Court File No. T-1621-19

FEDERAL COURT

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

- and –

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PART I - STATEMENT OF FACT

A. Overview

1. The victims of Canada's wilful and reckless discriminatory provision of the First Nations Child and Family Services Program ("FNCFS Program") and Jordan's Principle are mostly children. They have been waiting for more than twelve years since this case was filed for Canada to fully accept responsibility for its discriminatory conduct and take all necessary measures to stop the discrimination and redress the serious harms it has caused. Some of them sadly passed away waiting. Compensating victims, as provided for under the *Canadian Human Rights Act* (the "***CHRA***"), is one of the measures Canada must undertake in order to deter future discrimination and vindicate the losses suffered. The devastating effects of Canada's conduct include, but are not limited to: loss of family, culture, language, tradition, dignity and, for some, loss of life. Instead of accepting its responsibility in any meaningful way, Canada is, once again, choosing to continue to fight victims in court, opposing the compensation relief to which First Nations children, youth and their families across Canada are entitled, and for which they have been waiting.

2. On September 6, 2019, the Canadian Human Rights Tribunal (the "**Tribunal**") issued a preliminary order on financial compensation (the "**Compensation Entitlement Order**"). The Tribunal found that Canada's discrimination was "wilful and reckless," set out the classes of victims and the amount payable ($40,000 per victim). The Tribunal required Canada to (i) engage in discussion regarding a compensation process with the complainants, First Nations Child and Family Caring Society (the "**Caring Society**") and the Assembly of First Nations ("**AFN**") and (ii) submit a proposal to the Tribunal regarding a process of compensation on or before December 10, 2019, along with the other parties. However, the Tribunal has <u>not</u> ordered Canada to pay the victims at this stage. Instead, the Tribunal made certain findings that will lead to a future order for Canada to financially compensate the victims pursuant to a process of compensation that is to be determined.

3. Instead of engaging in discussions with the Caring Society and the AFN, and/or waiting for the Tribunal to complete its work, Canada commenced this judicial review application, with the express purpose of denying the victims a legal avenue to seek financial compensation under

the *CHRA*. In addition, Canada is now attempting to thwart the completion of the Tribunal's work on the issue of compensation by bringing a motion to stay the Compensation Entitlement Order.

4. These written representations address two motions before the court: (i) Canada's motion to stay the Tribunal's order (2019 CHRT 39) that Canada enter into discussions with the Caring Society and the AFN regarding a process for paying compensation to victims of Canada's discrimination; and (ii) the Caring Society's motion to hold Canada's application for judicial review in abeyance pending the Tribunal's final determination on the issue of compensation.

5. These motions raise overlapping and corresponding issues, focusing on one central question: should this Court pre-empt the Tribunal's final determination on the issue of financial compensation? Under the circumstances, the answer is clearly no.

6. The Caring Society submits that the Tribunal, given its expertise regarding discrimination, substantive equality, and the *CHRA*, must be allowed to complete its important work to craft a final compensation order. Canada's motion to stay the Compensation Entitlement Order ought to be dismissed and this application for judicial review ought to be held in abeyance pending a final decision by the Tribunal on compensation, including orders by the Tribunal regarding the process to be adopted for distributing compensation. Not only is this approach efficient, cost saving and mindful of judicial resources, it also protects the victims, does not prejudice Canada, safeguards a transparent and streamlined process, and ensures that unnecessary and duplicative delay do not hamper the ultimate resolution of the issues.

B. The Facts

1) *The Complaint and the Decision on the Merits*

7. On February 27, 2007, the AFN and the Caring Society filed a human rights complaint (the "**Complaint**") against the Applicant, the Attorney General of Canada, representing Indian and Northern Affairs Canada (now Indigenous Services Canada ("**ISC**")). The Complaints alleged that Canada was discriminating against First Nations children and their families on the basis of race and national and/or ethnic origin contrary to section 5 of the *CHRA*.[1] Amongst other things, the

[1] Affidavit of Cindy Blackstock, affirmed on October 24, 2019, at para. 7 ("**Blackstock Affidavit**"), Motion Record of the First Nations Child and Family Caring Society of Canada ("**Caring Society MR**"), Vol. 1, Tab B, pp. 8-9.

Complaint alleged that the federal government's First Nations Child and Family Services Program (the "**FNCFS Program**") discriminated against First Nations children, youth and families. The Complaint also alleged that Canada's approach to implementing Jordan's Principle was discriminatory, as jurisdictional disputes between and amongst federal, provincial and territorial governments caused First Nations children to be denied or to be adversely differentiated against when seeking services to achieve outcomes that are enabled by public services available to other Canadian children.[2]

8. Canada attempted to delay or derail the hearing of the Complaint on the merits almost every time a reviewable decision was made. For example, in November 2008, Canada sought judicial review of the Canadian Human Rights Commission's (the "**Commission**") decision that the Tribunal institute an inquiry into the Complaint. In response, the Caring Society and the AFN brought a motion to strike the application for judicial review.

9. On November 24, 2009, Prothonotary Aronovitch ordered that Canada's application for judicial review be held in abeyance until disposition of the Complaint before the Tribunal; she also refused to strike the application, concluding that:

> The subject matter of the complaint being serious and complex, I agree that it should not be determined in a summary fashion and in the absence of the factual record necessary to fully appreciate the matters in issue.
>
> [...]
>
> There is an interest [...] in allowing a full and thorough examination in the specialized forum of the Tribunal, of issues which may have an impact on the future ability of aboriginal peoples to make discrimination claims.[3]

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[2] Blackstock Affidavit, at para. 10, Caring Society MR, Vol. 1, Tab B, p. 9.

[3] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (24 Nov. 2009) Ottawa T-1753-08 (F.C.) (Proth.), Book of Authorities of the First Nations Child and Family Caring Society of Canada ("**Caring Society BOA**"), Tab 2.

10. Canada appealed the order placing its application in abeyance, while the Caring Society and the AFN appealed the refusal to strike the application. Justice O'Reilly dismissed both appeals.[4]

11. In the interim, in December 2009, Canada brought a motion before the Tribunal seeking to have the Complaint dismissed on technical grounds. On March 14, 2011, the Tribunal dismissed the Complaint (the "**Dismissal Order**").[5] The Caring Society, AFN and the Commission sought judicial review of the Dismissal Order and were ultimately successful before the Federal Court and the Federal Court of Appeal.[6]

12. Finally, on January 26, 2016, the Tribunal determined that Canada's FNCFS Program and approach to Jordan's Principle discriminated against First Nations children, youth and families contrary to section 5 of the *CHRA* (the "**Decision on Merits**").[7] The Tribunal generally ordered ISC to cease its discriminatory practices and reform the FNCFS Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the "**1965 Agreement**"). ISC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle.[8]

13. The Decision on the Merits made a number of important findings regarding the harm experienced by First Nations children and youth as well as Canada's knowledge regarding that harm, including but not limited to the following:

a. Canada knew that its child welfare funding formula created incentives to remove First Nations children from their homes and communities[9];

b. Despite being aware of the incentive to take children into care, Canada incorporated this shortcoming into other child welfare funding formulas it developed;[10]

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[4] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343, Caring Society BOA, Tab 3. Canada discontinued its application for judicial review on March 9, 2016.
[5] 2011 CHRT 4, Caring Society BOA, Tab 6.
[6] 2012 FC 445, Caring Society BOA, Tab 7; 2013 FCA 75, Caring Society BOA, Tab 8.
[7] 2016 CHRT 2, Applicant's Book of Authorities, Tab 16.
[8] Blackstock Affidavit, at para. 13, Caring Society MR, Vol. 1, Tab B, p. 10.
[9] 2016 CHRT 2, at paras. 168, 385, 386 and 458, Applicant's Book of Authorities, Tab 16.
[10] 2016 CHRT 2, at para. 386, Applicant's Book of Authorities, Tab 16.

c. Canada was aware, through various reports and evaluations of the FNCFS Program (including many of its own reports), that the FNCFS Program is not adapted to provincial/territorial legislation and standards, creating funding deficiencies for such items as salaries, benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures;[11]

d. Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, Canada did not significantly modify the program following its inception in 1990;[12] and

e. The failure to implement Jordan's Principle was causing detrimental impacts for First Nations children, including the denial, delay and un availability of services to First Nations children in need of, at times, live changing and live saving services.[13]

14. From the time of the Decision on the Merits in January 2016 to present, the Caring Society, the AFN, the Commission, and the interested parties involved in this case have taken significant steps to assist Canada in complying with the Tribunal's orders. Where Canada was unwilling to comply with the Decision on the Merits or when its actions failed to ameliorate the discrimination, the parties filed motions of non-compliance with the Tribunal to compel Canada to end its discriminatory conduct. These efforts have resulted in seven subsequent non-compliance orders by the Tribunal against Canada.[14] These decisions document Canada's ongoing patterns of discrimination against First Nations children and inaction and/or inadequate action to comply with the Decision on the Merits.[15]

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[11] 2016 CHRT 2, at para 389, Applicant's Book of Authorities, Tab 16.
[12] 2016 CHRT 2, at para 461, Applicant's Book of Authorities, Tab 16.
[13] 2016 CHRT 2, at paras 362, 363, 365, 366-373, and 374-376, Applicant's Book of Authorities, Tab 16.
[14] *Caring Society et al. v Canada,* 2016 CHRT 10, Applicant's Book of Authorities, Tab 17; *Caring Society et al. v Canada*, 2016 CHRT 16, Applicant's Book of Authorities, Tab 18; *Caring Society et al. v Canada*, 2017 CHRT 7, Caring Society BOA, Tab 10; *Caring Society et al. v Canada,* 2017 CHRT 14, Applicant's Book of Authorities, Tab 19; *Caring Society et al. v Canada*, 2018 CHRT 4, Applicant's Book of Authorities, Tab 20; *Caring Society et al. v Canada*, 2019 CHRT 1, Caring Society BOA, Tab 11 and *Caring Society et al. v Canada*, 2019 CHRT 39, Applicant's Book of Authorities, Tab 21.
[15] Blackstock Affidavit, at para. 16, Caring Society MR, Vol. 1, Tab B, p. 11.

2) *Nature of the Compensation Entitlement Order at Issue in this Application*

15. As part of the relief sought during the hearing of the Complaint, the Caring Society requested compensation pursuant to subsection 53(3) of the *CHRA* for wilful and reckless discrimination on Canada's part. In particular, the Caring Society sought: (i) $20,000 plus interest for every First Nations child affected by the FNCFS Program who was placed in out-of-home care since 2006; (ii) a detailed account from Canada of the number of First Nations children affected by the FNCFS Program who were placed in out-of-home care since 2006; and (iii) an order that the compensation be paid into a trust fund.[16] Thereafter, the Caring Society also sought $20,000 of compensation under subsection 53(3) of the *CHRA* for those First Nations children who experienced discrimination pursuant to Canada's narrow and discriminatory interpretation of Jordan's Principle, with the compensation to be placed in the same trust fund. The Caring Society made a similar request that Canada provide a detailed account of the number of First Nations children who were denied an eligible service or product pursuant to Jordan's Principle.[17] The AFN also requested that the victims of Canada's discrimination, including immediate family members, be paid compensation under paragraph 53(2)(e) of the *CHRA* for pain and suffering, which the Caring Society supported.

16. On September 6, 2019, the Tribunal issued the Compensation Entitlement Order, finding that victims of Canada's discriminatory conduct are entitled to financial compensation for both pain and suffering (s. 53(2)(e)) and as a result of Canada's wilful and reckless conduct (s. 53(3)). With respect to quantum, the Tribunal found that each victim was entitled to the statutory maximum of $20,000 under both s. 53(2)(e) and s. 53(3), but did <u>not</u> order Canada to pay compensation to victims at this time. Instead, it outlined a series of parameters and categories of victims for distributing compensation, making it clear that further orders will be issued by the Tribunal, only after receiving input from the parties, in order to arrive at a final order for compensation. In fact, in its decision, the Tribunal stressed that it would not make a final determination on the process to identify and compensate victims (the **"Compensation Process"**) until considering submissions by the AFN, Caring Society and Attorney General, to be made by

[16] *Caring Society v Canada*, 2019 CHRT 39 at paras 21-25, Applicant's Book of Authorities, Tab 21.
[17] *Ibid*, Applicant's Book of Authorities, Tab 21.

December 10, 2019. For instance, on page 81 of the September 6, 2019 decision, under the heading "XIV. Orders", the Tribunal states "[a]ll the following orders will find application once the compensation process referred to below has been agreed to by the Parties or ordered by the Tribunal."[18] Canada's witness on these motions, who is ISC's Associate Deputy Minister, has conceded that the Compensation Entitlement Order is not a final decision and that Canada is not required to pay anything to victims at this time. [19]

17. In its Compensation Entitlement Order, the Tribunal invited the parties to make comments and suggestions or request clarification regarding moving forward with the Compensation Process or the wording or the content of the Compensation Entitlement Order. This is in keeping with the Tribunal's practice on past orders.[20] Canada has not responded to the Tribunal's invitation in this regard.

18. Despite repeated effort by the Caring Society, through its counsel and its Executive Director, Dr. Cindy Blackstock, Canada not yet entered into the Tribunal-ordered compensation discussions. The evidence is that Canada has declined all of these invitations.[21] Canada has not yet appointed anyone to engage in discussions regarding a Compensation Process.[22] Before the Tribunal, Canada is instead seeking to delay discussions with the AFN and the Caring Society regarding the Compensation Process so that this Court can rule on its motion regarding a stay.[23]

3) *The Applicant's Public Statements Since the Ruling*

19. Since the Tribunal issued its compensation order on September 6, 2019, various members of the government, including the Prime Minister, the Minister of Indigenous Services, and the Minister of Crown Indigenous Relations, have repeatedly said they agree that compensation ought to be granted to the victims of Canada's discrimination. In some cases, representatives of Canada

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[18] Blackstock Affidavit, at para. 24, Caring Society MR, Vol. 1, Tab B, p. 13.
[19] Cross-examination of Sony Perron by Barbara McIsaac on November 14, 2019 ("**Perron XEX**"), at p. 16, Q & A 36, lines 7-15, Caring Society MR, Vol. 2, Tab D, p. 394.
[20] *Caring Society et al v Canada*, 2017 CHRT 35, Caring Society BOA, Tab 9; *Caring Society et al v Canada*, 2018 CHRT 4 at para 445, Applicant's Book of Authorities, Tab 20.
[21] Blackstock Affidavit, at paras. 11, 26-31, 44-47, Caring Society MR, Vol. 1, Tab B, pp. 9-10, 13-14, 18.
[22] Perron XEX, at p. 12, Q & A 28, lines 15-22, Caring Society MR, Vol. 2, Tab D, p. 390.
[23] Letter from Robert Frater to the Canadian Human Rights Tribunal dated November 15, 2019, Caring Society MR, Vol. 2, Tab F, p. 529.

have suggested that they do not oppose the Compensation Entitlement Order but simply need more time to have "conversations" about compensation.[24] These include:

a. On October 4, 2019, the Honourable Seamus O'Regan, Minister of Indigenous Services, tweeted that Canada agrees that compensation should be part of the healing process. He went on to state that the government is committed to engaging in discussions around compensation for the benefit of those individuals who were impacted by its discriminatory conduct.[25]

b. On October 7, 2019 during the Leaders' Debate Commission's English language debate held as part of the 43rd General Election, the Right Honourable Justin Trudeau, Prime Minister of Canada, was asked about this judicial review. He stated that Canada will be compensating the victims of discrimination.[26]

c. On October 10, 2019 during the Leaders' Debate Commission's French language debate, Prime Minister Trudeau was asked about this judicial review. He stated that Canada agreed with the Tribunal, and said that the federal government "absolutely" had to compensate First Nations children and was committed to having discussions about compensating the victims of discrimination. In response to a debate question from Elizabeth May, the then Green Party Leader, regarding Canada's effort to quash the Tribunal's Compensation Entitlement Order in Federal Court, Prime Minister Trudeau reiterated his agreement with the Tribunal.[27]

d. On October 13, 2019, Adam Vaughan, Liberal Member of Parliament for Spadina-Fort York and Parliamentary Secretary to the Prime Minister from 2015-2017 and to the Minister of Families, Children and Social Development from 2017 until the

[24] Blackstock Affidavit, at para. 33, Caring Society MR, Vol. 1, Tab B, p. 15.
[25] Blackstock Affidavit, at para. 34 and Exhibit "6", Caring Society MR, Vol. 1, Tab B, pp. 15, 95-96.
[26] Blackstock Affidavit, at para. 35 and Exhibit "7", Caring Society MR, Vol. 1, Tab B, pp. 15, 97-159.
[27] Blackstock Affidavit, at para. 36, Caring Society MR, Vol. 1, Tab B, p. 15-16.

dissolution of the 42nd Parliament, tweeted that compensation would be granted but that Canada could not act until after the election.[28]

20. On October 11, 2019, the Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations, and Trish Cowie, the Liberal candidate for Parry Sound—Muskoka spoke at a meeting attended by Chief Scott McLeod of Nippissing First Nation. During this meeting, Minister Bennett identified herself as the client in the proceedings related to the Compensation Entitlement Order and stated that Canada was asking for a stay of the Compensation Entitlement Order because "there was no process" before the Tribunal to request an extension of the December 10, 2019 deadline. She also stated that Canada does not want to talk to the AFN and the Caring Society, preferring instead to talk to victims of the discrimination. The Minister further said that she wants to "get to the table to sort out what would be fair" in terms of the Compensation Process and that Canada was not fighting the decision. She further noted that people should listen to what she and the Prime Minister are saying about compensation; not what the Attorney General filed in the current Federal Court matter.[29]

4) *Evidence of Alleged Harm to Canada*

21. Canada claims at paragraph 6 of its Notice of Motion that there are three demonstrable categories of irreparable harm that it will suffer if the Tribunal's Compensation Entitlement Order, which only requires Canada to enter into discussions with the Caring Society and the AFN regarding the Compensation Process and to make submissions to the Tribunal, is not stayed:

a. The potential for conflicting decisions as a result of the Tribunal's retained jurisdiction over the Compensation Entitlement Order and the Federal Court's review of this ruling;

b. The allocation of resources to set up and implement a compensation process that may be set aside; and

[28] Blackstock Affidavit, at para. 39 and Exhibit "10", Caring Society MR, Vol. 1, Tab B, pp. 16, 166-168.
[29] Blackstock Affidavit, at para. 41 and Exhibit "11", at p. 6, Caring Society MR, Vol. 1, Tab B, pp. 17, 170.

c. The unrecoverable loss of compensation paid out to certain individuals during the course of the judicial review.[30]

22. These are not irreparable harms, and some of these alleged harms do not arise at this stage of the Tribunal's process regarding compensation at all.

23. Canada's first concern (conflicting decisions) can best be addressed by the Caring Society's motion to place the judicial review in abeyance pending the issuing of an Order regarding Compensation Process.

24. The second concern (allocation of resources) is overstated, if not completely baseless. ISC's Associate Deputy Minister (Mr. Perron), the witness proffered by Canada on this issue has admitted that:

a. ISC has started work "… on preparing briefing, which is about the assessment of the order itself, the background of all the situation, because we cannot presume who will be the Minister at the time and what might be the way forward" as well as on options for moving forward;[31]

b. ISC has reviewed the Compensation Entitlement Order, including what are the specific orders in terms of who needs to be compensated, and has assessed what might be the financial consequences;[32]

c. ISC has identified the information that it has in the department to inform its process regarding *CHRA* compensation. It has reviewed other processes where Canada was required to compensate First Nations victims such as via the Indian Residential Schools and the Sixties Scoop class action compensation settlements;[33] and

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[30] Notice of Motion for Stay of Order, Attorney General of Canada, dated October 4, 2019 at para 3, Applicant's Motion Record, Tab 1.
[31] Perron XEX, at pp. 11-12, Q & A 26, lines 4-9, Caring Society MR, Vol. 2, Tab D, pp. 389-390.
[32] Perron XEX, at p. 14, Q & A 33, lines 17-23, Caring Society MR, Vol. 2, Tab D, p. 392.
[33] Perron XEX, at p. 14, Q & A 33, lines 17-23, Caring Society MR, Vol. 2, Tab D, p. 392.

d. ISC has begun assessing how it could implement a Tribunal order setting out specific actions Canada must take on a compensation process.[34]

25. The third concern (unrecoverable loss) does not arise at all. Canada's witness conceded that no payment is required at this time until the Tribunal issues its final ruling. [35]

5) *Steps taken by the Caring Society to Comply with the CHRT's Order to Propose a Compensation Process*

26. Upon receiving the Compensation Entitlement Order, the Caring Society's Executive Director, Dr. Blackstock, immediately took steps to ensure that the Caring Society would be ready to discuss the Compensation Process with Canada and to make submissions to the Tribunal on or before the December 10, 2019 deadline. The Caring Society, in partnership with the AFN, is working diligently to prepare a Compensation Process proposal for the Tribunal's consideration.[36]

27. The Caring Society is a small not-for-profit organization. Taking the necessary steps to meet the deadline set by the Tribunal required it to devote significant staff hours to this objective. Dr. Blackstock has personally devoted many hours, towards this objective including working after business hours and on weekends and statutory holidays. In addition, the Caring Society has also spent approximately $68,000 to organize and hold activities in order to obtain the input it requires to enter into discussions with Canada as required by the Tribunal's Compensation Entitlement Order.[37]

28. In particular, on September 20, 2019, the Caring Society entered into an agreement with Youth in Care Canada (**"YICC"**), a national charitable organization for youth in care and formerly in care across Canada, to organize a national consultation of First Nations youth in care regarding the Compensation Process. Pursuant to this agreement, the Caring Society provided funding to YICC in the amount of $67,285 to organize and hold a consultation with 15-20 First Nations youth on October 25, 2019. The Caring Society also arranged for Naiomi Metallic, a lawyer and a

[34] Perron XEX, at p. 12, Q & A 27, lines 12-14 and, p. 15, Q & A 34, lines 7 – 12, Caring Society MR, Vol. 2, Tab D, pp. 390, 393.
[35] Perron XEX, at p. 16, Q & A 36, lines 7-15, Caring Society MR, Vol. 2, Tab D, p. 394.
[36] Blackstock Affidavit, at para. 48, Caring Society MR, Vol. 1, Tab B, pp. 18-19.
[37] Blackstock Affidavit, at para. 49, Caring Society MR, Vol. 1, Tab B, p. 19.

professor who holds the Chancellor's Chair in Aboriginal Law and Policy at Dalhousie University, to explain the Compensation Entitlement Order to the YICC participants and answer any questions they might have. These young people's reflections and recommendations will be documented in a final summary report to be delivered to the Caring Society. The Caring Society will rely on this report in formulating its submissions on the Compensation Process. [38]

29. In addition, the Caring Society also took the following steps to comply with the Tribunal's Compensation Entitlement Order.

a. Sought advice from Elders, including Residential School Survivors, and the National Centre on Truth and Reconciliation ("**NCTR**");[39]

b. Contacted the National Council of Child Advocates to request their input regarding the Compensation Process;[40]

c. Contacted UNICEF Canada to obtain input regarding the Compensation Process;[41]

d. Emailed the Director of Strategic Policy for Saskatchewan's Ministry of Social Services to request a discussion with all provincial and territorial deputy ministers of social services regarding the Compensation Process;[42]

e. Contacted children's rights experts to also request their suggestions on the Compensation Process;[43]

f. Requested the assistance of Professor Barbara Fallon, of the University of Toronto, and Nico Trocmé, from McGill University, in structuring data questions to identify

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[38] Blackstock Affidavit, at paras. 50-51 and Exhibit "15", Caring Society MR, Vol. 1, Tab B, pp. 19, 222-226.
[39] Blackstock Affidavit, at para. 52, Caring Society MR, Vol. 1, Tab B, pp. 19-21.
[40] *Ibid,* Caring Society MR, Vol. 1, Tab B, pp. 19-21.
[41] *Ibid,* Caring Society MR, Vol. 1, Tab B, pp. 19-21.
[42] *Ibid,* Caring Society MR, Vol. 1, Tab B, pp. 19-21.
[43] *Ibid,* Caring Society MR, Vol. 1, Tab B, pp. 19-21.

the victims who are entitled to compensation and hired research assistants to assist them with their research;[44]

g. Contacted the former Chief of Child Protection at UNICEF to ask her for her input on the Compensation Process;[45]

h. Consulted Ry Moran, the Director of the NCTR to obtain his insight regarding the lessons learned from the distribution of compensation following the Indian Residential School settlement; and[46]

i. Sought out mechanisms to accommodate persons with disabilities and to ensure all persons can access reliable and cost-free financial advice regarding the payment of compensation under the *Act*, if required. [47]

6) *Evidence of Harm to First Nations Children and their Families if Abeyance is Not Granted*

30. At the time of the Decision on the Merits, based on Canada's documents, there were over 165,000 First Nations children and youth across the country who did not have access to substantively equal child welfare services or who were denied equitable services because of Canada's failure to implement Jordan's Principle. Since 2007, tens of thousands of First Nations children did not receive substantively equal child welfare services from Canada or were denied equitable services because of Canada's failure to fully implement Jordan's Principle. The individuals who are eligible for compensation are those who have experienced the most harmful impacts of Canada's ongoing discriminatory policies and practices based on the evidence that was before the Tribunal[48]. They also experience the highest rates of poverty in Canada.[49]

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[44] *Ibid,* Caring Society MR, Vol. 1, Tab B, pp. 19-21.
[45] *Ibid,* Caring Society MR, Vol. 1, Tab B, pp. 19-21.
[46] *Ibid,* Caring Society MR, Vol. 1, Tab B, pp. 19-21; Affidavit of Doreen Navarro affirmed on November 7, 2019, Exhibit "A" (**"Navarro Affidavit"**), Caring Society MR, Vol. 2, Tab C, pp. 376-378.
[47] *Ibid,* Caring Society MR, Vol. 1, Tab B, pp. 19-21.
[48] Blackstock Affidavit, at para. 72, Caring Society MR, Vol. 1, Tab B, p. 26.
[49] Blackstock Affidavit, at paras. 73-74, Caring Society MR, Vol. 1, Tab B, p. 26; and Exhibit "25", Caring Society MR, Vol. 2, Tab B, pp. 325-365.

31. The evidence in support of the Caring Society's motion to hold the judicial review in abeyance demonstrates that interrupting the Tribunal's work in the middle of this process will cause harm to those who have already been victimized by Canada's discriminatory conduct; many of them First Nations children. Canada has not tendered any evidence to the contrary.

32. According to the Director of the **NCTR**, there are two important lessons to be learned from the Indian Residential Schools Settlement Agreement (the "**IRSSA**") that are relevant to this motion:

a. **Speediness of the Process:** Delays in compensation processes to former students caused harm to survivors. The Alternative Dispute Resolution Process which preceded the IRSSA was generally deemed to be too slow to meet the needs of Survivors – former students were dying before they received compensation while others lost the benefit of treatment and access to services as a result of delayed compensation. The Independent Assessment Process and Common Experience Payment processes were specifically developed under the IRSSA in an effort to expedite the process of compensation to Survivors.

b. **Transparency of the Process and Avoiding Mixed Messages:** An important lesson of the IRSSA compensation process relates to the importance of transparency and consistency of messaging around the compensation and eligibility criteria and process. Mixed messages about compensation can be harmful.

(a) Speediness of the Process

33. Canada has not challenged or questioned the Caring Society's evidence that it is in the best interests of the First Nations children currently and formerly in care that the Compensation Process be determined as quickly as possible. Canada has not contested that the sooner a final decision can be rendered regarding how the compensation can be distributed to First Nations children and their families, the better the chances that this compensation will have life changing positive impacts for them. The evidence shows that prompt compensation can provide some measure of assistance to victims in overcoming the countless barriers they continue to encounter as a result of Canada's

discriminatory conduct.[50] Conversely, the evidence suggests that if the provision of compensation is delayed, it will significantly lessen the impact it will have on the lives of children currently and formerly in care and their families.[51]

34. In some circumstances, compensating former children in care quickly could have life-changing impacts for them.[52]

35. Canada has also not challenged the Caring Society's representations that some First Nations children, youth and families who are victims of Canada's discrimination are facing life-threatening circumstances and may not be alive to receive their compensation if the compensation process is delayed.

36. Contrary to Canada's assertion that any harm to victims arising from its stay and judicial review applications can be remedied by paying interest, the foregoing examples demonstrate how a failure to pay compensation in a timely manner can deepen the harm arising from Canada's wilful and reckless discriminatory conduct.

(b) Transparency of the Process and Avoiding Mixed Messages

37. The conflict between Canada's public statements of support for compensation and the Attorney General's legal submissions regarding Canada's position on the Compensation Entitlement Order is harming children, youth and their parents and grandparents. Youth in care and youth formerly in care have expressed frustration and hurt resulting from Canada's decision to seek a judicial review of the Compensation Entitlement Order.[53] The uncertainty arising from Canada's motion for a stay also adds further stress to families who have experienced tragic losses of their children. For example, Dr Blackstock has received several communications from the father of First Nations children who passed away after they did not receive the medical and home care

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[50] Blackstock Affidavit, at paras 76-78, Caring Society MR, Vol. 1, Tab B, p. 27-28.
[51] *Ibid,* Caring Society MR, Vol. 1, Tab B, p. 27-28.
[52] Blackstock Affidavit, at para. 82, Caring Society MR, Vol. 1, Tab B, pp. 28-29. See also Affidavit of Erickson Owen affirmed on November 8, 2019, at paras 10-11, filed on November 8, 2019, and Affidavit of Rachelle Metawabin affirmed on November 8, 2019 at para 10, filed on November 8, 2019.
[53] Blackstock Affidavit, at para. 83, Caring Society MR, Vol. 1, Tab B, p. 29 and Exhibit "26", Caring Society MR, Vol. 2, Tab B, p. 366-373.

services they needed due to Canada's discriminatory implementation of Jordan's Principle.[54] The public statements he has heard by government officials combined with the news updates about the legal proceeding have been confusing and hurtful to him.

PART II - STATEMENT OF THE POINTS IN ISSUE

38. The Caring Society submits that these motions raise the following issues:

a. Whether proceedings before the Tribunal related to the Compensation Process should be stayed; or

b. Whether Canada's judicial review should be held in abeyance pending the Tribunal ordering a Compensation Process following discussions between Canada, the AFN and the Caring Society and full submissions to the Tribunal.

PART III - SUBMISSIONS

A. Canada's Motion to Stay

39. Canada's motion to stay the Tribunal's Compensation Entitlement Order ought to be dismissed. The evidence proffered by Canada falls significantly short of what is required under the law and there are no public policy reasons to support the suspension of the Tribunal's order at this stage. In fact, there are significant reasons for the parties to continue with the process set out in the Tribunal's order requiring submissions on the Compensation Process in order to inform the Tribunal's final order. First, the Tribunal's process will respond to the significant needs of First Nations children and families who have been and continue to be impacted by Canada's discriminatory conduct. Second, it is in everyone's best interest, including Canada's, to allow the decision-maker with expertise to complete its work and come to a final determination on all elements of compensation before this Court becomes involved in the merits. Third, it will provide time for Canada to align its political statements with its legal filings in this matter.

[54] Blackstock Affidavit, at para. 79, Caring Society MR, Vol. 1, Tab B, p. 28.

40. The test on a motion to stay a tribunal's order is well known and generally uncontroversial: Canada is required to demonstrate that (i) there is a serious issue be tried; (ii) it will suffer irreparable harm absent the stay; and (iii) the balance of convenience lies in Canada's favour.[55]

41. A stay should only be granted after all three branches are met. As Stratas J.A. noted in *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112:

> The test is aimed at recognizing that the suspension of a legally binding and effected matter – be it a court judgment, legislation or a subordinate body's statutory right to exercise its jurisdiction – is a most significant thing: *Mylan Pharmaceuticals ULC v. AstraZeneca Inc.,* 2011 FCA 312 at paragraph 5. The binding, mandatory nature of law – which I shall call "legality" – matters. Indeed, it is an aspect of the rule of law, a constitutional principle: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at paragraph 58.[56]

42. The Tribunal is a highly specialized administrative body with expertise in the areas of human rights, discrimination, and substantive equality. As this Court recently held, the exercise of the Tribunal's powers "requires a 'fact-intensive inquiry' commanding a high degree of deference from reviewing Courts."[57] In this case, the Tribunal has made a decision directly within the purview of its expertise: ordering the parties to engage in discussions regarding the issue of compensation and to prepare further submissions regarding the Compensation Process. Halting the Tribunal's process at this time would only serve to delay and confuse the completion of it's work on this important issue.

1) *There is No Serious Issue to be Tried*

43. While the threshold to demonstrate a serious question is low, the reviewing court is required to take a "hard look" at the issue raised by the moving party.[58] If there is some merit to the issue raised and it is not frivolous or vexatious, a moving party will often be able to overcome this threshold first step.

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[55] *R.J.R. MacDonald Inc. v. Canada* (Attorney General), [1994) 1 5.C.R. 311, at para. 43, Applicant's Book of Authorities, Tab 36.
[56] *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 at para. 20, Caring Society BOA, Tab 14.
[57] *Attorney General of Canada v. Hughes*, 2019 FC 1026, at para. 30, Caring Society BOA, Tab 1.
[58] *Canada (Minister of Citizenship & Immigration) v. Fox*, 2009 FCA 346, at para. 23, Applicant's Book of Authorities, Tab 7.

44. In this case, Canada has improperly framed the issue, suggesting that the Tribunal has ordered it to immediately pay compensation to victims of its discrimination at the maximum amount allowable under the *CHRA*. But no payments are required at this time. The Tribunal has merely ordered Canada to engage in discussions with AFN and the Caring Society to attempt to agree on a Compensation Process and file submissions to the Tribunal on or before December 10, 2019. As a result, this Court should not be tempted to evaluate these issues on the merits.

45. At this stage of this judicial review, when the Tribunal's compensation order is incomplete, the evaluation of whether there is a serious question should be limited only to the part of the Tribunal's order that is operative. To extend the inquiry to the entire decision before the Tribunal, when the Tribunal is waiting for submissions from the parties to complete its order, would fail to provide the deference owed to the Tribunal and its process.

46. Bearing this in mind, the Caring Society submits that, at this stage of the proceeding, there is no serious issue to be tried.

47. Pursuant to the Compensation Entitlement Order, the only enforceable relief imposed on Canada is to engage in discussions with the parties and file submissions for the Tribunal's consideration regarding the Compensation Process by December 10, 2019. As Canada's witness has acknowledged,[59] there is no order in force requiring Canada to pay compensation to the victims of Canada's discriminatory conduct. While the Tribunal has determined that compensation is payable in this case, the Tribunal has not made a final determination on the issue. The reasonableness of the Tribunal's order with respect to compensation can only be determined once the Compensation Process has been decided.

48. Proceeding at this stage, when the order is incomplete, risks this Court being unable to determine the reasonableness of the entire order, which would require the parties to return to this Court a second time after the Compensation Process is resolved.

49. The governing paragraph of the Tribunal's order is as follows:

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[59] Perron XEX, at p. 16, Q & A 36, lines 7-15, Caring Society MR, Vol. 2, Tab D, p. 394.

> [...] Canada shall enter into discussions with the AFN and the Caring Society on [the issue of process]. The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to. The Panel **is not making a final determination on the process here** rather, it will allow the parties to discuss possible options and return to the Tribunal with propositions if any, no later than December 10, 2019. The Panel will then consider those propositions and make a determination on the appropriate process to locate victims/survivors [emphasis added].[60]

50. As the Tribunal has already concluded in prior decisions in this proceeding (that Canada has not judicially reviewed),[61] the Tribunal has the power to order parties to consult under the *CHRA* in the context of complex cases of systemic discrimination. This is part of its broad remedial powers bestowed upon it by Parliament, which respects the Tribunal's expertise in the area of human rights and its capacity to order public interest remedies.[62] This is not a serious issue to be tried and Canada's motion ought to be dismissed at this stage of the inquiry.

2) *Canada Will Suffer No Irreparable Harm*

51. The Caring Society disagrees with the assertion that the burden on Canada to demonstrate irreparable harm is less onerous than that on a private litigant. Recently, in *Canada v. Oshkosh Defense Canada Inc.*, Stratas J.A. (in Chamber's) applied the onerous test of irreparable harm to Canada where it was the moving party on a motion to stay. Justice Stratas described the principle test for irreparable harm as follows:

> Finally, to prove irreparable harm, the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm. Those who offer assertions rather than evidentiary demonstrations and "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence" often fall short on this branch of the stay test. Those who offer "evidence at a convincing level of particularity that demonstrates a real probability of unavoidable irreparable harm will result unless a stay is granted" often succeed. [citations omitted][63]

[60] 2019 CHRT 39 at para. 269, Applicant's Book of Authorities, Tab 21.
[61] 2017 CHRT 14, at paras. 114-120, Applicant's Book of Authorities, Tab 19; 2018 CHRT 4, at paras. 399-400, Applicant's Book of Authorities, Tab 20.
[62] See for example, *Hughes v. Elections Canada*, 2010 CHRT 4, Applicant's Book of Authorities, Tab 24; *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10, Applicant's Book of Authorities, Tab 23; and *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, 2017 CHRT 14, at para. 114. Applicant's Book of Authorities, Tab 19.
[63] *Canada v. Oshkosh Defense Canada Inc.*, 2018 FCA 102, at para. 25, Caring Society BOA, Tab 5.

52. In any event, this is not a case where the government is litigating against a private litigant – the AFN, Chiefs of Ontario and Nishnabwe Aski Nation represent the interests of First Nations. The Caring Society is an award winning public interest organization that promotes the rights and wellbeing of First Nations children, youth and families who have all been harmed through Canada's past and contemporary colonial policies of separating children from their families and denying them equal access to social services. There is no basis to allow Canada to meet a lower standard of irreparable harm in this case.

53. Canada has failed to adduce any evidence that it will suffer irreparable harm (or harm of any kind) if required to engage in discussions with the AFN and the Caring Society, and if it investigates, considers and prepares submissions regarding the Compensation Process on or before December 10, 2019.

54. In fact, Canada has not provided any details as to the nature or extent of the alleged harm to the government arising from the Tribunal's order that Canada engage in discussions with the Caring Society and the AFN regarding the Compensation Process.

55. Instead, the evidence proffered by Canada is vague, speculative and fails to meet the high standard for irreparable harm. For example, Mr. Perron's affidavit states that Canada would "require instructions from Cabinet" but does not state why such instructions cannot be obtained between November 20, 2019 (the date the new Cabinet is expected to be announced)[64] and December 10, 2019. To the contrary, Mr. Perron's evidence goes on to contradict the requirement for instructions, stating that ISC has started work "... on preparing briefing, which is about the assessment of the order itself, the background of all the situation, because we cannot presume who will be the Minister at the time and what might be the way forward" as well as on options for moving forward.[65]

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[64] Perron XEX, p. 11, Q & A 24, lines 6-12, Caring Society MR, Vol. 2, Tab D, p. 389.
[65] Perron XEX, at pp. 11-12, Q & A 26, lines 4-9 (at p. 12), Caring Society MR, Vol. 2, Tab D, p. 389-390.

56. Mr. Perron also states that "significant resources" would be required and that the process would be "extremely costly and complex" but does not provide further specifics.[66] Instead, Mr. Perron relies on a "general costing" conducted in relation to the ultimate payment of compensation, rather than any costs related to discussions with the Caring Society and the AFN, or submissions to the Tribunal or the Compensation Process.[67]

57. Under cross-examination, Mr. Perron conceded that Canada has the staff and internal expertise required to comply with the Tribunal's order that Canada discuss with the Caring Society and AFN and make submissions.[68] Indeed, Mr. Perron's evidence was that there are many thousands of public servants within ISC involved in the implementation of the Tribunal's existing orders,[69] and that there is expertise within ISC regarding processes for paying significant compensation to victims of Canada's past discrimination.[70]

58. These multiple statements support the view that engaging in discussions on the compensation process poses no harm to Canada, but rather would be the first logical step to fulfilling the government's publicly stated policy objective of compensating the victims of its discrimination.

59. In fact, Canada has consistently stated in public and in its Written Representations that it is committed to compensating First Nations people for past discriminatory polices and that it accepts the Tribunal's findings of discrimination.[71] This is not a case where Canada is principally, procedurally and ethically opposed to the remedy at issue. Therefore no irreparable harm can flow from the current Compensation Entitlement Order.[72]

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[66] Affidavit of Sony Perron, affirmed on October 3, 2019 at para 7 ("**Perron October Affidavit**"), Applicant's Motion Record, Vol. X, Tab 3, p. 602.
[67] Perron XEX, at pp. 26-27, Q & A 64, see in particular lines 3-8 on p. 27, Caring Society MR, Vol. 2, Tab D, pp. 404-405.
[68] Perron XEX, at pp 28-29, Q & A 68, lines 1-4, Caring Society MR, Vol. 2, Tab D, pp. 406-407
[69] Perron XEX, at p. 24, Q & A 57, lines 12-22, Caring Society MR, Vol. 2, Tab D, p. 402.
[70] Perron XEX, at p. 29, Q & A 68, lines 1-4, Caring Society MR, Vol. 2, Tab D, p. 407; See also: Perron XEX, p. 28, Q & A 67, lines 14-21, Caring Society MR, Vol. 2, Tab D, p. 406.
[71] Canada's Written Representations at para. 1, Applicant's Motion Record, Vol. X, Tab 5, p. 641.
[72] This case is distinguishable from that of *Canada (Prime Minister) v. Khadr*, 2010 FCA 199 (Applicant's Book of Authorities, Tab 8) where the government brought a motion to stay an order that required it to list remedies to redress Mr. Khadr's s. 7 rights violation.

60. Perhaps most importantly, Canada has not sought to amend or otherwise delay the Tribunal's order, other than to seek further time to allow this Court to make a determination regarding Canada's stay request. This is significant and clearly demonstrates that the harm alleged by Canada on its motion does not match the evidentiary threshold required:

> The moving party's failure to ask the administrative decision-maker to delay the effect of its decision may be relevant to the reviewing court's consideration of a motion to stay the administrative decision, and in particular, the presence of irreparable harm. It may call for some explanation. Without explanation, the failure might be taken as an indication that the moving party did not think that the harm that would eventuate from an adverse award would matter.[73]

61. This lack of communication with the Tribunal is compounded in this case, given that the Tribunal specifically invited Canada to comment or make suggestions regarding its decision: "[a]s part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or wording and/or content of the orders".[74] The evidence demonstrates that Canada has made no effort to respond to the Tribunal's offer in this regard.

62. The Caring Society submits that Canada's arguments that it will be irreparably harmed by the sheer quantum of the compensation ordered ought not be considered – there currently is no enforceable order that Canada compensate the victims and therefore there is no harm that can flow from this assertion. Moreover, the quantum is directly influenced by the large number of children and families that Canada wilfully and recklessly discriminated against. If and when the Tribunal issues an order to make compensation payments to the victims, there will be procedural avenues for Canada to engage should it choose.

3) *Balance of Convenience Favours the Respondents*

63. The balance of convenience requires determining which party will suffer the greatest harm from the granting or refusal of the stay.[75] This step of the test requires the Court to determine

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[73] *Attorney General of Canada v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 at para 23, Caring Society BOA, Tab 5.

[74] *Caring Society et al. v Canada* [2019 CHRT 39], at para. 270, Applicant's Book of Authorities, Tab 21.

[75] *Canada (Prime Minister) v. Khadr*, 2010 FCA 199 citing *Toth v. Canada (M.C.J.)* (1988), 86 N.R. 302 (F.C.A.), Applicant's Book of Authorities, Tab 8; *Canada (Minister of Citizenship and Immigration) v. Fox*, 2009 FCA 346, Applicant's Book of Authorities, Tab 7.

which of the two parties will suffer the greater harm from the granting or refusal of the relief sought pending a decision on the merits.[76]

64. In this case, the Court must consider not only the interests of the seven parties to this proceeding, but, more urgently, those of the tens of thousands of First Nations children, youth and their families who are impacted by these proceedings.

65. There is no question that the balance of convenience favours the victims in this case. These are individuals who were victimized by Canada's wilful and reckless discrimination both prior to the Tribunal's Decision on the Merits and thereafter as evidenced by the successive non-compliance orders. As a result of Canada's discrimination, these First Nations children, youth and families are often in vulnerable circumstances and the passage of time risks severely diminishing, if not destroying, the beneficial impact of an order for compensation under the *CHRA*.

66. As the Supreme Court of Canada has recognized on multiple occasions, periods of delay may weigh more heavily on young people than on adults.[77] The crucial nature of timely intervention in light of childhood development is also evidenced by the tight timelines that surround many procedural steps laid out in provincial and territorial child welfare legislation. As such, the significant prejudice that would be caused to First Nations children, youth and their families by a stay, which would delay the Tribunal's final decision regarding compensation by months, if not years, vastly outweighs the possibility of Canada's public servants being required to speak to the Caring Society and the AFN regarding the Compensation Process, and to make submissions to the Tribunal, even if that process is ultimately modified by later proceedings before this Court.

67. Such impacts would also undermine the Nation-to-Nation relationship between Canada and First Nations. As the Tribunal noted in its Compensation Entitlement Order, the AFN has been mandated by resolution following a unanimous vote by Chiefs in Assembly to pursue

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[76] *RJR MacDonald* at 351, citing *Manitoba (AG) v Metropolitan Stored Ltd*, [1987] 1 SCR 110 at 129, per Beetz J, Applicant's Book of Authorities, Tab 36.

[77] *R v KJM*, 2019 SCC 55 at para 52, Caring Society BOA, Tab 17; *Catholic Children's Aid Society of Metropolitan Toronto v M (C)*, [1994] 2 SCR 165 at 206, Caring Society BOA, Tab 12.

compensation under the *CHRA*. A stay of proceedings would pre-empt the process that First Nations from across Canada have endorsed, before it is complete.

68. In addition, the Caring Society and the AFN have already undertaken significant work on the Compensation Process, which ought be completed.

69. There is no prejudice to Canada that would outweigh the serious harms to First Nations children, youth and their families arising from delaying the Tribunal's ultimate conclusion on the issue of compensation under the *CHRA*. As such, the balance of convenience favours the respondents and the victims of Canada's discrimination.

B. The Caring Society's Motion to Stay the Application

70. Canada's application for judicial review should be stayed pending the outcome of the Tribunal's complete determination of the compensation issue. Section 50(1)(b) of the *Federal Courts Act* provides this Court with the power and discretion to stay an application where the Court determines that a stay is in the interests of justice.

71. In *Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc.* Stratas J.A., in Chambers, in what has become the leading case on this point, set out an "interest of justice test" to determine when a matter ought to be put into abeyance, in the following terms:

> *This Court deciding not to exercise its jurisdiction until some time later.* When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.[78]

[78] *Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc.*, 2011 FCA 312, at para. 5, Caring Society BOA, Tab 15.

72. A court will not stay an application for judicial review lightly and has broad discretion in considering such a request.[79] Indeed, the court will consider whether, in all of the circumstances, the interests of justice support the application being delayed.[80] The following principles most often guide the Court's consideration of a motion to hold a judicial review in abeyance:

a. the just, most expeditious and least expensive determination of every proceeding on its merits must be considered;[81]

b. the Court should exercise its discretion against the wasteful use of judicial resources as long as no party is unfairly prejudiced;[82]

c. whether a stay will prevent unnecessary and costly duplication of judicial and legal resources;

d. the possibility of inconsistent decisions; and

e. prejudice to the parties[83]

73. The Caring Society submits that the circumstances of the case clearly demonstrate that Canada's application for judicial review ought to be held in abeyance – essentially adjourned in order to allow the Tribunal to complete its work.

1) *Prejudice and Harm to First Nations Children, Youth and their Families Waiting for a Final Determination*

74. Given that there are no grounds to stay the Tribunal's Compensation Entitlement Order, allowing Canada's judicial review to proceed at this time will almost certainly cause harm to the victims of Canada's discriminatory conduct through confusion, delay and the potential for conflicting/duplicative decisions.

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[79] See for example, *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2017 FC 382, at para. 26, Caring Society BOA, Tab 18.
[80] *Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc.*, 2011 FCA 312, at para. 14, Caring Society BOA, Tab 15.
[81] Rule 3 of the *Federal Court Rules,* SOR/98-106, Applicant's BOA, Tab 44.
[82] *Coote v. Lawyer Professional Indemnity Company*, 2013 FCA 143 at para. 12, Caring Society BOA, Tab 13.
[83] *Power to Change Ministers v. Canada (Minister of Employment, Workforce Development and Labour*), 2019 CanLII 13579 (FC) at para. 20, Caring Society BOA, Tab 16.

75. First, allowing the judicial review to proceed while the Tribunal continues its work will cause confusion. This confusion will come in many forms:

a. Canada has made many public statements that it supports compensation for the victims of Canada's discriminatory conduct. To allow the judicial review to proceed while the parties are making submissions regarding the Compensation Process can be reasonably apprehended to create confusion, upset and stress for the victims;

b. The Tribunal may take a variety of steps while the judicial review is proceeding, including asking the parties further questions, calling for further submissions, requiring attendance for oral submissions, and ultimately making a final determination regarding the Compensation Process. These public steps taken by the Tribunal, in conjunction with the Federal Court's parallel proceeding, will almost certainly cause confusion and mixed messages, which the evidence demonstrates could cause harm; and

c. The uncertainty that could unfold while the courts review the Tribunal's preliminary determinations in the Compensation Entitlement Order will almost certainly cause confusion to First Nations children, youth and families who have been waiting for nearly thirteen years for a resolution. In the best interests of the victims in this case, the process ought to be as streamlined as possible.

76. Second, allowing the judicial review to proceed will ultimately delay the final resolution of the issue of financial compensation. Given Canada's litigation strategy up to this point, it is fair and reasonable to presume that once the Tribunal makes a final determination regarding the Compensation Process, Canada will seek judicial review of that decision as well, resulting in two judicial reviews on the same issue.

77. Indeed, this is not the first time in these proceedings that Canada has attempted to pre-empt the process for resolving this Complaint. As noted above, in 2008, after the Commission referred the Caring Society and the AFN's complaint to the Tribunal, Canada sought a judicial review of that decision, and also sought a stay of proceedings before the Tribunal. Prothonotary Aronovitch placed Canada's application for judicial review in abeyance, finding that the matter should not be

determined in a summary way given the serious and complex subject matter of the proceedings. Most importantly, she held that "[t]here is an interest however, in allowing a full and thorough examination in the specialized forum of the Tribunal, of issues which may have impact on the future ability of aboriginal peoples to make discrimination claims."[84]

78. Prothonotary Aronovitch's order was upheld on appeal by Mr. Justice O'Reilly.[85]

79. Finally, there is a serious and prejudicial risk of duplicative/conflicting decisions, as the Tribunal may make further orders as this judicial review proceeds, and which would impact on the way in which the reasonableness of the Tribunal's order is construed. As Prothonotary Aronovitch held in 2009, this would cause irreparable harm.[86]

80. The harm and prejudice that will almost certainly unfold for First Nations children, youth and families impacted by the Compensation Entitlement Order can be avoided by holding the government's application for judicial review in abeyance. Conversely, "adjourning" the application in this manner, as articulated by Stratas J.A. in *Mylan*, does not prejudice Canada from ultimately making the arguments it wishes to make. While the Caring Society does not agree with the arguments made by Canada on the issue of compensation, holding the application in abeyance does not prevent Canada from presenting its case to the Court at the appropriate time.

2) *Judicial Economy Calls for One Judicial Review on the Issue of Compensation*

81. Canada's proposed approach, and the possibility of two separate judicial reviews, will, without question, result in greater cost, time and resources for the parties: multiple affidavits; multiple cross-examinations; multiple records; and multiple appearances, all with a view to determining the singular issue of financial compensation to the victims of the Complaint. The Caring Society has little ability to bear such costs, as it is a small non-profit organization with a limited budget.

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[84] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (24 Nov. 2009) Ottawa T-1753-08 (F.C.) (Proth.), at p. 6, Caring Society BOA, Tab 2.

[85] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2010 FC 343, Caring Society BOA, Tab 3.

[86] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (24 Nov. 2009) Ottawa T-1753-08 (F.C.) (Proth.), at p. 6, Caring Society BOA, Tab 2.

82. It bears noting that proceeding with two judicial reviews also risks being more burdensome on the Court's resources, particularly given that this proceeding is case managed. This prejudice would be avoided by completing the Tribunal's entire compensation process, and by having one Federal Court proceeding if Canada, or any other party, seeks to challenge the Tribunal's Compensation Ruling once it is complete. Furthermore, Canada has an opportunity to address concerns that it has with the Tribunal's decision both through discussions on the Compensation Process and by taking up the Tribunal's invitation to make "any comment/suggestion and request clarification [...] in regards to moving forward with the compensation process and/or the wording and/or content of the orders."[87]

83. Judicial review is a discretionary remedy. One of the key principles that underlies the exercise of that discretion is the principle of judicial non-interference with ongoing administrative processes. Justice Stratas explained this principle in the following terms in *Canada (Border Services Agency) v CB Powell Limited*:

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. **Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted** [emphasis added].[88]

84. In keeping with this principle, Canada ought to pursue its concerns before the Tribunal by completing discussions and submissions on the Compensation Process and by taking the Tribunal up on its invitation to make suggestions or seek clarification.

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[87] *Caring Society et al. v Canada,* 2019 CHRT 39, at para 270, Applicant's Book of Authorities, Tab 21.
[88] *Canada (Border Services Agency) v CB Powell Limited,* 2010 FCA 61 at para 31, Caring Society BOA, Tab 4.

85. Clearly, the just, most expeditious and least expensive approach is to hold Canada's application for judicial review in abeyance and allow the Tribunal to complete its work. Should Canada ultimately seek to judicially review the Compensation Process, Canada can be granted leave to amend its application for judicial review, thereby reducing the harm to the victims of this human rights complaint and ensuring that justice is served in a transparent, efficient and cost-minded manner.

PART IV - ORDER SOUGHT

86. The Caring Society seeks an order:

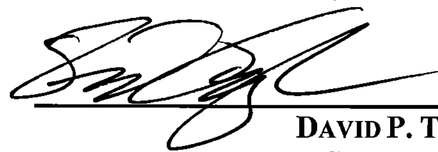
a. Dismissing Canada's motion for a stay;

b. Placing Canada's application for judicial review in abeyance, with leave to Canada to amend its application for judicial review within 30 days of the Tribunal's final decision with respect to the Compensation Process; and

c. Directing the parties, no later than 5 days following Canada filing any amended application for judical review, to provide their availability for a Case Management Conference.

87. Given that the Caring Society is a public interest litigant in this matter and given the complexity of the proceedings, the Caring society seeks its costs on a solicitor-client basis on both motions and says that no costs ought to be awarded against it in the event that Canada is successful on either motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of November, 2019.



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ANNE LEVESQUE

LAWYERS FOR THE RESPONDENT/MOVING PARTY
FIRST NATIONS CHILD AND FAMILY
CARING SOCIETY OF CANADA

LIST OF AUTHORITIES

APPENDIX A - STATUTES OR REGULATIONS

1.	*Federal Court Rules,* SOR/98-106

APPENDIX B - JURISPRUDENCE

2.	*Attorney General of Canada v. Hughes*, 2019 FC 1026
3.	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (24 Nov. 2009) Ottawa T-1753-08 (F.C.) (Proth.)
4.	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343
5.	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2012 FC 445
6.	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2013 FCA 75
7.	*Canada (Minister of Citizenship & Immigration) v. Fox*, 2009 FCA 346
8.	*Canada (Prime Minister) v. Khadr*, 2010 FCA 199
9.	*Canada v. Oshkosh Defense Canada Inc.*, 2018 FCA 102
10.	*Caring Society et al. v Canada,* 2011 CHRT 4
11.	*Caring Society et al. v Canada*, 2016 CHRT 16
12.	*Caring Society et al. v Canada*, 2016 CHRT 2
13.	*Caring Society et al. v Canada,* 2017 CHRT 14
14.	*Caring Society et al. v Canada*, 2017 CHRT 35
15.	*Caring Society et al. v Canada*, 2017 CHRT 7
16.	*Caring Society et al. v Canada*, 2018 CHRT 4
17.	*Caring Society et al. v Canada*, 2019 CHRT 1

18.	*Caring Society et al. v Canada*, 2019 CHRT 39
19.	*Catholic Children's Aid Society of Metropolitan Toronto v M (C)*, [1994] 2 SCR 165
20.	*Coote v. Lawyer Professional Indemnity Company*, 2013 FCA 143
21.	*Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10
22.	*Hughes v. Elections Canada*, 2010 CHRT 4
23.	*Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112
24.	*Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc.*, 2011 FCA 312
25.	*Power to Change Ministers v. Canada (Minister of Employment, Workforce Development and Labour)*, 2019 CanLII 13579 (FC)
26.	*R v KJM*, 2019 SCC 55
27.	*R.J.R. MacDonald Inc. v. Canada* (Attorney General), [1994) 1 5.C.R. 311
28.	*Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2017 FC 382
29.	*Attorney General of Canada v. Hughes*, 2019 FC 1026