Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

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 Indian and Northern Affairs)

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

RESPONDENT'S SUBMISSIONS – Compensation

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Civil Litigation Section
500-50 O'Connor St.
Ottawa, ON K1A 0H8
Fax: (613) 954-1920

Per: **Robert Frater Q.C. & Max Binnie**
Tel: (613) 670-6283
Email: Robert.Frater@justice.gc.ca
Max.Binnie@justice.gc.ca

Counsel for the Respondent

CONTENTS:

A. Overview

1. This complaint was brought by public interest organizations who claimed that the Government's funding for child and family services on reserve amounted to systemic and ongoing discrimination against First Nations children and families. The complaint was largely substantiated, and the Tribunal must now determine the appropriate remedies. Remedies must be responsive to the nature of the complaint made, and the discrimination found: that means addressing the systemic problems identified, and not awarding monetary compensation to individuals.

2. Awarding compensation to individuals in this claim would be inconsistent with the nature of the complaint, the evidence, and this Tribunal's past orders. In a complaint of this nature, responsive remedies are those that order the cessation of discriminatory practices, redress those practices, and prevent their repetition.

3. The *Canadian Human Rights Act*[1] does not permit the Tribunal to award compensation to the complainant organizations in their own capacities or in trust for victims. The complainants are public interest organizations and not victims of the discrimination; they do not satisfy the statutory requirements for compensation under the *Act.* A class action claim seeking damages for the same matters raised in this complaint, on behalf of a broader class of complainants and covering a broader period of time, has already been filed in Federal Court.

4. These submissions address the legal questions before the Tribunal relating to compensation including the Tribunal's two questions on compensation that require a response from the Attorney General of Canada:

> a) Is the AFN's expert panel proposal feasible and legal? Would it be more appropriate to form a committee of the parties to identify individual victims and to refer them to the Tribunal for compensation? Should that committee include the COO and NAN?

[1] R.S.C. 1985, c. H-6 ("the Act")

b) The Caring Society is requesting compensation via an independent trust comparable to the Indian Residential Schools settlement achieved via the settlement of a class action claim. The AFN is requesting that compensation be paid directly to victims and their families. Should the Tribunal take both approaches?

B. What is Systemic Discrimination?

5. Systemic discrimination occurs where an organization's policies, practices and culture create or perpetuate the unequal treatment of a person or people.[2] Complainants allege systemic discrimination when they claim that government practices, attitudes, policies, and procedures disproportionately limit a group's right to opportunities that are generally available.[3] Quebec's Human Rights Tribunal defines systemic discrimination as

> "the cumulative effects of disproportionate exclusion resulting from the combined impact of attitudes marked by often unconscious biases and stereotypes, and policies and practices generally adopted without taking into consideration the characteristics of the members of groups contemplated by the prohibition of discrimination.[4]

C. This is a Complaint of Systemic Discrimination

6. In its 2014 written submissions, the Caring Society acknowledged that this is a claim of systemic discrimination, with no individual victims as complainants and little evidence about the nature and extent of injuries suffered by individual complainants.[5] The Caring Society stated that it would be an "impossible task" to obtain such evidence.[6] The absence of complainant victims and the assertion that it would be "impossible" to obtain victims' evidence strongly indicate that this is not an appropriate claim in which to award compensation to individuals. The AFN appears to also acknowledge that this is a claim of

---

[2] *Moore v. British Columbia (Education),* 2012 SCC 61, quoting *Action Travail* at p.1138.
[3] *Crockford v. BC (AG)*, 2006 BCCA 360 at para. 49.
[4] *Commission des droits de la personne et des droits de la jeunesse c. Gaz métropolitain inc.*, 2008 QCTDP 24 (CanLII) at para. 36.
[5] Caring Society Written Submissions dated August 29, 2014 at para. 513.
[6] *Ibid.*

systemic discrimination: it alleges that the discriminatory practice is a perpetuation of systemic discrimination and historic disadvantage.[7]

7. Complaints of systemic discrimination are distinct from complaints alleging discrimination against an individual and they require different remedies.[8] Complaints of systemic discrimination are not a form of class action permitting the aggregation of a large number of individual complaints. They are a distinct form of claim aimed at remedying structural social harms.[9]

8. The Canadian Human Rights Commission considers this to be a complaint of systemic discrimination. Then Acting-Commissioner, David Langtry, referred to it as such in his December 11, 2014 appearance before the Senate Committee on Human Rights. In discussing how the Commission allocates its resources, he specifically named this complaint as an example of a complaint of systemic discrimination that merited significant involvement on the part of the Commission.[10]

9. Evidence of the systemic nature of the complaint is found in the identity of the complainants, the language of the complaint, the Statement of Particulars, and the nature of the evidence provided to the Tribunal. The Tribunal's previous orders in this matter, discussed below, clearly indicate that the Tribunal also regards this claim as a complaint of systemic discrimination.

Identity of the Complainants

10. This complaint is advanced by two organizations, the Assembly of First Nations ("AFN") and the First Nations Child and Family Caring Society of Canada ("Caring Society"),[11] who sought systemic changes to remedy discriminatory practices. It is not a complaint by

---

[7] AFN Written Submissions on Compensation dated April 4, 2019 at para. 6.
[8] *Crockford v. BC (AG)*, 2006 BCCA 360. at paras. 49, 57 and 94
[9] Melissa Hart, "Civil Rights and Systemic Wrongs", (2011) 32 Berkeley J Emp & Lab L 4555 at 455-56.
[10] Canada, Parliament, *Senate Standing Committee on Human Rights*, 31st Parliament, 2nd Sess. (Dec. 11 2014). Available at: https://sencanada.ca/en/Content/Sen/committee/412/ridr/51838-e.
[11] Complaint to the Canadian Human Rights Commission ("Complaint") at p. 1 (Summary).

individuals seeking compensation for the harm they suffered as a result of a discriminatory practice. The complainant organizations were not victims of the discrimination and they do not legally represent the victims.

Language of the Complaint

11. In their initial complaint to the Canadian Human Rights Commission, the complainants allege systemic discrimination. They stated that the government's funding formula for child and family services on reserve constituted "systemic and ongoing" discrimination against First Nations children and families on reserve because it provided them with inequitable levels of child welfare services, as compared to non-Aboriginal children, due to their race and ethnic origin.[12] They further alleged that the government's failure to adequately fund services has resulted in 30%-40% of children in care in Canada being Aboriginal, and they called for an investment of $109 million dollars in year one of multi-year funding to ensure a basic level of equitable child welfare service for the First Nations children on reserve,[13] stating that anything less would "perpetuate the inequity".[14]

12. The framing of the complaint is important. In the *Moore* case, discussed in further detail below, the Supreme Court of Canada determined that remedies must flow from the claim as framed by the complainants.[15]

Complainants' Statement of Particulars

13. In the complainants' joint statement of particulars, they also indicated that this is a claim of systemic discrimination. They alleged insufficient funding for "statutory child welfare and protection programs for registered Indian children and families normally resident on reserve"[16] and undertook to provide the Tribunal with the evidence needed to compare the services available to the general public with those available to "registered First Nation

---

[12] Complaint at p. 3 (final para.).
[13] Complaint at p. 1 (end of para. 1).
[14] Complaint at p. 3 (2nd bullet).
[15] *Moore v. British Columbia (Education), supra.*, particularly at paras. 64, 68-70.
[16] Complainants' Joint Statement of Particulars ("Particulars") at para. 1.

children and families normally resident on reserve", to determine if there was differential treatment and discriminatory practices.[17]

14. Claims by individual victims provide details of the harms they suffered as a result of the discriminatory practice. Here, the public interest Complainants alleged that the government's policies and practices amounted to a denial of essential services to First Nations children and families on reserve writ large. They also suggested that this denial perpetuated prior inequalities by stating that on reserve families have greater child welfare and protection needs.[18]

Nature of the Evidence

15. If this were a claim alleging discrimination against an individual or individuals, there would be evidence of the harm they suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation. No such evidence exists in this case. With respect to child welfare practices, there is very little evidence in the record regarding the impact of the discriminatory funding practice on individuals, particularly regarding causation, that is, evidence of the link between the discriminatory practices and the harms suffered. The AFN acknowledges that awards for pain and suffering require an evidentiary basis outlining the effects of the discriminatory practice on the individual victims.[19]

16. Underfunding did not cause specific children to be removed from their homes; additional funding would not necessarily have enabled them to stay. Provincial and Territorial child-care systems, relied on as the properly funded comparator for on-reserve services in the complaint, regularly remove children from homes. In some cases, removing a child can be a valid approach to ensure the well-being of that child.

17. No case law supports the argument that compensation to individuals can be payable in claims of systemic discrimination without at least one representative individual complainant

---

[17] Particulars at para. 5.
[18] Particulars at para. 12.
[19] AFN Written Submissions on Compensation dated April 4, 2019 at para. 10.

providing the evidence needed to properly asses their compensable damages. This Tribunal has only awarded compensation to individuals in claims of systemic discrimination where they were complainants and where there was evidence of the harm they had suffered.[20] In this claim, the Tribunal lacks the strong evidentiary record required to justify awarding individual remedies.[21] An adjudicator must be able to determine the extent and seriousness of the alleged harm in order to assess the appropriate compensation and the evidence required to do so has not been provided in this claim.[22]

18. Neither of the tools available to the Tribunal to address the deficiency in evidence are appropriate in the circumstances. The Tribunal is entitled to require better evidence from the parties,[23] and to extrapolate from the evidence of a group of representative complainants. [24] However, there are no representative individual plaintiffs in this complaint and no evidence regarding their experiences from which to extrapolate on a principled and defensible basis.[25] The Tribunal's ability to compel further evidence is also not helpful as the Caring Society has stated that it would be an impossible task to obtain such evidence,[26] and would be inconsistent with the fundamental nature of the complaint. Compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court. [27]

---

[20] *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Gaz Métropolitain Inc.*, 2008 QCTDP 24 at para 536 and 537 and *Canada (Human Rights Commission) v Canada (Minister of Social Development)*, 2010 FC 1135.

[22] *Lebeau v Conseil du Trésor (Statistique Canada),* 2015 FC 133 at para. 31, *Jodhan v Canada (AG)*, 2012 FCA 161 at para 102 (in the context of evidence in support of systemic remedies). See also *Entrop. Et al. v. Imperial Oil Ltd., et al.,* 2000 CanLII 16800 (ON CA) at paras. 46 and 59.

[23] *Canada (Human Rights Commission) v Canada (Minister of* Social *Development)*, 2011 FCA 202 at para 32, *Canada (Human Rights Commission) v Canada (Minister of Social Development)*, 2010 FC 1135 at para 75, and *Keeper-Anderson v Canada (Human Rights Commission)*, 2008 CHRT 46.

[24] *Canada (Human Rights Commission) v Canada (Minister of Social Development),* 2011 FCA 202 at para 12.

[25] *Canada Human Rights Commission v. Canada (Attorney General),* 2010 FC 1135 at para. 73.

[26] Caring Society's Written Submissions dated August 29, 2014 at para. 513.

[27] *Canada (Secretary of State for External Affairs) v. Menghani,* [1994] 2 FC 102 at para. 62.

19. In *Canada (Sec. State for External Affairs) v. Menghani*, the Court concluded that the Tribunal could not award permanent residency to an individual who was not a complainant even though it determined that he would have received it if not for the discriminatory practice it identified. The Court's conclusion was based on two findings: first, that the remedy was barred by statute and second, that there is a general objection to award specific relief to non-complainants.[28] The Commission points to two additional decisions in which this Tribunal declined to award compensation in claims where it would have been impractical to have thousands of victims testify, acknowledging that it could not award compensation en masse.[29]

20. Having framed their complaint as one of systemic discrimination, the complainants are now only entitled to remedies that flow from the complaint as framed. This Tribunal made their findings based on that choice. Complainants are only entitled to obtain remedies that flow from their complaint. In *Moore v. British Columbia (Education),* the B.C. Human Rights Tribunal permitted the complainant to lead evidence regarding systemic issues in a complaint of discrimination against an individual, in that case an individual with dyslexia who claimed discrimination on the basis he was denied access to education.

21. The B.C. Tribunal relied on that evidence to award systemic remedies. However the Supreme Court of Canada concluded that the systemic remedies are too far removed from the "complaint *as framed by the Complainant*" [emphasis in original].[30] The Supreme Court upheld the individual remedies but set aside all of the systemic orders because the remedy must flow from the claim.[31]

22. While the situation is reversed in this case, the same principle applies. The complainants framed this complaint as one of systemic discrimination and are now bound by that choice. Remedies in this case must be systemic, particularly because there is insufficient evidence to determine appropriate compensation, if any, for individuals. The lack of evidence of harm

---

[28] *Ibid.*
[29] CHRC Written Submissions dated April 3, 2019, at para. 59.
[30] *Moore v. British Columbia (Education),* 2012 SCC 61 generally, particularly at para. 68.
[31] *Ibid.* at paras. 64 and 68-70.

suffered by individuals, and the apparent impossibility of obtaining it, clearly indicates that this is not an appropriate claim in which to award individual compensation.

The Tribunal Recognizes this as a Claim of Systemic Discrimination

23. The Tribunal has consistently recognized that this is a complaint of systemic discrimination in its decisions in this matter. In 2016 CHRT 10, the Tribunal acknowledged the systemic nature of the complaint in discussing the remedies available to address systemic discrimination under s. 53(2)(a) of the *Act*.[32]

24. In 2017 CHRT 14, in discussing who bears the onus of showing that Canada has complied with orders for immediate relief, the Tribunal stated that the complainants proved that Canada discriminated against First Nations children and families "in a systemic way".[33]

25. In 2018 CHRT 4, the Tribunal discusses the "fundamental core of Canada's systemic discrimination"[34] and states that it must intervene where, as here, it finds that behaviours and patterns that led to systemic discrimination are still occurring.[35]

The Complaint is not a Class Action

26. The remedies claimed by the parties resemble the sort of remedies that may be awarded by a superior court of general jurisdiction rather than a Tribunal with a specific and limited statutory mandate. A class action claim addressing the subject matter of this complaint has been filed in the Federal Court. The *Moushoom* claim demands $3B in damages under the *Canadian Charter of Rights and Freedoms* and an additional $50M in punitive and exemplary damages for the Crown's alleged breach of its common law and fiduciary duties to the class and the alleged breach of the class's s.15(1) *Charter* equality rights.

---

[32] 2016 CHRT 10 at para. 18.
[33] 2017 CHRT 14 at para. 23.
[34] 2018 CHRT 4 at para. 93.
[35] 2018 CHRT 4 at para. 165

27. The claim alleges that Canada knowingly underfunded child and family services for children living on reserve and in the Yukon and underfunded prevention services to those same children while funding care for First Nations children who are removed from their homes thus creating an incentive to remove children.[36] It also alleges that Canada has failed to comply with Jordan's Principle and seeks damages on behalf of the people who suffered and died as a result.[37]

28. The *Moushoom* claim is brought on behalf of two classes: the Jordan's Principle class consisting of minors who were denied a service or product or whose receipt of a service or product was delayed or disrupted due to lack of funding, lack of jurisdiction or as a result of a jurisdictional dispute and the On-Reserve Class consisting of individuals who were minors during the relevant period and who were taken into out-of-home care during the class period when they or at least one of their parents was ordinarily resident on Reserve.[38] These classes include the victims of the discrimination identified by the Tribunal.

29. This class action will determine whether the individuals harmed by the discrimination identified in this complaint are entitled to compensation and will do so with the benefit of the robust powers granted to courts hearing class actions. As the AFN notes, the *Moushoom* class action assumes that there will be no compensation paid in this claim.[39]

30. The *Act* does not permit complaints on behalf of classes of complainants, nor does it permit remedies to be awarded to those same classes. Section 40(1) of the *Act* permits individuals or groups of individuals to file a complaint with the Commission while s.40(2) of the *Act* specifically empowers the Commission to decline to consider complaints, such as this, that are filed without the consent of the actual victims.

31. These provisions are quite different from other Canadian human rights legislation. British Columbia's *Human Rights Code* permits non-class members to start complaints on behalf of

---

[36] *Xavier Moushoom v. The AGC* CFN: T-402-19. Filed March 4, 2019.
[37] *Ibid.*
[38] *Ibid.* at para. 1 (O) and (P)
[39] AFN Written Submissions on Compensation dated April 4, 2019 at para. 34.

a group or class of individuals.[40] Similarly, *The Saskatchewan Human Rights Regulations, 2018* (and their predecessor regulations) permit class complaints where the individual complainants share a common interest in a cause or matter subject to the Chief Commissioner's review. Potential class members are permitted to request exclusions from the class.[41]

32. The lack of an equivalent provision in the *Act* indicates that Parliament chose not to permit class action-style complaints, and it certainly did not grant the Tribunal jurisdiction or provide the tools needed to deal with class complaints.

33. Given its lack of jurisdiction, the Tribunal should not rely on principles from class action jurisprudence. Québec's Tribunal des droits de la personne, whose statute is similar to the *Act*, addressed the relationship between class actions and human rights (in the civil law context) in *Commission des droits de la personne et des droits de la jeunesse c. Québec (Procureur général)*.[42] The case concerned a settlement agreement reached by Quebec, the Quebec Commission, and the teachers' union. The parties encouraged the Tribunal to rely on class actions principles and to approve the agreement despite opposition from a group of young teachers who felt the deal was disadvantageous to them. The Tribunal declined to do so, noting that a "class action is an extraordinary procedural vehicle that breaks with the principle that no one can argue on behalf of another. That recourse can be exercised only with the prior authorization of the court."[43]

34. The Tribunal rejected the suggestion that class actions principles could apply in the human rights context, noting that in class actions the judge serves an important role in protecting "absent members".[44] Without these procedural protections, the tribunal process should not be used to dispossess victims of their rights in the dispute.[45] The Tribunal also concluded that the procedural mechanism of class actions is legislative, and can only be exercised where

---

[40] *Human Rights Code* RSBC 1996, c 210, s 21(4) at para. 21(4)(b).
[41] *The Saskatchewan Human Rights Regulations, 2018* S-24.2 Reg 1 at s. 4.
[42] 2007 QCTDP 26 (CanLII).
[43] *Ibid.* at para. 105.
[44] *Ibid.* at para. 109.
[45] *Ibid.* at para. 109.

statutory conditions are met and therefore cannot, be transplanted into Tribunal proceedings without legislative authority.[46]

35. While not binding on this Tribunal, the Quebec Tribunal's reasoning is compelling. Class action principles do not apply to human rights complaints and should not be injected into them without legislative authority. Where courts are empowered to consider class proceedings, they are equipped with the tools necessary to do so. For example, Rule 334 of the *Federal Court Rules,* which governs class proceedings in the Federal Court, empowers judges to review and certify class proceedings, dictates the form for a certification order, provides a process for opting out of the class and modifies other processes under the *Rules* to accommodate class proceedings. The Rule notably requires a class representative, a person who is qualified to act as plaintiff or applicant under the rules.[47]

36. In the absence of such a provision, the Canadian Human Rights Tribunal is not empowered to address class complaints or to treat complaints that purport to be on behalf of unidentified individual complainants like a class claim.

D. The Scope of the Tribunal's Remedial Jurisdiction

37. The Tribunal does not have jurisdiction to award individual compensation in complaints of systemic discrimination, particularly where, as here, there are no individual complainants. The terms of the *Act* and the jurisprudence of both this Tribunal and the Federal Courts clearly indicate that paying compensation to the complainant organizations or to non-complainant victims would exceed the Tribunal's jurisdiction. Compensation can only be paid where there is evidence of harm suffered by complainant individuals and should only be paid where it advances the goal of ending discriminatory practices and eliminating discrimination.

---

[46] *Ibid.* at para. 112.
[47] *Federal Court Rules,* SOR/98-106, Rule 334.

There is no Legal Basis for Compensating the Complainants

38. The Tribunal was created by the *Act* and its significant powers to compensate victims of discrimination can only be exercised in accordance with the *Act.* The Tribunal's task is to adjudicate the claim before it.[48] Its inquiry must focus on the complaint and any remedies ordered must flow from the complaint.[49] The requirements of s. 53(2)(e) or 53(3) must be satisfied for the Tribunal to award compensation under the *Act.*

Pain and Suffering

39. Section 53(2)(e) of the *Act* grants the Tribunal jurisdiction to award up to $20,000 to "the victim" of discrimination for any pain and suffering they experienced as a result of the discriminatory practice.[50] However, the complainant organizations are not victims of the discrimination and did not experience pain and suffering as a result of it. The evidence presented to the Tribunal by the complainants did not speak to "either physical or mental manifestations of stress caused by the hurt feelings or loss of respect as a result of the alleged discriminatory practice."[51] Organizations cannot experience pain and suffering and there is, therefore, no need to "redress the effects of the discriminatory practices"[52] with regards to the complainants. Redressing the discrimination found was necessary in this case, but the Tribunal's previous orders accomplished this goal.

Willful and Reckless

40. For discrimination to be found to be willful and reckless, and therefore compensable under s. 53(3) of the *Act,* evidence is required of a measure of intent or of behaviour that is devoid of caution or without regard to the consequences of that behaviour.[53] Compensation for willful and reckless discrimination is justified where the Tribunal finds that a party has failed to comply with Tribunal orders in previous matters intended to prevent a repetition of similar events from recurring.[54]

---

[48] *Moore v. British Columbia (Education),* 2012 SCC 61 (CanLII) at paras. 64.
[49] *Ibid.* at para. 69.
[50] Section 53(2)(e) of the Act.
[51] *Canada (AG) v. Hicks,* 2015 FC 599 at para. 48.
[52] *Closs v. Fulton Forwarders Incorporated and Stephen Fulton,* 2012 CHRT 30 at para. 84.
[53] *Canada (AG) v. Collins,* 2011 FC 1168 at para. 33.
[54] *Canada (AG) v. Johnstone* 2014 FCA 110 at para. 125.

41. As with compensation for pain and suffering, compensation for willful and reckless discrimination can only be paid to "victims" of discrimination.[55] The complainant organizations were not victims of willful and reckless discrimination. Furthermore, there is no evidence of a consistent failure to comply with Orders.

42. This claim raises novel issues. There were no Orders requiring the Government to address these issues before the Tribunal's first decision in this matter. The Tribunal's decisions in this matter since 2017 are based on the findings and reasoning of the initial decision and are intended to: "provide additional guidance to the parties". [56] They do not demonstrate that Canada has acted without caution or regard to the consequences of its behaviour.

43. Concerns about the adequacy of the Government's response to studies and reports in the past[57] do not provide a basis for awarding compensation under s. 53(3). Canada's funding for child welfare services has consistently changed to address shifts in social work practice and the increasing cost of providing family services. Examples of these changes include the redesign of the funding formula to add an additional funding stream for prevention services and Bill C-92 currently before the House of Commons.

This Tribunal Understands the Limitations of its Remedial Jurisdiction

44. In its decisions in this matter, the Tribunal has shown a nuanced understanding of both its powers and of the limitations of its remedial jurisdiction. The Tribunal should follow its own guidance in deciding the issue of compensation in this case.

45. In 2016 CHRT 2, the Tribunal concluded that its remedial discretion must be exercised reasonably and on a principled basis considering the link between the discriminatory practice

---

[55] s. 53(3) of the Act.
[56] *First Nations Child & Family Caring society Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2017 CHRT 14 at para. 32.
[57] Caring Society Written Submissions on Compensation dated April 3, 2019 at paras. 14-18 and 29.

and the loss claimed, the particular circumstances of the case and the evidence presented. In reaching its conclusion, it stated that the goal of issuing an order is to eliminate discrimination and not to punish the government.[58]

46. In 2016 CHRT 10, the Tribunal noted that s. 53(2)(a) of the *Act* "has been described as being designed" to address systemic discrimination. Section 53(2)(a) permits the Tribunal to employ special programs, plans or arrangements under s. 16 of the *Act* or an accommodation plan pursuant to s. 17 to redress discrimination.[59]

47. In 2016 CHRT 16, in declining to order the Government to pay to transfer recordings of the Tribunal hearings into a publicly accessible format at the request of the Aboriginal Persons Television Network (the "APTN"), the Tribunal acknowledged the importance of the link between the discriminatory practice and the loss claimed. While the Tribunal was respectful of the APTN's mission and recognized the public interest in the recordings, the fact that APTN was neither a party nor a victim meant that the remedial request was not linked to the discrimination and was, therefore, denied.[60]

48. The Tribunal dealt with this complaint on the basis alleged.. Section 53(2)(a) contains the appropriate remedies for proven claims of systemic discrimination, and that the goal of a remedial order is to eliminate discrimination. Awarding compensation to individuals who were not parties to the complaint would not achieve that purpose.

Systemic Discrimination Requires Systemic Remedies

49. The Federal Court of Appeal has recognized that structural and systemic remedies are required in complaints of systemic discrimination. In *Re: C.N.R. and Canadian Human Rights Commission,* the Federal Court of Appeal concluded that compensation for individuals is not an appropriate remedy in complaints of systemic discrimination. The Court found that

---

[58] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para. 468.
[59] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10 at para. 18.
[60] *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 16 at para. 145.

compensation is limited to victims which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, as here "by the nature of things individual victims are not always readily identifiable".[61]

50. Remedies in claims of systemic discrimination should seek to prevent the same or similar discriminatory practices from occurring in the future in contrast with remedies for individual victims of discrimination which seek to return the victim to the position they would have been in without the discrimination.[62] As human rights lawyers Brodsky, Day and Kelly state in their article written in support of this complaint:

> [w]here the breach of a human rights obligation raises structural or systemic issues – such as longstanding policy practices that discriminate against indigenous women – the underlying violations must be addressed at the structural or systemic level."[63]

Any Compensation Must be Paid Directly to Victims of the Discrimination

51. There is no legal basis for the Caring Society's requests that compensation for willful and reckless discrimination be paid into a trust fund that will be used to access services including: language and cultural programs, family reunification programs, counselling, health and wellness programs, and education programs.[64] Compensation is only payable to victims under the term of the *Act* and paying compensation to an organization on behalf of individual victims could bar that individual from vindicating their own rights before the Tribunal and obtaining compensation. It may also prejudice their recovery in a class action claim as any damages awarded to the victims would be offset against the compensation already awarded to the organization by the Tribunal.

Compensation is Inappropriate in Claims Alleging Breaches of Jordan's Principle

52. There is no basis to award compensation under the *Act* to either the complainant organizations or non-complaint individuals for alleged breaches of Jordan's Principle. As the

---

[61] *Re: C.N.R. and Canadian Human Rights Commission*, 1985 CanLII 3179 (FCA) at para. 10 (overturned on other grounds but this issue was not appealed).
[62] Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Hum Rts 1 at p. 3-4.
[63] *Ibid.* at p.18.
[64] Caring Society Written Submissions dated August 29, 2014 at para. 541.

Commission has stated, the proper remedy for breaches of Jordan's Principle is reconsideration.[65]

53. This remedy has already been ordered by the Tribunal in this case. In 2017 the Tribunal instructed the Government to re-review all denied requests for services, pursuant to Jordan's Principle or otherwise, dating back to April 1, 2009 to ensure compliance with the principle.[66] The results of this re-review were reported by Mr. Sony Perron in his November 15 and December 15, 2017 affidavits. As communicated in his affidavits and those more recently of Dr. Valerie Gideon, Canada continues to evaluate and determine any previously denied requests since April 2007 when submitted.

54. As the Canadian Human Rights Commission notes in its submissions, where Canada has implemented policies that satisfactorily address the discrimination, no further orders are required.[67]

55. Finally, and as discussed above, there is no basis to find that the government discriminated willfully or recklessly in this claim. The Tribunal in the *Johnstone* decision, relied on by the Caring Society,[68] justified its award of compensation under s. 53(3) of the *Act* by pointing to disregard for a prior Tribunal decision that addressed the same points and the government's reliance arbitrary and unwritten policies, among other things, neither of which are the case here.

E. Responses to the Tribunal's Questions

56. The responses provided below to the Tribunal's questions on compensation flow from the principles and jurisprudence discussed above.

---

[65] CHRC's Statement of Particulars at para. 27(b).
[66] 2017 CHRT 35 (CanLII) at para. D of "ORDER".
[67] CHRC Written Submissions on Compensation dated April 3, 2019 at para. 10.
[68] Caring Society Written Submissions on Compensation dated April 3, 2019 at para. 6.

Question 1

57. The Tribunal has asked whether the expert panel proposed by the AFN is feasible and legal or whether it would be more appropriate for the parties to form a committee (potentially including COO and NAN) to refer individual victims to the Tribunal for compensation.

58. Neither of these proposals is feasible or legal. The Tribunal cannot delegate its authority to order remedies to an expert panel and it would not be appropriate to ignore the nature of the complaint by awarding compensation to victims who are not complainants in a claim of systemic discrimination. There are no individual complainants in this claim and little evidence of the harm suffered by victims from which the Tribunal can extrapolate. It would also offend the general objection against awarding compensation to non-complainants in human rights matters.

Question 2

59. This is for the NAN to answer.

Question 3

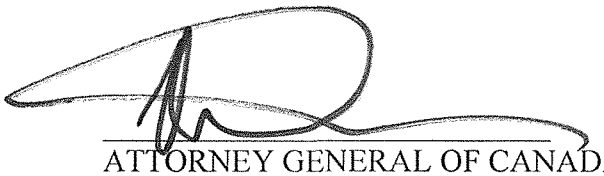
60. The Caring Society requests that compensation be paid in to an independent trust similar to the ones established under the Indian Residential Schools class action settlement and the AFN is requesting payment of compensation directly to victims and their families. You have asked why the Tribunal should not take both approaches to compensation proposed by the Caring Society and AFN.

61. The Tribunal should not, and is not permitted in law, to take either of the approaches proposed by the complainants. As the question notes, the Indian Residential Schools settlement is the result of agreement between the parties in settling a class action and the independent trust was not imposed by a Court or tribunal.

62. Compensation cannot be paid to victims or their families through this process because there are no victims or family-member complainants in this claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, ON this 16th day of April, 2019.



ATTORNEY GENERAL OF CANADA
Department of Justice Canada
500-50 O'Connor St.
Ottawa, ON, K1A 0H8
Fax: (613) 954-1920

Per: Robert Frater Q.C. and Max Binnie
Tel: (613) 670-6283
E-Mail: Robert.Frater@justice.gc.ca
Max.Binnie@justice.gc.ca

Counsel for the Respondent