Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 7
Date: April 16, 2020
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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Reasons on Three Questions Regarding Eligibility for Compensation

I. Context

[1] On September 6, 2019, the Tribunal rendered its decision on the issue of compensation remedies (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 [*Compensation Decision*]) and found Canada liable to pay compensation under the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*) to victims/survivors of its discriminatory practices, namely First Nations children and their parents or grandparents (caregivers).

[2] The Panel finds it important to reiterate the significant context and findings in which the compensation order was decided and has reproduced a summary of its decision in the *Compensation Decision* below:

> [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 […] 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.
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> (*Compensation Decision* at paras. 14-15)

[3] Furthermore, in its decision, the Panel also directed the First Nations Child and Family Caring Society of Canada (Caring Society), the Assembly of First Nations (AFN) and Canada to discuss possible options, to consult with the Commission, Chiefs of Ontario (COO) and Nishnawbe Aski Nation (NAN) on a process for identifying specific victims or distributing the compensation and to return to the Tribunal on February 21, 2020 with their proposals.

[4] After discussions, the Caring Society, the AFN and Canada have created a draft "Framework for the Payment of Compensation under 2019 CHRT 39" (the "Draft Framework") that sets out proposals on implementation that they have agreed to as of February 21, 2020. This Draft Framework has not yet been finalized and the parties have now requested the Tribunal to rule on three questions where they did not reach a consensus and required further guidance from this Panel.

[5] On February 28, 2020, the Attorney General of Canada (AGC) wrote a letter to the Tribunal indicating that no party wished to file a reply on those three questions and confirmed that the three questions could now be taken under reserve by the Panel.

[6] On March 3, 2020, the Panel sought the parties' views on a specific case related to one of the three questions and the parties' submissions were received on March 11, 2020.

[7] Finally, on March 16, 2020, the Panel reached a decision on the three questions, and in the interests of expediency and to facilitate resolution, its determinations were provided in a short form with full reasons to follow shortly. That format is consistent with an oral ruling issued from the bench. The full reasons are outlined in this ruling.

II. Question 1) At what age should beneficiaries gain unrestricted access to the compensation?

[8] **Decision:** The provincial/territorial age of majority

A. The First Nations Child and Family Caring Society of Canada's Position

[9] The Caring Society argues that compensation should only be paid to victims/survivors who are 25 years of age and older, rather than by relying on the provincial/territorial ages of majority, with an exception for those aged 18-25 who wish to access funds for education or for "compelling compassionate reasons". The Caring Society argues that children are a highly vulnerable group, and society recognizes this, building structures to protect them from making decisions they are not adequately prepared to make is appropriate.

[10] The Caring Society contends that current age of majority presumptions, are premised on a societal belief that the once they transition to adulthood, people are less impulsive and susceptible to peer pressure, better able to understand complex concepts and appreciate risks and consequences. However, the Caring Society's position is that such growth should not be presumed to occur at an age which was somewhat arbitrarily chosen by legislatures.

[11] The Caring Society cites Lord Scarman from his concurring 1985 reasons in *Gillick v. West Norfolk and Wisbech Area Health Authority*, which were quoted by the Supreme Court of Canada in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para. 51:

> … The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose on the process of "growing up" fixed limits where nature knows only a continuous

> process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change ….

[12] The Caring Society argues that research in the areas of child development and neuroscience provide the same conclusion as Lord Scarman: effectively, the process of maturation is a continuous one, and that the "age of transition" is closer to 25 years. The Caring Society provided the Tribunal with an expert report prepared by Dr. Sidney Segalowitz, a professor of psychology and neuroscience, to support its position. Dr. Segalowitz's evidence advances that brain development continues past age 18 and levels off at approximately 25 years old for healthy individuals.

[13] Dr. Segalowitz's research is summarized at page 4 of his report as follows:

> There is growing consensus that, for many important functions, the average age at which brain development in healthy individuals' asymptotes is about 25 years. However, there will be a sizable group whose trajectory is behind this schedule as well as some ahead of it. This can be for a number of reasons. […] The research […] has led us to this average figure of 25 years for some developmental process and the various factors that can interfere with this normative trajectory.

[14] In arriving at this finding, Dr. Segalowitz reviews the current research on brain development and suggests that the mental functions most associated with adult maturity involve emotional self-regulation and complex cognitive functions involving attention, memory and inhibitory control. Risk-taking is a key concern among young people, especially when in the presence of peers. Impulsivity and sensation-seeking behaviours decrease gradually through adolescence, according to Dr. Segalowitz, and there is a major reduction in such behaviour in the 26-30 years range.

[15] Importantly, Dr. Segalowitz notes that negative early life experiences (such as chronic stress, poverty, poor nutrition, exposure to air and water pollution, pre-and post natal drug exposure, traumatic brain injury and PTSD) can put an individual's mental health trajectory at risk by compromising brain growth in regions related to emotional self-regulation and cognitive processing.

[16] Dr. Segalowitz's evidence, the Caring Society argues, is illustrative of the fact that scientific knowledge on brain development has made significant advances since the time

when provincial ages of majority were set in the 1970's. The scientific evidence provided by Dr. Segalowitz, coupled with the 'egregious nature of the harm and adverse impacts experienced by the child victims in this case' points to payment at age 25 as the only appropriate result, according to the Caring Society.

B. The Assembly of First Nations' Position

[17] The AFN disagrees with the Caring Society's proposal on this issue, pointing instead to provincial legislation on age of majority as well as laws which lay out duties of property guardians upon a minor attaining the age of majority. Section 53 of Ontario's *Children's Law Reform Act*, RSO 1990, c C.12, for example, provides that guardians of property must transfer to the child all property in the care of the guardian when the child attains the age of eighteen years. Similarly, the *Indian Act*, RSC 1985, c I-5 provides at s. 52 that the Minister can appoint guardians of property for infant children under the Act's jurisdiction, but at s. 523(1) specifies that any property held for them must be conveyed to the child in lump sum upon attaining the age of majority.

[18] The AFN points to trust law in support of its argument that distribution at an age higher than the provincial/territorial age of majority would be problematic. They cite the rule in *Saunders v. Vautier*, summarized by the Supreme Court of Canada in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28 as follows at para 21:

> The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton: Law of Trusts and Trustees* (14th ed. 1987), at p. 628:
>
> > If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or trustees.

[19] The AFN also cites two cases where structured settlements (arrangements through which claimants can receive all or part of a settlement by way of periodic payments rather

than via lump sum) established by court order were modified or extinguished where trust beneficiaries were capable of managing their own affairs. (See *Hubbard v Hubbard*, 140 ACWS (3d) 216, 2005 CanLII 20811 (ONSC) and *Grieg v National Trust Co*, 47 BCLR (3d) 42, 1998 CanLII 4239 (BCSC)).

C. The Canadian Human Rights Commission's Position

[20] The Commission ultimately takes no position on the question of the appropriate age for receiving compensation. That said, in light of the evidence provided by the Caring Society in support of its position, the Commission does share a concern that young persons in the period of 'emerging adulthood', may face unique challenges or pressures if substantial sums of money are suddenly made available to them. The Commission points out that potential beneficiaries will have faced discrimination and may have been impacted by other forms of marginalization and disadvantage which could add to their vulnerability. For these reasons, regardless of what minimum age may eventually be selected for paying out compensation awards, it will be critically important for Canada to follow through on the laudable commitments made in the Draft Framework to adequately fund the delivery of culturally-appropriate financial and other supports to beneficiaries.

D. The Chiefs of Ontario's Position

[21] The COO did not take any position on this question.

E. The Nishnawbe Aski Nation's Position

[22] The NAN did not take any position on this question.

F. Canada's Position

[23] The AGC advances that a child's unrestricted access to the compensation should coincide with attaining the age of majority set by their home province or territory. Even Indigenous Services Canada's own Social Assistance Manual 2017-2018 refers back to the

provincial or territorial legislation to determine age of majority. Such an approach, according to the AGC, would ensure that First Nations children who may receive a benefit are treated equally to their same-age peers in the place where they reside. No other approach, the AGC argues (including the one proposed by the Caring Society) is justifiable. The AGC suggests that approaches encouraging deviation from well-established norms around age of majority would be best directed at the legislatures who set the approach to age of majority.

G. Analysis

[24] Throughout all of its decisions and rulings, the Panel has consistently stressed the importance of responding to the specific needs of First Nations children and families and avoiding a one-size-fits-all approach. This reasoning was applied in crafting its orders and remains the backdrop for all its considerations. While the Panel also discussed the need to respond to the specific needs of First Nations Child and Family Services Agencies, it emphasized that the decision was about children and their families and meeting their specific needs. The Panel believes that this reasoning respects substantive equality and upholds each child's fundamental human rights in recognizing that each child is unique and may have different needs, culture, teachings, values, aspirations and circumstances.

[25] This being said, the Panel does share the Caring Society and the Commission's concerns, outlined above, that young adults in the period of 'emerging adulthood', may face unique challenges or pressures if substantial sums of money are suddenly made available to them. Some of them will have faced discrimination and may have been impacted by other forms of marginalization and disadvantage which could add to their vulnerability. The Panel also shares the same concerns for other vulnerable adults above the age of 25.

[26] While the expert evidence is compelling it remains untested in these proceedings and also is insufficient to outweigh the legislators' intent expressed in legislation in each Province/Territory that has already determined the age of majority. The Panel is not convinced by the case law cited by the Caring Society in support of its position and finds it does not trump Provincial/Territorial legislation in that regard.

[27] Of note, some of those same young adults may be parents of young children themselves which is arguably a more significant responsibility than that of administrating large sums of money. The Panel has difficulty reconciling the Caring Society's position with the place that young adults aged 18-24 legally and practically occupy in society, which includes many legislated rights and the parenting role that some may hold.

[28] In addition, none of the other parties share the Caring Society's position on this question.

[29] Moreover, siding with the Caring Society on this point may result in engendering liabilities for the trust fund where young adults could potentially allege discrimination on the basis of age. While the Panel concedes that some young adults may experience difficulty handling large sums of money awarded as compensation, the Panel believes that barring **all** 18-24-year-old victims/survivors across Canada from receiving compensation is unreasonable. The Panel would prefer that vulnerable young adults who need and desire counsel and assistance be able to access it as part of the compensation process.

[30] That said, as part of the Caring Society's significant work on the compensation process, it entered into an agreement with Youth in Care Canada (YICC), a national charitable organization for youth in care and formerly in care, to organize a national consultation with First Nations youth in care and formerly in care regarding the compensation process. Following the consultations, YICC worked independently to produce a report with two main objectives:

1. Provide recommendations to the Caring Society on the process for distributing the funds, with consideration to children in vulnerable circumstances; and
2. Provide recommendations to alleviate risks that providing additional funds to certain primary caregivers may increase the family risk level.

[31] YICC issued a report including a series of recommendations for the compensation process and, while they desire to continue their reflection and work on the compensation process, they did not yet recommend to raise the age of unrestricted access to the compensation funds to 25 years old (See exhibit 11 to Dr. Blackstock's affidavit dated December 2019).

[32] While the YICC did not recommend raising the age of unrestricted access to the compensation funds to 25 years old, it proposed a number of relevant recommendations such as healing circles; support for counselling or therapy; navigational support; mental health supports to help with youth's experiences and challenges; continued support after compensation; mental health supports and navigational assistance to help youth apply for compensation; restitution for children and youth who have died while in care or due to their experiences in the child welfare system; youth's compensation paid to parents, grandparents or to a trust fund; offering non mandatory financial training for youth receiving compensation; and awareness training offered to recipients about predatory banks and financial institutions like those that swindled compensation from residential school survivors.

[33] The Panel generally agrees with those recommendations.

[34] Furthermore, the Panel believes the Draft Framework should include the currently proposed supports for compensation beneficiaries and should consider including additional supports. In sum, adequate support for young adults and all persons receiving compensation, culturally appropriate services, access to financial advisers, mental health supports, guidance from Elders, etc., could alleviate some of the concerns raised by the Caring Society and the Commission. The Panel strongly encourages the parties to maintain or include such provisions in the Draft Framework to ensure the Draft Framework best supports reconciliation between First Nations and Canada.

[35] For the reasons above, the Panel prefers the AFN and the AGC's positions on this question.

H. Order

[36] The provincial/territorial age of majority is determined to be the age for victims/survivors/beneficiaries to gain unrestricted access to the compensation.

III. Question 2) Should compensation be available to children who entered care prior to January 1, 2006 but remained in care as of that date?

[37] **Decision**: Yes

[38] As part of the parties' three questions, another sub question was also included as part of question 2. It is a request from the Caring Society for compensation for the parents and caregiving grandparents of children who entered care prior to January 1, 2006 but remained in care as of that date. While the above question 2 wording does not reflect this request, it was considered by this Panel given that all parties had an ample opportunity to make full submissions on this question. The Panel believes that it is appropriate to also include its reasons and determination on this point as part of this present ruling.

A. The First Nations Child and Family Caring Society of Canada's Position

[39] The Caring Society argues that an interpretation of the compensation decision which includes children in care as of January 1, 2006 (but who were removed earlier) and their caregivers is supported by the Tribunal's reasons in both *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 [*Merit Decision*] and the *Compensation Decision*.

[40] In doing so, the Caring Society points to the Tribunal's repeated emphasis on the harms associated with apprehension, removals and family/community separation. Put plainly, the Caring Society suggests that the question to be answered is: As of January 1, 2006, "which children were being harmed by Canada's discriminatory practices?" The answer put forward by the Caring Society is that it was children **in care** as of that date, as well as those taken into care thereafter. The Caring Society advances that discrimination experienced by those children, and their caregivers, is virtually identical and rooted in the very same set of facts which led the Tribunal to find discrimination.

B. The Assembly of First Nations' Position

[41] The AFN shares the Caring Society's view that if a child was in care as of January 1, 2006, the date of removal should be immaterial. The AFN asserts that those children experienced the same harms and discrimination as children who came into care on or after January 1, 2006.

C. The Canadian Human Rights Commission's Position

[42] The Commission advances that while, as pointed out by Canada, the temporal scope of the order is relatively clear on its face, the underlying goals of the compensation order should be considered for cases of children who were removed from home before January 1, 2006 but remained in care as of that date.

[43] The Commission also points to para. 270 of the *Compensation Decision*, where the Panel explicitly retained jurisdiction over a number of issues, welcoming "any comments/suggestions 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." This, the Commission argues, is indicative of a clear retention of jurisdiction and thereby the Panel is not *functus officio* on those matters.

D. The Chiefs of Ontario's Position

[44] The COO did not take any position on this question.

E. The Nishnawbe Aski Nation's Position

[45] The NAN adopts and relies on the Caring Society's position on this question. The NAN submits that children in care prior to January 1, 2006 and as of January 1, 2006, who were removed from their homes for compensable reasons per the Tribunal's compensation entitlement order should be entitled to compensation. According to the NAN, these children and their primary caregivers, were deprived of the opportunity to be reunited with their families in a timely manner during the eligibility period set out by the Tribunal.

F. Canada's Position

[46] The AGC argues that compensation should be payable only to those who entered care **after** the complaint was instituted. The AGC claims that the complaint itself, the

Compensation Decision, and an analysis of the Tribunal's statutory jurisdiction are supportive of this position.

[47] The AGC points out in particular the following excerpt, from para. 245 of the *Compensation Decision*, where the Panel ordered Canada to pay… "$20,000 to each First Nation child removed from its home, family and community between **January 1, 2006** [and a date to be determined]" [Emphasis in original]. It points out two other instances in the decision where exact dates were listed and bolded as being further indicative of a clear intent by the Panel to provide exact dates in exercising its remedial powers under s. 53 of the *CHRA* (see paras 249 and 251). The Panel could not have been clearer, the AGC argues, that based on its assessment of the evidence, January 1, 2006 was that date on which the discrimination was found to have begun, and to extend the scope for compensation to any time period predating that date would be to re-write the judgment.

[48] With respect to compensation under Jordan's Principle, the AGC submits that the Panel was also clear. At para. 251, compensation was also for a defined period, Dec. 12, 2007-November 2, 2017. These dates were also placed in bold in the judgment.

[49] The AGC further argues that it is apparent that the Panel carefully considered the matter of when discrimination occurred for the purposes of exercising its jurisdiction under s. 53 of the *CHRA*.

[50] The AGC further suggests that such potential beneficiaries would be able to access compensation via one of the two as-yet-uncertified class actions which have been filed in Federal Court seeking compensation for those who fall outside of the timelines established by the Tribunal's compensation decision. the AGC says that it has announced that it would compensate children affected by the discrimination found in the *Merit Decision* even where they fall outside of the terms of the complaint. According to the AGC, a class action, would be an appropriate vehicle to do so.

G. Analysis

[51] The Panel in its *Compensation Decision*, has clearly left the orders open to possible amendments in case any party, including Canada, wanted to add or clarify categories of

victims/survivors or wording amendments to the ruling similar to the process related to the Tribunal's ruling in 2018 CHRT 4 and also informed by the process surrounding the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35. While this practice is rare, in this specific ground-breaking and complex case it is beneficial and also acknowledges the importance of the parties' input and expertise in regards to the effectiveness of the Panel's orders.

[52] The Panel explicitly retained jurisdiction over compensation (see *Compensation Decision* at para. 277), including on a number of issues as part of the compensation process consultation, welcoming any comments, suggestions and requests for clarification from any party in regards to moving forward with the compensation process and the wording or content of the orders. For example, whether the categories of victims/survivors should be further specified or new categories added (see *Compensation Decision* at para. 270).

[53] This is a clear indication that the Panel was open to suggestions for possible modifications of the *Compensation Decision* Order, welcoming comments and suggestions from any party. The Panel originally chose the January 1, 2006 and December 2007 cut-off dates following the Caring Society's requests in its last compensation submissions with the understanding that the evidence before the Tribunal supported those dates and also supported earlier dates as well. Considering this, instead of making orders above what was requested, the Panel opted for an order including the possibility of making amendments or further compensation orders. The Panel was mindful that parties upon discussion of the compensation orders and process may wish to add or further specify categories of compensation beneficiaries. This process is complex and requires flexibility.

[54] Furthermore, the Federal Court in *Grover v. Canada (National Research Council)* (1994), 80 FTR 256, 28 Admin LR (2d) 231 (F.C.) [*Grover*], a case that this Panel relied on in previous decisions in this case (see for example, 2017 CHRT 14, at para. 32, see also 2018 CHRT 4 at para. 39), an application for judicial review of a Tribunal decision had to decide whether the Tribunal had the power to reserve jurisdiction with regards to a remedial order. *Grover* is summarized as follows in *Berberi v. Attorney General of Canada*, 2011 CHRT 23 [*Berberi*]:

[13] The Tribunal had ordered that the complainant be appointed to a specific job, but retained jurisdiction to hear further evidence with regards to the implementation of the order. The Federal Court held that although the *Act* does not contain an express provision that allows the Tribunal to reopen an inquiry, the wide remedial powers set out therein, coupled with the principle that human rights legislation should be interpreted liberally, in a manner that accords full recognition and effect to the rights protected under such legislation, enables the Tribunal to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants (see *Grover* at paras. 29-36). The Federal Court added:

[14] It is clear that the Act compels the award of effective remedies and therefore, in certain circumstances the Tribunal must be given the ability to ensure that their remedial orders are effectively implemented. Therefore, the remedial powers in subsection 53(2) should be interpreted as including the power to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants. The denial of such a power would be overly formalistic and would defeat the remedial purpose of the legislation. In the context of a rather complex remedial order, it makes sense for the Tribunal to remain seized of jurisdiction with respect to remedial issues in order to facilitate the implementation of the remedy. This is consistent with the overall purpose of the legislation and with the flexible approach advocated by Sopinka J. in *Chandler, supra*. It would frustrate the mandate of the legislation to require the complainant to seek the enforcement of an unambiguous order in the Federal Court or to file a new complaint in order to obtain the full remedy awarded by the Tribunal. (*Grover* at para. 33)

[15] Similarly, in *Canada (Attorney General) v. Moore*, [1998] 4 F.C. 585 [*Moore*], the Federal Court had to determine whether the Tribunal exceeded its jurisdiction by reconsidering and changing a cease and desist order. Having found the complaint to be substantiated, the Tribunal made a general direction in its order and gave the parties the opportunity to work out the details of the order while the Tribunal retained jurisdiction. After examining the reasoning in *Grover* and *Chandler*, the Federal Court stated:

[16] The reasoning in these cases supports the conclusion that the Tribunal has broad discretion to return to a matter and I find that it had discretion in the circumstances here. Whether that discretion is appropriately exercised by the Tribunal will depend on the circumstances of each case. That is consistent with the principle set out in *Chandler v. Alberta Association of Architects*, relied upon by the applicant, which dealt with the decision of a board other than the Canadian Human Rights Tribunal. (*Moore* at para. 49)

[17] The Federal Court determined that the Tribunal had reserved jurisdiction and there was no indication that the Tribunal viewed its decision as final and conclusive in a manner that would preclude it from returning to a matter included in the order. Therefore, on the authority of *Grover*, the Federal

Court concluded that subsection 53(2) of the *Act* empowered the Tribunal to reopen the proceedings (see *Moore* at para. 50).

[18] The Tribunal jurisprudence that has considered the *functus officio* principle and interpreted *Grover* and *Moore*, has generally found that absent a reservation of jurisdiction from the Tribunal on an issue, the Tribunal's decision is final unless an exception to the *functus officio* principle can be established (see *Douglas v. SLH Transport Inc.*, 2010 CHRT 25; *Walden v. Canada (Social Development)*, 2010 CHRT 19; *Warman v. Beaumont*, 2009 CHRT 32; and, *Goyette v. Voyageur Colonial Ltée*, (November 16, 2001), TD 14/01 (CHRT)). However, recent Federal Court jurisprudence, decided several years after *Grover* and *Moore* and which examined the authority of the Commission to reconsider its decisions, provides further guidance on the application of the *functus officio* principle to administrative tribunals and commissions.

(*Berberi* at paras. 13-18, emphasis ours)

[21] The application of the *functus officio* principle to administrative tribunals must be flexible and not overly formalistic (see *Chandler* at para. 21). In *Grover*, in determining whether the Tribunal could supervise the implementation of its remedial orders, the Federal Court recognized that the Tribunal has the power to retain jurisdiction over its remedial orders to ensure that they are effectively implemented. In *Moore*, in deciding whether the Tribunal could reconsider and change a remedial order, the Federal Court expanded on the reasoning in *Grover* and stated that "the Tribunal has broad discretion to return to a matter..." (*Moore* at para. 49). In *Grover* and *Moore*, while the retention of jurisdiction by the Tribunal was a factor considered by the Federal Court in determining whether the Tribunal appropriately exercised its discretion to return to a matter, ultimately, it was not the only factor considered by the Court. In addition to examining the context of each case, the Tribunal must also consider whether "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation" (*Chandler* at para. 22). This method of analyzing the Tribunal's discretion to return to a matter is consistent with the Federal Court's reasoning in *Kleysen* and *Merham*. The question then becomes: considering the *Act* and the circumstances of the case, should the Tribunal return to the matter in order to discharge the function committed to it by the *Canadian Human Rights Act*?

[22] The primary focus of the *Act* is to "...identify and eliminate discrimination" (*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 13). In this regard, subsection 53(2) of the Act grants the Tribunal broad remedial discretion to eliminate discrimination when a complaint of discrimination is substantiated (see *Grover* at para. 31). Therefore, as the Federal Court has stated, "subsection 53(2) should be interpreted in a manner which best facilitates the compensation of those subject to discrimination"

> (*Grover* at para. 32). The *Act* does not provide a right of appeal of Tribunal decisions, and judicial review is not the appropriate forum to seek out the implementation of a Tribunal decision. As the Federal Court indicated to the Complainant: "The Applicant is at liberty to seek an order from the Tribunal with respect to implementation of the remedy" (*Berberi v. Canadian Human Rights Tribunal and Attorney General of Canada (RCMP)*, 2011 FC 485 at para. 65). When the Tribunal makes a remedial order under subsection 53(2), that order can be made an order of the Federal Court for the purposes of enforcement under section 57 of the *Act*. Section 57 allows decisions of the Tribunal to "...be enforced on their own account through contempt proceedings because they, like decisions of the superior Courts, are considered by the legislator to be deserving of the respect which the contempt powers are intended to impose" (*Canada (Human Rights Commission) v. Warman*, 2011 FCA 297 at para. 44).
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> (*Berberi,* at paras. 21-22)

[55] The Panel agrees with the above reasoning outlined in *Berberi* on the retention of jurisdiction over remedial orders to ensure that they are effectively implemented and has adopted and followed this approach from the *Merit Decision* and onward.

[56] Additionally, the Tribunal used a similar approach to remedies in *Grant v. Manitoba Telecom Services Inc.*, 2013 CHRT 35 [*Grant*] once the decision on the merits was rendered:

> [3] The Tribunal retained jurisdiction on many of the remedies requested by the Complainant, including the missed pension contributions, in order to get further submissions and clarification from the parties.
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> [4] Both parties were given the opportunity to provide additional submissions on the Complainant's outstanding remedial requests from *Grant (decision)* on a conference call on July 10, 2012.
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> (*Grant* at paras. 3-4, emphasis ours).
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> [7] In *Grant (remedies)*, the Tribunal again retained jurisdiction in the event the parties were unable to reach an agreement on the pension remedy, among others.
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> [8] The parties have been unable to work out the details of the Complainant's lost pension and disagree on what remedy the Tribunal ordered with respect thereof.
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> (*Grant*, 2013 CHRT 35 at paras 7-8, emphasis ours).

[57] The Tribunal in *Grant* provided further direction on the remedy in that subsequent ruling. Of interest, this case was challenged at the Federal Court after the decision on the merits while the Tribunal was deciding further remedies. The application for judicial review was ultimately discontinued.

[58] Furthermore, the Panel does not agree with the AGC's position, mentioned above, that the complaint itself, the Panel's *Compensation Decision*, and an analysis of the Tribunal's statutory jurisdiction all support that compensation should be payable only to those who entered care after the complaint was instituted.

[59] Additionally, the Supreme Court of Canada in *Moore v. British Columbia (Education), 2012 SCC 61* at, para.64 *[Moore])* stated that the remedy must flow from the claim. Moreover, the Tribunal in the *Compensation Decision* analyzed the claim and found that the claim consists of the complaint, the Statement of Particulars, and the specific facts of the case (see *Compensation Decision* at para. 103).

[60] It is useful here to do a review of the complaint, the Caring Society's Statement of Particulars and the Panel's rulings to understand the claim on this point. Relevant extracts are reproduced below:

> […] This review, known as the *Joint National Policy Review on First Nations Child and Family Services* (NPR MacDonald $ Ladd) provides some insight into the reasons why there has been such an increase in the numbers of Registered Indian children entering into care. The review found that INAC provides funding for child welfare services only to Registered Indian children who are deemed to be ''eligible children" pursuant to the Directive. An eligible child is normally characterized as a child of parents who are normally resident on reserve. Importantly, the preamble to the Directive indicates that the formula is intended to ensure that First Nations children receive a ''comparable level'' of service to the other children in similar circumstances […] Overall, the Directive was found to provide 22% less funding per child to FNCFCSA's than the average province. A key area of inadequate funding is a statutory range of services, known as least disruptive measures, that are provided to children and youth at significant risk of child maltreatment […] The NPR also indicates that although child welfare costs are increasing at over 6% per year there has not been a cost of living increase in the funding formula for FNCFCSA's since 1995. Economic analysis conducted last year indicates that the compounded inflation losses to FNCFCSA's from 1999-2005 amount to $112 million nationally.

> […] It has been over 6 years since the completion of NPR and the Federal government has failed to implement any of the recommendations which would have directly benefited First Nation children on reserve. As INAC documents obtained […] in 2002 demonstrate, the lack of action by the Federal government was not due to lack of awareness of the problem or the solution. Documents sent between senior INAC officials confirm the level of funding in the Directive is insufficient for FNCFCSA's to meet their statutory obligations under Provincial child welfare laws- particularly with regard to least disruptive measures resulting in higher numbers of First Nations children entering child welfare care (INAC, 2002).
>
> […] Despite having apparently been convinced of the merits of the problem and the need for the least disruptive measures INAC maintained that additional evidence was needed to rectify the inequitable levels of funding documented in the NPR. […]
>
> […] Additionally, as Canada redresses the impacts of residential schools it must take steps to ensure that old funding policies which only supported children being removed from their homes are addressed.
>
> […] INAC has been aware of this problem for a number of years and was presented with an evidence base of this discrimination in June 2000 with the two *Wen:de* reports being delivered in August and October of 2005 respectively. These reports were followed by the Canadian Incidence Study Report […] in June of 2006.

[61] In light of the complaint reproduced above, the Panel finds that the complaint clearly mentions that INAC was aware of the alleged discrimination, which has now been proven, as early as the 2000 Joint National Policy Review (NPR).

[62] The Caring Society's Statement of Particulars also specifically mentions the 2000 NPR at paras.14-15 and 20-21, reproduced below:

> 14. Furthermore, this Tribunal will have the opportunity of hearing from the Complainants' witnesses in support of each of the following facts:
>
> > (i) The Complainants, together with Canada, participated in a series of expert studies[7] designed to examine the nature of the differential treatment in the provision of statutory child welfare and child protection services on and off reserve and to provide recommendations on the improvement to Canada's current funding structures, policies and formulas;
> >
> > (ii) The findings contained in the expert studies substantiate the differential treatment arising from the current funding structures,

> policies and practices to the severe detriment of registered First Nation children and families normally resident on reserve;
>
> (iii) Canada's response, without supporting expert analysis and opinion, included strategies that did not redress the inequities.[8] Separate and independent reports from the Auditor Generals of Canada and British Columbia in May of 2008, and the recent March 2009 Report of the Standing Committee on Public Accounts[9] found that Canada's response did not redress the inequities;
>
> (iv) Canada independently commissioned studies that came to the same conclusion[10] as that of the Complainants in respect of the inequities;
>
> (v) Canada did not provide the Canadian Human Rights Commission with any factual material to contradict the assertions of discriminatory practices in the Complaint; and
>
> (vi) Canada has acknowledged that the current funding practices and structure contribute to disproportionately growing numbers of registered First Nation children in child welfare and protection care and results in First Nations Child and Family Services Agencies being unable to meet their statutorily mandated responsibilities[11].

15. The Canadian Human Rights Commission requested an inquiry. An inquiry is necessary because findings of fact are required for a determination of the legal issues.

> [7] The studies include the "Joint National Policy Review-Final Report" of June 2000 and a series of three reports: "Bridging Econometrics and First Nations Child and Family Service Agency Funding" (2004); "Wen: de We Are Coming to the Light of Day" (2005) and "Wen de The Journey Continues" (2005)

[…]

20. The evidence will demonstrate that the needs of First Nations Child and Family Services Agencies and the needs of the children and families that they serve are certainly not less[18] than those of children and families off reserve and the agencies that serve them, and thus the remedy sought.

> [18] The Complainants rely upon the Royal Commission on Aboriginal Peoples.

Relief Requested

21. The purpose of the tribunal hearing is to achieve a substantiation of the complaint to the Commission and for an order against the federal authorities:

> (1) Pursuant to section 53 (2)(a) of the CHRA requiring the immediate cessation of disparate funding, as described above;
>
> (2) Pursuant to section 53(2)(a), and in order to redress the discriminatory practices:
>
> (a) The application of Jordan's Principle to federal government programs affecting children and which implementation shall be approved by the Canadian Human Rights Commission in accordance with section 17;
>
> (b) The adoption of all of the funding formula (updated to 2009 values) and policy recommendations contained in "Wen: de The Journey Continues [:] The National Policy Review on First Nations Child and Family Services Research Project Phase 3" and which implementation shall also be approved by the Canadian Human Rights Commission in accordance with section 17; and
>
> […]
>
> (a) As compensation, subject to the limits provided for in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989[19] and thereby experienced pain and suffering;
>
> [19] As the evidence at the hearing will reveal, in 1989, Canada introduced the funding formula known as "Directive 20-1, Chapter 5,"

[63] The NPR is part of the evidence before the Tribunal (see Joint National Policy review, Exhibit HR-1, Tab 3: Dr. Rose-Alma J. MacDonald & Dr. Peter Ladd et al., *First Nations Child and Family Services Joint National Policy Review Final Report* (Ottawa: Assembly of First Nations and Department of Indian Affairs and Northern Development, 2000)). Likewise, the findings before the Tribunal discuss the 2000 NPR numerous times, (see for example *Merit Decision* at paras 150-154, 216, 224, 257, 260, 262 and 264). More specifically, the Panel found 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.
> (*Merit Decision* at para. 257)

[64] Additionally, in the *Compensation Decision* the Panel found that:

> Canada was aware of the discrimination and 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 Tribunals 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.
> (*Compensation Decision* at para. 231, emphasis added see also, paras. 156, 162 and 170)

[65] The above excerpts support that the claim, the evidence and the findings clearly establish that the discrimination was ongoing as early as the year 2000.

[66] What is more, the evidence before the Tribunal established that Canada was already cognizant of the discrimination in 1996 in light of the findings of the 1996 report of the Royal Commission on Aboriginal Peoples (RCAP), part of the Tribunal's evidentiary record that forms part of the claim and also forms part of the Tribunal's evidence and findings (see complaint extracts above and *Compensation Decision* at paras. 1 and 168-169).

[67] Additionally, the AGC's argument that the two class actions filed at the Federal Court could potentially provide compensation to children who were in care prior to January 1, 2006 is speculative and not convincing. The class actions have not yet been certified and it is unclear if Canada will support the certification. Given the early stages of the filed class actions, this argument is concerning as it involves further delays for victims of Canada's racial discrimination.

[68] In addition, a compensation process under the *CHRA* is different than that of a Court where a class action may be filed.

[69] Additionally, this Panel indicated in the *Compensation Decision* at para. 188 the following:

> 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*

[70] Moreover, the Panel already voiced the crucial context of this case namely, the mass removal of children from their respective First Nations along with "the impracticalities and the risk of revictimizing children which 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." (*Compensation Decision* at para. 189).

[71] Finally, on this point, all the above support an order providing compensation to First Nations children living on reserve and in the Yukon Territory, who were taken into care prior to or on January 1, 2006 and remained in care on January 1, 2006 and to their parents or caregiving grandparents. The Panel agrees with the Caring Society and the AFN that the discrimination experienced by those children and their caregivers, experienced the same harms rooted in the very same set of facts which led the Tribunal to find discrimination, as children who came into care after January 1, 2006.

[72] Finally, the AGC advances that it has announced it would compensate the children affected by the discriminatory underfunding found in the *Merit Decision*, even where the children affected fall outside the terms of the complaint and that a class action, would be an appropriate vehicle to do so. The Panel believes this important acknowledgment that First Nations children will be compensated supports the Caring Society and the AFN's request. Also, the Panel notes that the Caring Society's submissions at page 3, para.11 refer to the December 11, 2019 House of Commons motion, passed unanimously and reproduced below:

> That the House call on the government to comply with the historic ruling of the Canadian Human Rights Tribunal ordering the end of discrimination against First Nations children, including by:

> (a) fully complying with all orders made by the Canadian Human Rights Tribunal as well as in ensuring the children and their families don't have to testify their trauma in court; and
>
> (b) establishing a legislated funding plan for future years that will end the systemic shortfalls in First Nations child welfare.
>
> (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279 [*Motion 296*])

[73] Given the above, it is surprising that the AGC now opposes this.

H. Order

[74] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further orders:

[75] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal's *Compensation Decision* Order.

[76] Canada is also ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to First Nations parents or caregiving grandparents living on reserve and in the Yukon Territory of First Nations children living on reserve and in the Yukon Territory, who were removed from their homes and were taken into care for compensable reasons prior to or on January 1, 2006 and remained in care on January 1, 2006, per the Tribunal's *Compensation Decision* Order.

IV. Question 3) Should compensation be paid to the estates of deceased individuals who otherwise would have been eligible?

[77] **Decision**: Yes

A. The First Nations Child and Family Caring Society of Canada's Position

[78] The Caring Society submits that the AGC's litigation strategy has caused significant procedural delays in this case. Moreover, to deny payment to the estates of any since-deceased victims of discrimination would be, to allow Canada to benefit improperly from these delays. More importantly, the Caring Society submits that hundreds of child victims have died in care since the Complaint was commenced.

[79] Significantly, Canada ought not benefit from a financial windfall simply because children, youth and family members have died waiting for Canada's discrimination to end. This is particularly so given the Tribunal's findings that Canada's discrimination is wilful and reckless and ongoing in the case of the First Nations Child and Family Service Program. Additionally, the Caring Society contends that one of the purposes of compensation pursuant to the *CHRA* is to remove the economic incentive for discrimination by ensuring that some measure of the cost savings respondents achieve by discriminating are returned to victims. Indeed, allowing Canada to financially benefit due to its own delays in having this case resolved could set a dangerous precedent and entice other respondents to delay cases in the future where a particularly vulnerable group or individual brings a case forward.

[80] In addition to caselaw cited by the Commission and some other provincial decisions, the Caring Society raises the 2010 Ontario case of *Clark v. Toshack Brothers (Prescott) Ltd.*, 2010 HRTO 27. In that decision, the Ontario Human Rights Tribunal adopted a similar principled analysis to that of this Tribunal in *Stevenson v. Canadian National Railway Company*, 2001 CanLII 38288 (CHRT) [*Stevenson*], ruling that the dual purposes of serving public and private interests mitigated in favour of ultimately allowing the proceedings to continue after the death of a complainant.

[81] Furthermore, on March 3, 2020, the Panel provided the parties with a case on this matter (*Commission des droits de la personne c. Bradette Gauthier*, 2010 QCTDP 10 (*Gauthier*)) and requested feedback. In *Gauthier*, the Quebec Human Rights Tribunal awarded discrimination remedies to the children of a complainant who died prior to the issuance of a decision in his case.

[82] The Caring Society adopts the submissions of the Commission on *Gauthier*.

[83] Regarding *Canada (Attorney General) v. Hislop*, 2007 SCC 10 [*Hislop*], the Caring Society acknowledges that s. 15 *Charter* damages generally do not survive the death of a claimant. However, they argue that it does not follow that this approach should be carried over to *CHRA* cases, pointing to the different language in s. 24(1) of the *Charter* as compared to ss. 53(2)(e) and 53 (3) of the *CHRA*, as well as the differing overarching legislative objectives. To support its position, the Caring Society points to academic commentary which argues that cross-fertilization between constitutional equality rights and statutory human rights regimes should only happen to enrich equality jurisprudence and not when doing so would undermine either's statutory objectives.

[84] The Caring Society raises several cases of individuals who otherwise would have qualified for compensation pursuant to the compensation decision but have since died. According to the Caring Society, these cases demonstrate the unfairness that would result from allowing Canada to effectively benefit (via cost savings) from their deaths.

[85] Finally, the Caring Society also makes an "in the alternative" argument that the Tribunal possesses the statutory authority as master of its own house to retroactively backdate its orders, and provides a variety of possible dates to do so. The prospective dates to which the order could be backdated include the date the Commission referred the complaint to the Tribunal, the originally-scheduled final hearing date on the merits, the actual final hearing date on the merits, the release date of the decision on the merits, the final date of the hearing on compensation or the release date of the compensation decision.

[86] The Caring Society submits that, in a scenario where the Tribunal opts to craft a *Hislop*-type rule, the earliest possible date would be the most just.

B. The Assembly of First Nations' Position

[87] The AFN's position on this matter is also that an otherwise-eligible individual who died prior to receiving compensation should see the compensation awarded to their estate. They rely on the same cases cited by the Commission and the Caring Society, pointing out that while *Hislop*, *British Columbia v. Gregoire*, 2005 BCCA 585 [*Gregoire*] and *Giacomelli Estate v. Canada (Attorney General)*, 2008 ONCA 346 [*Giacomelli*] have been applied in

several contexts, they are not determinative of the issue at hand. The AFN raises several contemporary cases including the recent case of *Pankoff v. St. Thomas (City)*, 2019 HRTO 993, an interim decision on a matter with a deceased complainant who was alleging discrimination in the context of government services, to support the argument that this issue is not settled law.

[88] The AFN provided extensive submissions on the Ontario case of *Morrison v. Ontario Speed Skating Association*, 2010 HRTO 1058 [*Morrison*], also raised by the Commission. In that case, a complainant filed an employment discrimination complaint but died shortly thereafter. The respondent brought a motion to dismiss, citing *Gregoire*, *Hislop* and *Giacomelli*. The Ontario Human Rights Tribunal (HRTO) found that common-law principles about abatement on death did not apply to statutory claims under the Ontario *Human Rights Code,* RSO 1990, c H.19. The AFN argues that the HRTO distinguished the *Gregoire* and *Charter* cases from the case before it, being a private employment relationship, but expressly left the question of its precedential value to similar cases of government services in the human rights context open, at para 31:

> The *Gregoire* decision itself is also distinguishable. Although both *Gregoire* and the present Application involve claims of breaches of provincial human rights statues, *Gregoire* involved an allegation that the provincial government had breached the applicant's right to be free from discrimination on the basis of disability under the *British Columbia Human Rights Code* by failing to provide appropriate supervision, treatment and counselling services. It was a claim against the government with respect to the provision of government services or benefits. In contrast, the Application before me involves an allegation of discrimination by a private employer. It is unnecessary for me to decide in this case whether *Gregoire* is a compelling precedent in the situation of a claim for government benefits and services, as this Application does not involve such a claim.

[89] The AFN also adopts the submissions of the Commission on *Gauthier*; while adding several additional submissions of their own. First, they point out that the Quebec *Charter* contains no language which would suggest the victim of discrimination must be alive to be compensated. Second, they suggest that there are parallels in terms of vulnerability and exploitation as between the victims of discrimination in *Gauthier* (nursing home residents) and here (First Nations children). Additionally, they argue that the payment of an award to the victim's children in *Gauthier* was appropriate in the given context. As many of the victims

in this case were children themselves and may not yet have produced heirs, an award to their estates would be more appropriate.

[90] Finally, the AFN submits that an individual who became deceased should still be able to pass on the compensation award to their estate.

C. The Canadian Human Rights Commission's Position

[91] The Commission provided extensive submissions on the issue of payments to estates. They are prefaced by a reminder that, in the view of the Commission, the progress of this case was stalled by multiple lengthy delays, often caused by Canada, and that it was sadly inevitable that some individuals will have died while awaiting the remedies stage.

[92] The Commission argues that the Tribunal's own caselaw is supportive of paying awards to estates, as is a purposive reading of the Tribunal's statutory remedial powers. The Tribunal's ruling in *Stevenson*, is put forward as the only occasion on which the Tribunal has dealt with the question of a complainant's death.

[93] In that case, a matter was settled in principle but the complainant died before the settlement was finalized. While the Tribunal ruled in *Stevenson* that the complaint could continue, there was no explicit ruling as to whether remedies for pain and suffering or wilful and reckless discrimination could also flow to the complainant's estate. The Commission notes that in its ruling in *Stevenson* the Tribunal cited *Barber v. Sears Inc (No. 2)*, (1993) 22 C.H.R.R. D/409 (Ont. Bd. Inq.) [*Barber*]. The *Barber* case was also a preliminary ruling where the Board found that it could continue with a complaint, even though the complainant had died after filing. In the subsequent decision on the merits, the Board found discrimination, and ordered the respondent to pay general damages to the complainant's estate. The Commission points out that two other provincial cases from the same time period similarly awarded remedies to estates, being *Allum v. Hollyburn Properties Management Inc.* (1991), 15 C.H.R.R. D/171 and *Baptiste v. Napanee and District Rod and Gun Club* (1993), 19 C.H.R.R. D/24.

[94] Furthermore, the Commission adds that two additional policy considerations mitigate in favour of paying estates. First, disallowing payments to estates could create perverse

incentives for respondents to delay cases, contrary to the requirement in 48.9(1) of the *CHRA* that hearings be conducted "as informally and expeditiously as the requirements of natural justice and the rules of procedure allow". Second, the Commission stresses that family separations often have intergenerational impacts, making it ever more important that payments should flow through estates to benefit the heirs to the victims of discriminatory practices.

[95] In addition to the above analysis of the Tribunal's own statute and jurisprudence, the Commission provided submissions on cases from other jurisdictions where human rights adjudicators have considered the impact of a complainant's death on the survival of proceedings/remedies.

[96] In *Gregoire*, the British Columbia Court of Appeal distinguished the CHRT's decision in *Stevenson* and held that the estate of a deceased complainant was not a "person" within the meaning of the BC Code (which, the Commission notes, is worded differently than the federal legislation). This case can and should be distinguished, the Commission argues.

[97] Regarding *Hislop*, the Commission stresses that it should be read contextually and was never meant to lay down a blanket rule. This is echoed by the Manitoba Court of Appeal, who noted that the Supreme Court declined to lay down a clear broad declaration that the right to redress for *Charter* violations ends on death (see *Grant v. Winnipeg Regional Health Authority et al*, 2015 MBCA 44). The Commission stresses that *Hislop* was decided on different facts: there, the individuals whose estates were looking to pursue equality claims had died prior to the passage of the legislation from which they alleged they were discriminatorily excluded. They were not alive at the time of the rights infringements, in contrast to the case at hand. Consequently, the Commission argues that *Hislop* should be distinguished, on the basis of the factual matrix as well as the language found in the differing statutory regimes.

[98] The Commission also cites provincial human rights jurisprudence (from Manitoba, Nova Scotia, Alberta and Ontario), where results on the issue differ. While not binding on the Tribunal, these cases are somewhat persuasive. Of note is *Morrison* where *Stevenson* is followed and *Gregoire* and *Hislop* are distinguished.

[99] With respect to the *Gauthier* case provided by the Panel, generally, the Commission finds the decision supportive of its proposed approach to compensating estates in this case. However, they do point out that there, payments were made to the complainant's successors rather than his estate. Payments to estates would be more appropriate in this case where it may not be possible to determine the proper beneficiaries at the outset of an awards process. The decision is further distinguishable on the basis that the respondents did not attend the hearing or make submissions about remedy. Furthermore, it is unclear when exactly the complainant died, which complicates assessing it in light of *Hislop*. And ultimately, it is persuasive rather than binding, being from a provincial body under a different piece of legislation.

D. The Chiefs of Ontario's Position

[100] The COO did not take any position on this question.

E. The Nishnawbe Aski Nation's Position

[101] NAN adopted the submissions of the Caring Society on this question.

F. Canada's Position

[102] The AGC points to the case of *Hislop* for the proposition that the estate of an individual is not a legal entity capable of experiencing discrimination (see paras. 72-73). *Hislop* was a *Charter* case concerning discrimination against same-sex partners under survivorship rules for the Canada Pension Plan. In *Hislop*, the Court crafted an approach whereby any members of the class who were alive at the time that the first hearing and arguments had concluded could take advantage of the judgement.

[103] The AGC's position is that the estates of individuals who were alive as of the time that the hearing of the original decision on the merits of the discrimination concluded (being October 24, 2014) should be entitled to compensation. Conversely, the AGC argues, those of any individuals who passed away after that date ought not to be. The AGC notes that

such a determination by the Tribunal would not necessarily preclude potential class actions from including such estates in any settlement negotiated between those parties.

[104] Canada does not believe that *Gauthier* provides any assistance to the Tribunal. They point out that it is from a different jurisdiction, under different legislation, and conflicts with more persuasive approaches from guiding courts (namely *Hislop*).

G. Analysis

[105] The specific facts and context of this case and the *CHRA's* objective and purpose are the starting point in the Panel's analysis (*Compensation Decision* at paras. 94-97 and 132): "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. […] [O]ne should not search for ways and means to minimize those rights and to enfeeble their proper impact." (*Compensation Decision* at para.135).

[106] Furthermore, in the *Compensation Decision*, the Panel relied on this specific quote from the Supreme Court in *CN v. Canada (Canadian Human Rights Commission)*:

> 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)
>
> (*Compensation Decision* at para. 133)

[107] The Panel also adopts the reasoning in *Canada (Attorney General) v Morgan*, [1992] 2 FC 401(FCA) at para. 49 where Marceau J.A (dissenting on other grounds) wrote "a strict

tort or contract analogy should not be employed in human rights law, since what is in question is not a common law action but a statutory remedy of a unique nature".

[108] Moreover, the Panel agrees with the Caring Society's position that compensating estates is consistent with the remedial purposes of the *CHRA*, and that human rights legislation is not, according to the Supreme Court of Canada, to be limited or 'read down' in anything but the clearest cases of express legislative intent.

[109] On this point, the Supreme Court of Canada, ruled that human rights tribunals and courts cannot limit the meaning of terms in human rights legislation that are meant to advance the quasi-constitutional purposes of the *CHRA*: "the *Canadian Human Rights Act* is a quasi-constitutional document and we should affirm that any exemption from its provisions must be clearly stated" (*Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81).

[110] What is more, the issue of the Tribunal's ability under the *CHRA* to deal with a complaint after a complainant's death was discussed by the former Tribunal Vice-Chair Grant Sinclair, as he then was, in *Stevenson*. There, the Tribunal emphasized that prohibiting a victim's estate from proceeding with a claim would extinguish all interests of said victim, including the important public interest (see *Stevenson* at para 32). The Tribunal also found in *Stevenson* at paras. 23-35 as follows:

> [23] The core of CN's argument is that this common law principle applies so that the complaint terminates with the death of the Complainant. No provision in the *Act* or any other relevant legislation, nor a liberal interpretation of the *Act* allows for an Estate or Estate representative to continue the complaint before the Tribunal.
>
> [24] The starting point is the *Act*, which must be read in light of its nature and purpose. The purpose of the *Act* as set out in section 2, is to give effect to the principle of equal opportunity for individuals by eradicating invidious discrimination. That task should not be approached in a narrow, literal fashion. Rather the *Act* is to be given a large and liberal interpretation that will best obtain the objectives of the *Act* [(2)].
>
> [25] Reference to section 2 and other relevant provisions of the *Act* demonstrates that the *Act* extends beyond just individual rights and engages the broader public interest of freedom from discrimination.

[26] Section 40 of the *Act* permits an individual or group of individuals alleging discrimination to file a complaint with the Commission. These persons need not be the victims of the alleged discrimination. The Commission itself may initiate a complaint under Section 40(3) of the *Act*.

[27] As well, section 50(1) recognizes there may be "interested parties" to the complaint. The Tribunal has on many occasions given intervenor status to such parties in the hearing of the complaint.

[28] The Commission is a party in the hearing of a complaint. In such case the Commission does not appear as the representative of the individual Complainant but is there to represent the public interest (section 51).

[29] The Commission also exercises a screening role by way of the discretion given to it under sections 40(2) and Section 41 of the *Act*. In the exercise of this discretion, the Commission can determine whether or not a complaint goes forward to a hearing.

[30] The remedies provided by the *Act* are corroborative of the broader reach of the *Act*, beyond the interests of an individual complainant. Thus, under section 53(2), in addition to compensating the complainant, the Tribunal can:

- issue a cease and desist order against the person who committed the discriminatory practice;

- order such person to take or adopt practices in consultation with the Commission to redress the discriminatory practice, including the adoption of a special program under section 16(1) of the *Act* or the making of an application under section 17 of the *Act*.

[31] In my opinion, having regard to the regime of the *Act*, one must conclude that a human rights complaint filed under the *Act* is not in the nature of and does not have the character of an "action" as referenced in the *actio personalis* principle of law. The *Act* is aimed at the removal of discrimination in Canada, not redressing a grievance between two private individuals.

[32] If CN has its way, the death of the complainant would extinguish not only the interests of that complainant, but also all the other interests involved in the complaint, including the very significant public interest.

[33] Should the maxim *actio personalis*, a maxim that has its origins in medieval common law, a maxim whose anachronism is illustrated by the fact that in England and all common law jurisdictions in Canada the rule has been abolished,[(3)] be allowed to override the purpose and objectives of the *Canadian Human Rights Act*? I think not.

[34] Counsel cited a number of authorities. In my opinion, the most relevant case on this issue is *Barber v. Sears Canada Inc. (No.2)*[(4)]. This case supports

> the conclusion that, taking into account public interest considerations, a human rights complaint should not be stayed because of the death of the Complainant.
>
> [35] Accordingly, for the above reasons, I have concluded that the *actio personalis* maxim does not and should not apply to a human rights complaint under the *Act* and this proceeding should not be stayed on that ground.

[111] The Panel agrees with the Tribunal's reasoning in *Stevenson* above and finds it is applicable to this case.

[112] Furthermore, the HRTO, adopted a similar principled analysis to that of this Tribunal in *Stevenson*, ruling that the death of a complainant does not terminate a proceeding under the Ontario *Human Rights Code* and does not abolish the HRTO's jurisdiction to hear the complaint. In fact, the dual purposes of serving public and private interests mitigated in favour of ultimately allowing the proceedings to continue after the death of a complainant. (see *Clark v. Toshack Brothers (Prescott) Ltd.*, 2010 HRTO 27 at paras. 13-14).

[113] Although it is not bound by the HRTO decision, given the nature of the HRTO's analysis, the Tribunal finds the HRTO's reasoning persuasive in this case.

[114] However, in *Stevenson*, the issue of awards of compensation payments to the estates of complainants or victims for pain and suffering or for wilful and reckless conduct under the *CHRA* was not decided.

[115] Nevertheless, the Tribunal in *Stevenson* relied on an interesting case from the Ontario Board of Inquiry (the "Board") in *Barber* where the Board determined there is certainly a public interest affected immediately by the resolution of this case. This interest does not expire with the death of the complainant.

[116] More importantly here, in the subsequent decision on the merits, the Board found discrimination, and ordered the respondent to pay general damages of $1,000 to the complainant's estate, "…as compensation for the loss to Mrs. Barber's dignity arising out of the infringement." (see *Barber* at para. 18 (ON BOI), and *Barber v. Sears Inc. (No. 3)*, (1994), 22 C.H.R.R. D/415 at para. 98 (ON BOI)). While this case is also not binding on this Tribunal, the Panel agrees with its reasoning. The reasoning is consistent with the objective and purpose of the *CHRA* and is also applicable to this case.

[117] The Panel believes, in the event that a question arises concerning the *CHRA*, the best reference is the *Act* itself, case law interpreting the *Act* and case law that is similar to the case at hand.

[118] The AGC relies on *Hislop* to support its position that only estates of individuals who were alive at the time of the hearing of the original decision on the merits of the discrimination concluded (being October 24, 2014) should be entitled to compensation.

[119] Moreover, the AGC submits that the Supreme Court of Canada decided that an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed.

[120] While the AGC's assertion is true, a closer look at the Supreme Court's analysis and selected wording is helpful. Moreover, the Court reiterates a paramount principle to be used in every case: the importance of the specific context of the case. In *Hislop*, this specific context is, as aptly argued by the Commission, that one of the issues was whether a limitation period under the Canada Pension Plan had a discriminatory effect by effectively blocking the estates of deceased same sex survivors from benefitting from remedial legislation that was passed after their deaths. The Supreme Court's statements were made in a context where the deceased survivors whose estates sought to pursue equality claims had died before the passage of the remedial legislation from which they were being excluded. Consequently, the claims were not based on alleged infringements that took place while the survivors were still alive. It was in this particular context that the Supreme Court held that estates do not have standing to "commence" s. 15(1) *Charter* claims:

> […] in the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term "individual" in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) *Charter* claims. In this sense, it may be said that s. 15 rights die with the person
> (see *Hislop* at para. 73)

[121] The Panel agrees with the Commission's position on *Hislop* above and finds that the context of the claim analysed in *Hislop* differs considerably from the case at hand.

[122] Additionally, the Panel distinguishes the Supreme Court of Canada's reasoning in *Hislop,* which is made on specific facts involving persons who desire to commence actions on behalf of alleged victims who are now deceased, and the case at hand, where the complainants [who have standing] are First Nations organizations representing First Nations children and families, the victims in the present case. Of note, in this case, the victims' suffering was already established in the evidence and explained in the findings and reasons of the Tribunal's decisions and rulings. Given the above, the two cases are completely different given the facts, the context, the evidence and the Panel's findings in the present case.

[123] Also, on this point, the Panel agrees with the Manitoba Court of Appeal who has stressed the importance of context when considering the Supreme Court's decision in *Hislop*. As Mainella J.A. stated for a unanimous Court of Appeal:

> I do not read such careful language [from *Hislop*] as endorsement for the broad proposition that redress for a violation of a *Charter* right ends on death, regardless of the context. The court could have easily made such a broad declaration, but chose instead to keep its remarks tailored to the context of claims on behalf of persons who were already deceased at the time the change to the CPP occurred.
> (*Grant v. Winnipeg Regional Health Authority et al*., 2015 MBCA 44 at para. 66).

[124] On the facts that were before it, the Court of Appeal went on to dismiss a motion to strike a *Charter* claim that had been brought in circumstances where the alleged infringement was said to have contributed to the death of the claimant.

[125] Furthermore, the Panel agrees with the Complainants and the Commission that, in any event, while s. 15(1) *Charter* jurisprudence may be of assistance when interpreting analogous human rights statutes such as the *CHRA*, the two regimes are separate and distinct. What is more, the wording of s. 53 of the *CHRA* is more prescriptive than the very general remedial language used in s. 24(1) of the *Charter*. The *CHRA* language arguably creates a stronger presumption that meaningful remedies will flow where it has been found that a victim has experienced a discriminatory practice in his or her lifetime.

Moreover, there is no explicit wording or language in the *CHRA* barring payment of compensation to estates for pain and suffering or wilful and reckless discrimination. In fact, the Panel finds it would be unfair to the victims who have died to deny them and their estates the compensation that they are entitled to.

[126] The Panel finds that misapplying the *Hislop* reasoning to victims may seriously thwart the victims' human rights. While estates may not have standing to commence *Charter* actions, this in no way abolishes the victims' rights to receive compensation for the discrimination found by this Panel. In this instance, one of the worst cases of racial discrimination and suffering was found.

[127] Furthermore, cases before this Tribunal and the case at hand, involve the very important public interest namely, to protect human rights and to deter those who violate those fundamental rights and discriminate on the basis of those fundamental rights.

[128] This important public interest forms part of the Panel's analysis in this case.

[129] Moreover, paying compensation to victims who have suffered discrimination but died before a compensation order is made is consistent with the objectives of the *CHRA*. Human rights laws are remedial in nature. They aim to make victims of discrimination "whole" and to dissuade respondents from discriminating in the future. Both of these important policy goals can be achieved by conferring compensation to the victims in this case who are deceased: it ensures that the estate of the victim is compensated for the pain and suffering experienced by the victim and ensures that Canada is held accountable for its racial discrimination and wilful and reckless discriminatory conduct.

[130] Taking all this into account, it is by no means obvious that the reasoning from *Hislop* should be directly carried over into the present context. Unlike *Hislop*, there is no doubt here that any deceased beneficiaries under the *Compensation Decision* Order actually experienced discriminatory impacts during their lives.

[131] For all these reasons, the Panel does not apply *Hislop* directly to this case and rejects the AGC's argument to only pay compensation to the estates of individuals who were alive at the time the hearing of the original decision on the merits of the discrimination concluded

(being October 24, 2014). The Panel disagrees with the AGC's argument that any individuals who passed away after that date ought not to receive compensation.

[132] In *Gregoire*, the B.C. Court of Appeal found that the *B.C. Human Rights Code* allows claims to be made by an individual "person" or group of "persons," and that the estate of a deceased complainant was not a "person" within the meaning of the statute.

[133] The Panel finds that the *Gregoire* decision can be distinguished from the case at hand. The two cases have a very different factual matrix. In the case at hand, we are dealing with a complaint filed by representative organisations on behalf of children and families who are victims as opposed to the case in *Gregoire* of a single representative of an individual complainant who had passed before the hearing occurred.

[134] Moreover, the B.C. Court of Appeal itself distinguished a complaint on behalf of a group or class of persons alleging a human rights violation against them and a complaint on behalf of an individual:

> *CNR v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 is cited for the proposition that a complaint can be heard absent any allegations of individual violations. The complaint in that case was lodged by a public interest group about what was alleged to be systemic discrimination of women in respect of employment by the Railway without any one of them being specifically named. But the case is of no particular assistance here. The complaint filed by Ms. Gregoire was not filed on behalf of a group or class of persons alleging a human rights violation against them. It was filed on behalf of an individual. I see nothing in the CNR case that is at odds with the judge's conclusion that Mr. Goodwin's rights abated with his death. The question raised here did not arise in that case.
> (*Gregoire* at para. 10).

[135] What is more, the Tribunal already analysed the word "victim" in the *CHRA* and the wording on remedies in the *CHRA* in its recent *Compensation Decision* (see paras. 112-124 and 129-155). The Panel continues to rely on this interpretation of "victim" in the *CHRA*. This Panel found that victims of discrimination in this case have suffered. The fact that some have died and some have not should not be determinative of who receives compensation remedies for the racial discrimination and the pain and suffering that Canada caused or for Canada's wilful and reckless conduct.

[136] Furthermore, the Panel finds there are compelling public interest arguments in favour of awarding compensation to estates of children who have died in care.

[137] The Panel agrees with the Caring Society that Canada should not benefit financially because children, youth and family members have died waiting for Canada's racial discrimination to end. The Panel must not encourage incentives for respondents to delay the resolution of discrimination complaints. Even more so, when the victims are children.

[138] Moreover, the Panel agrees with the Commission that this would be of particular concern in the case of victims who were discriminated against in connection with a terminal illness or advanced old age, where it could be anticipated that death might occur before a hearing can be concluded.

[139] The Panel also agrees with the Commission that in the context of this particular case, it must be remembered that many of the discriminatory practices at stake involved the forced separation of families and communities, and could therefore have intergenerational impacts. In these circumstances, it is entirely appropriate to direct Canada to make payments that will flow through estates to the heirs of the victims of its discriminatory practices. This outcome is responsive to the nature of the harms, and best advances the goal of reconciliation between First Nations peoples and the Crown.

[140] The Panel rejects the AGC's argument on class actions for the same reasons mentioned above in question 2.

[141] Finally, the Panel notes that no party has raised or discussed the important question of what needs to be done if an estate has been closed under Provincial statutes.

[142] The *Indian Act* governs estates for registered "Indians" however, not all First Nations children in care were registered or have kept their status.

[143] This prompts the question as to what should be the guidelines if a First Nations child was adopted in a Non-First Nations' family and lost status or if a First Nations child was not registered?

[144] For example, if there is a need to petition the Superior Court for the appointment of an administrator of the estate in case of intestacy (absence of a will) should funding and assistance be provided to avoid placing burdens on beneficiaries?

[145] The Panel believes this should be addressed in the parties' discussions on the compensation process especially given the possibility that numerous victims who have died did not have wills.

[146] Additionally, in deciding which date should be considered for compensation payments to estates of victims, the Tribunal must consider the claim, the specific facts of the case, the evidence and the *CHRA*. In this case, representatives of complainant organizations successfully proved that First Nations children and their families were harmed by Canada's discriminatory practices and have suffered before and after the original cut-off date of January 1, 2006 found in the compensation decision. This is demonstrated as early as the year 2000, as explained above. The Panel already found in the *Compensation Decision* that the complainant organizations were speaking on behalf of a group of victims in this case. The fact that some victims in the group were alive and others deceased at the time the complaint was filed does not change the fact that all victims of Canada's discriminatory practices found in this case have suffered. Moreover, all victims should be compensated or have their estates compensated. The Panel finds that the fact that some victims have suffered and died prior to and during these proceedings should not preclude them from receiving some form of vindication in having their suffering recognized and their estates compensated. This reasoning becomes even more important if victims have died as a result of the discriminatory practices. A technical argument distinguishing living victims and deceased victims in this case does not advance the remedial purposes of the *CHRA*.

[147] There is no doubt that the Tribunal has the ability under the *CHRA* to make compensation orders considering the discriminatory practices that took place prior to the filing of the complaint. The Tribunal has already explained above and, in the *Compensation Decision,* that the claim is broader than the complaint form.

[148] Furthermore, the Panel agrees with the Commission that Canada should pay compensation in respect of all the victims of its discriminatory practices, including those who

passed away after experiencing suffering that would make them eligible under the *Compensation Decision* Order. The Panel also finds it should also include the further orders contained within this ruling. Paying compensation awards for pain and suffering (s. 53(2)(e)) and special compensation (s. 53(3)) to the victims' estates will further the remedial purposes of the quasi-constitutional *CHRA*.

[149] Finally, for those reasons, the Panel's chosen temporal scope for compensation to estates of victims of Canada's discriminatory practices is the same as for all victims/survivors in the *Compensation Decision* and this ruling. Consequently, the Panel sets aside the other alternative proposed dates of 2008 (filing of the complaint), 2014 (final arguments) and 2016 (*Merit Decision*).

H. Order

[150] The Panel relies on its *Compensation Decision* Order in 2019 CHRT 39 and adds the following further order:

[151] Canada is ordered to pay compensation under s. 53(2)(e) pain and suffering ($20,000) and s. 53(3) wilful and reckless discriminatory practice ($20,000) to the estates of all First Nations children and parents or caregiving grandparents who have died after suffering discriminatory practices described in the *Compensation Decision* Order, including the referenced period in the Order above mentioned in Question 2.

I. Other Important Considerations

[152] The AGC made arguments on the issue of the temporal scope for the compensation order under Jordan's Principle (see para.48 above). For the Panel, this raises an important point concerning victims who have experienced discrimination found in these proceedings prior to December 12, 2007 or on December 12, 2007. The Panel strongly believes that in light of the above reasons and further orders, the parties should now consider whether compensation to the estate of Jordan River Anderson and the estate of his deceased mother and, First Nations peoples in similar situations, should be paid as part of this Tribunal's compensation process. While the Panel is not making a final determination on this issue,

the evidence and findings in this case may support it and Jordan River Anderson is the reason why Jordan's Principle exists. While *Motion 296* on Jordan's Principle did not yet exist, the life story of Jordan River Anderson and his family and the discrimination that they have experienced prior to December 12, 2007 birthed Jordan's Principle. This is the very reason why *Motion 296* was brought forward and adopted. This forms part of the Tribunal's evidence. The Panel also believes that Jordan River Anderson's father should also be considered for compensation in a similar fashion as the parents/grandparents discussed in question 2.

[153] Furthermore, the Panel requests submissions on this point and, on whether First Nations children living on reserve or off-reserve who, as a result of Canada's racial discrimination found in this case, experienced a gap, delay and/or denial of services, were deprived of essential services and were removed and placed in out-of-home care in order to access services prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should receive compensation. The Panel also requests submissions on whether First Nations children living on reserve or off-reserve who were not removed from the home but experienced a gap, delay and/or denial of services, were deprived of essential services as a result of the discrimination found in this case prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should be compensated.

[154] The Panel will establish a schedule for parties to make submissions on the questions and comments identified in the two preceding paragraphs.

[155] Additionally, the interested parties, the Chiefs of Ontario and the Nishnawbe Aski Nation have requested further amendments to the compensation orders to broaden the compensation orders to include off-reserve First Nations children and to include a broader class of caregivers reflecting caregiving practices in many First Nations communities including aunties, uncles, cousins, older siblings, or other family members/kin who were acting in a primary caregiving role, amongst other things. The Panel has questions for the interested parties and parties on these issues. The Panel will establish a schedule for parties to make submissions on the Panel's questions and will make a determination once the

questions are fully answered. Depending on the outcome, the Panel may further amend the compensation orders.

V. Retention of Jurisdiction

[156] 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
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
April 16, 2020

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: April 16, 2020

Motion dealt with in writing without the appearances of the parties

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