert panel empowers the victims and we think this would allow victims to decide for themselves. There could be an opt out process established where a victim may decide to transfer their request for compensation elsewhere, such as to another court or tribunal. The AFN believes the Panel's question lends credence to the AFN's proposed remedial request because it centres on the individual victim thereby addressing the Panel's concerns.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 4, 2019

_____

NAHWEGAHBOW, CORBIERE
Genoodmagejig/Barristers & Solicitors
Thomas R. Milne, *Associate*
Co-Counsel for the Complainants,
Assembly of First Nations

VII. LIST OF AUTHORITES

	PRIMARY SOURCES
	Jurisprudence
1.	*Big River First Nation v. Dodwell*, 2012 FC 766
2.	*Canada (AG) v. Mowat*, 2009 FCA 309
3.	*Canadian Human Rights Commission v. Canada (AG)*, 2010 FC 1135
4.	*CN v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114
5.	*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
6.	*Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FC 789, [1996] FCJ No. 842
7.	*Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56
8.	*Taylor v. Canada (AG)*, [2000] 3 FC 298, 2000 CanLII 17120 (FCA)
9.	*Teather v. Kawashima*, 2016 BCSC 2231
10.	*Walden et al v. Social Development, Treasury Board of Canada and Public Service Human Resources Management Agency of Canada*, 2009 CHRT 16
11.	*Xavier Moushoom v. AGC, Federal Court of Canada,* Court File No. T-402-19
	SECONDARY SOURCES
12.	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