Court file Nos.: T-1621-19, T-1559-20

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

Respondents

- and -

CONGRESS OF ABORIGINAL PEOPLES

Intervener

APPLICANT'S MEMORANDUM OF FACT AND LAW

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OVERVIEW

1. In two separate applications, Canada seeks review of decisions of the Canadian Human Rights Tribunal (Tribunal) in litigation over Canada's discriminatory underfunding of First Nations child and family services. The first decision concerns an order for compensation to indeterminate classes of children and their caregivers; the second concerns an order defining who is a First Nations child for purposes of receiving undefined health supports and services from the federal government.

2. The issue in the first application is whether the Tribunal had jurisdiction, rather than this Court, to provide class action-like compensation to impacted individuals. Canada does not dispute that its child and family services funding system was broken and needed immediate and substantial reform. The Tribunal ordered the funding system be fixed, and Canada agreed. However, the issue here is whether the children should receive compensation in a Tribunal proceeding that focused on systemic discrimination, rather than in a class action in this Court where the rules better protect the interests of victims. Here, no individuals were party to this litigation. Where individuals seek compensation for harms they have suffered, they must be represented so that they can choose the forum in which they seek compensation, the form that compensation takes, and how their individual experience should be reflected. No individual had any control over this litigation. The Tribunal's decision denies their rights, and fails to respect the principles of causality and proportionality that were essential to a just result.

3. The second application focuses on the Tribunal's decision on the definition of "First Nations child." The Tribunal defined that term to include not only the children living on reserve who were the subject of the complaint, but other groups of children living off reserve who did not have *Indian Act* status. The decision takes an expansive approach to difficult issues of identity, which have not yet been decided by First Nations. The Tribunal issued orders on these complex issues without an appropriate evidentiary basis for doing so, then imposed duties on non-party First Nations to carry out its orders and in so doing, exceeded its jurisdiction.

4. Both systemic reform and individual compensation can and must occur; Canada is taking the necessary steps to ensure that they do. But these two decisions demonstrate clear jurisdictional and other errors: they fail to respect the nature of the complaint before the Tribunal, the evidence called, the applicable statutes and binding authority. They also fail to respect basic elements of procedural fairness. They are unreasonable and should be set aside.

PART I: STATEMENT OF FACTS

A. Nature of the Claim

5. In 2007, the First Nations Child and Family Caring Society ("Caring Society") and the Assembly of First Nations ("AFN") filed a complaint alleging that Canada's funding for child and family services on reserve and in the Yukon discriminated against First Nations children.[1] The Chiefs of Ontario ("COO"), Nishnawbe Aski Nation ("NAN"), the Canadian Human Rights Commission ("CHRC") and Amnesty International all joined the litigation as interested parties over its course (collectively, with AFN and the Caring Society, the "Respondents"). The Congress of Aboriginal Peoples (CAP) were added as interveners at the remedies stage and continue in that capacity.

6. The complaint alleged that Canada's funding model for agencies that provide child and family services on reserve and in the Yukon was discriminatory and caused chronic underfunding. The complaint also made passing reference to "Jordan's Principle", a 2007 House of Commons resolution establishing that where a First Nations child needs a product or service, the government first contacted should provide a service and only seek repayment from the appropriate partner after providing the service to the child.[2] The Tribunal employed the term "Jordan's Principle" to refer to the many federal

[1] Complaint filed at Tribunal, Affidavit of Deborah Mayo dated March 10, 2021 ("Mayo Affidavit"), Exhibit 1.

[2] *Jordan's Principle, Summary of Orders from the Canadian Human Rights Tribunal*. First Nations Child and Caring Society website, 2019. Available at the following link: https://fncaringsociety.com/sites/default/files/summary_of_jordans_principle_orders_2019_update.pdf

government programs that fund health, social and educational supports, products and services for First Nations children on and off reserve. The complainants did not request compensation in relation to Jordan's Principle in the complaint or Statement of Particulars.

7. The complainants did not initially request that compensation be paid directly to victims. Instead, the complainants requested the creation of a $112 million trust fund administered by the Caring Society.[3] Some of the money in the proposed trust would go to children removed from their homes for their pain and suffering and expenses, and some to agencies to defray expenses they incurred.[4] There was no mention of compensation for wilful or reckless discrimination, nor for payments to children who did not receive supports and services under Jordan's Principle. The complainants do not represent any individual; complaints brought on behalf of victims usually require their consent.[5] The Commission's particulars asked that the government work with it to fix policies and practices; that work is ongoing.[6]

8. Since the complaint alleges "systemic discrimination" through underfunding, it is important to define that term. The Tribunal did not define the term, though it did use it repeatedly to describe the complaint.[7] In other complaints, the Tribunal has relied on the following definition from Quebec's Human Rights Tribunal:

> [t]he 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

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[3] Statement of Particulars, Disclosure, Production of the Complainants, Preliminary Disclosure Brief of the Complainants ("Complainants' Particulars"), para 21, Mayo Affidavit, Exhibit 3.

[4] *Ibid.*

[5] *Canadian Human Rights Act*, RSC 1985, c H-6, s 40(2) (the "*Act*").

[6] Statement of Particulars of the Canadian Human Rights Commission, section C, Mayo Affidavit, Exhibit 2.

[7] See e.g. *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4 ["2018 CHRT 4"] at paras 93, 165; *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10 at paras 18, 36.

> consideration the characteristics of the members of groups contemplated by the prohibition of discrimination.[8]

In this case, it is the latter part of the definition that matters, since the complaint targeted the policies and practices that led to underfunding of the child welfare system for First Nations.

9. In 2014, the Caring Society acknowledged that their claim was one of systemic discrimination;[9] that no individual victims were complainants; that there was little evidence brought forward about the nature and extent of injuries suffered by individuals;[10] and that it would be an "impossible task" to obtain such evidence.[11] In 2019, the AFN described the systemic nature of the claim as a perpetuation of existing systemic discrimination and historic disadvantage.[12] In 2014, the Acting Commissioner of the Canadian Human Rights Commission described this complaint as the kind of systemic complaint that merits significant involvement by the Commission.[13]

10. Neither the complaint nor the Statement of Particulars filed by the Caring Society and the AFN mentioned direct compensation to individuals.[14] The Tribunal's *Rules of Procedure* specifically require each party to set out in the Particulars "the relief that it

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[8] *Commission des droits de la personne et des droits de la jeunesse c Gaz métropolitain inc.*, 2008 QCTDP 24 ["*Gaz métropolitain*"] at para 36. Cited in *Emmett v Canada Revenue Agency*, 2018 CHRT 23 at para 73; *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v Public Safety Canada*, 2019 CHRT 21 at para 20.

[9] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2019 CHRT 39 at para 51 ["*Compensation Decision"*].

[10] *Ibid.*

[11] *Ibid.*

[12] Written Submissions of the AFN regarding Compensation dated April 4, 2019, para 6, Mayo Affidavit, Exhibit 161.

[13] Canada, Parliament, *Senate Standing Committee on Human Rights*, 41st Parliament, 2nd Sess. (Dec 11 2014). Available at: https://sencanada.ca/en/Content/Sen/committee/412/ridr/51838-e.

[14] Complaint filed at Tribunal, Mayo Affidavit, Exhibit 1; Complainants' Particulars, Mayo Affidavit, Exhibit 3.

seeks."[15] Compensation paid directly to individuals was first requested by the AFN in 2016 in their written submissions to the Tribunal on remedies,[16] and, while the Caring Society supported that claim by 2019, it continued to request that compensation be paid into a trust fund.[17] Neither the claim nor the Statement of Particulars were ever amended.

B. Evidence before the Tribunal

11. The hearing of this complaint took place over approximately 70 days in 2013 and 2014.[18] The Complainants called 19 witnesses, all of whom were involved in the provision of child welfare services on reserve, the study of child welfare services, or the study of the history and impact of the residential school system on First Nations communities.[19] The testimony focused on the need for systemic reform in the funding of services. No witnesses testified to the individual harm or the impact the funding regime had on children on reserve and their caregivers. No individuals testified about their experiences in the child welfare system, or their experiences as the parents or guardians of children in the system.[20]

12. Several of the Complainants' witnesses referred to children having to leave their communities to gain access to services, medical and social, or who were denied funding for services.[21] However, no individuals provided direct evidence to substantiate the

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[15] *Canadian Human Rights Tribunal Rules of Procedure* s 6(1)(c) ["*CHRT Rules*"].

[16] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 at para 487 ["*Merits Decision"*].

[17] Written Submissions of the Caring Society on Compensation dated April 3, 2019, Mayo Affidavit, Exhibit 159.

[18] *Merits Decision* at para 14.

[19] Transcripts of Hearing, vols. 1-49, Mayo Affidavit, Exhibits 8-45.

[20] *Ibid*.

[21] See for e.g. testimony of Darrin Keewatin, vol. 36, pp 72-86, 96-98, 158-166, Mayo Affidavit, Exhibit 34; testimony of Cindy Blackstock, vol. 1, pp 192-201, Mayo Affidavit, Exhibit 8.

details of these cases, the impact of these experiences on their lives, or the effects that delays in receiving services may have had on the children or their parents.[22]

13. Dr. Cindy Blackstock gave extensive evidence for the Complainants regarding her experience and knowledge of First Nations child and family service agencies and federal funding regimes. Dr. Blackstock spoke about the lack of parity between provincial funding regimes for child welfare off reserve and federal funding for child welfare services provided on reserve, and the impact this has on the ability of First Nations agencies to provide equitable services on reserve.[23]

14. Dr. Blackstock, along with numerous other witnesses with experience working with First Nations child welfare agencies across the country, gave evidence regarding the challenges faced by these agencies to provide an adequate level of child welfare services on reserve under Canada's former funding regime, Directive 20-1.[24] The witnesses identified the lack of a separate funding stream for prevention services as a significant issue, and viewed the absence of prevention services as a cause of the higher incidence of First Nations child apprehensions and removals from their homes on reserve. The Tribunal did not define "prevention services," or explain how such services would prevent removals. The Tribunal also did not address the fact that such services are not funded by all provinces. Dr. Blackstock testified that the removals of children from their homes result from numerous complex factors.[25]

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[22] Transcripts of Hearing, vols. 1-49, Mayo Affidavit, Exhibits 8-45.
[23] Testimony of Dr. Cindy Blackstock, vols. 1-5, 48-49, Mayo Affidavit, Exhibits 8-12, 44-45.
[24] Testimony of Dr. Cindy Blackstock, vols. 1-5, Mayo Affidavit, Exhibits 8-12; testimony of Elsie Flette, vols. 20-21, Mayo Affidavit, Exhibits 18-19; Testimony of Carolyn Bohdanovich, vols. 21-22, Mayo Affidavit, Exhibits 19-20; Testimony of Brenda Ann Cope, vol. 29, Mayo Affidavit, Exhibit 27; Testimony of Judith Levi, vol. 30, Mayo Affidavit, Exhibit 28; Testimony of Raymond Shingoose, vols. 31-32, Mayo Affidavit, Exhibits 29-30; testimony of Darrin Keewatin, vols. 32 and 36, Mayo Affidavit, Exhibits 30 and 34; testimony of Sylvain Plouffe, vol. 37, Mayo Affidavit, Exhibit 35.
[25] Testimony of Dr. Blackstock, vol. 2, p 110, Mayo Affidavit, Exhibit 9, vol. 3, p 165, Mayo Affidavit, Exhibit 10, vol. 4, p 126, Mayo Affidavit, Exhibit 11, and vol. 48, pp 200-201, Mayo Affidavit, Exhibit 44; see also Testimony of Dr. Nicolas Trocmé, vol. 7, p 107, Mayo Affidavit, Exhibit 14.

15. The complainants' witnesses also focused on the difficulties faced by First Nations agencies in obtaining sufficient infrastructure for their operations, the lack of technology, and the lack of funding to hire staff and pay them at levels comparable to their provincial counterparts. Many spoke of the rigidity of Directive 20-1, and its failure to adapt funding to meet varying levels of communities' needs.[26]

16. Several witnesses described the work undertaken to study the funding shortfalls under Directive 20-1, and to develop a more responsive funding regime, including the National Policy Review and the *Wen:De Report*.[27] Several experts spoke about the *Wen:De Report*'s recommendations for a new funding regime, focusing on the methodology employed in the *Wen:De Report* and the specific recommendations made. Some spoke of the House of Commons resolution endorsing Jordan's Principle.[28]

17. Some of the Complainants' witnesses addressed the impact of Canada's more recent funding regime, the Enhanced Prevention Funding Approach ("EPFA"), adopted to

[26] Testimony of Dr. Blackstock, vols. 1-5, Mayo Affidavit, Exhibits 8-12; testimony of Elsie Flette, vols. 20-21, Mayo Affidavit, Exhibits 18-19; Testimony of Carolyn Bohdanovich, vols. 21-22, Mayo Affidavit, Exhibits 19-20; Testimony of Brenda Ann Cope, vol. 29, Mayo Affidavit, Exhibit 27; Testimony of Judith Levi, vol. 30, Mayo Affidavit, Exhibit 28; Testimony of Raymond Shingoose, vol. 31-32, Mayo Affidavit, Exhibits 29-30; testimony of Darrin Keewatin, vol. 32 and 36, Mayo Affidavit, Exhibits 30 and 34; testimony of Sylvain Plouffe, vol. 37, Mayo Affidavit, Exhibit 35.

[27] Testimony of Dr. Blackstock, vols. 1-5, Mayo Affidavit, Exhibits 8-12; testimony of Jonathan Thompson, vol. 6, Mayo Affidavit, Exhibit 13; testimony of Dr. Nicolas Trocmé, vols. 7-8, Mayo Affidavit, Exhibits 14-15; Testimony of Dr. John Loxley, vols. 27-28, Mayo Affidavit, Exhibits 25-26.

[28] Testimony of Dr. Nicolas Trocmé, vols. 7-8, Mayo Affidavit, Exhibits 14-15; Testimony of Dr. John Loxley, vols. 27-28, Mayo Affidavit, Exhibits 25-26.

address the funding deficiencies of Directive 20-1.[29] These witnesses spoke to matters such as the impact of funding for prevention services.[30]

18. Several witnesses testified about the funding regime in Ontario, which differs from that in the rest of the country, as it falls under an agreement between Canada and Ontario (the "1965 Agreement').[31] Witnesses explained the 1965 Agreement's cost-sharing formula between Canada and Ontario, and how this affects the funding of First Nations agencies. Their evidence highlighted that in Ontario, First Nations agencies are funded in the same manner as provincial agencies that provide services to non-First Nations children. However, the evidence also illustrated the difficulties experienced by First Nations children on reserve in Ontario, given their particular needs and the lack of available services in many First Nations communities.[32]

19. There was extensive historical expert evidence regarding the impact that the residential school system has had on First Nations communities, and how that legacy has negatively affected generations of families, leading to an increased need for services and supports in those communities.[33]

20. The Complainants did not introduce significant evidence regarding Jordan's Principle, and none that would permit findings relevant to compensation.

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[29] Testimony of Derald Dubois, vol. 9, pp 18-24, 74-82, 88-101, 126 and vol. 10, pp 32-47, 56, Mayo Affidavit, Exhibits 16-17; testimony of Elsie Flette, vol. 20, pp 32-33, 63-186 and vol. 21, pp 2-37, 49-62, 103-178, Mayo Affidavit, Exhibits 18-19; testimony of Carolyn Bohdanovich, vol. 21, pp 187-232 and vol. 22, pp 23-32, 59-69, 101-110, Mayo Affidavit, Exhibits 19-20; testimony of Brenda Ann Cope, vol. 29, Mayo Affidavit, Exhibit 27; testimony of Raymond Shingoose, vols. 31-32, Mayo Affidavit, Exhibits 29-30; testimony of Darrin Keewatin, vols. 32 and 36, Mayo Affidavit, Exhibits 30 and 34.

[30] *Ibid*.

[31] *Memorandum of Agreement Respecting Welfare Programs for Indians* (the "1965 Agreement").

[32] Testimony of Thomas Goff, vol. 23, Mayo Affidavit, Exhibit 21; testimony of Elizabeth Kennedy, vol. 24, Mayo Affidavit, Exhibit 22.

[33] Testimony of John Milloy, vols. 33-35, Mayo Affidavit, Exhibits 31-33; testimony of Amy Bombay, vol. 40, Mayo Affidavit, Exhibit 36.

21. Canada's witnesses explained the development of the First Nations child and family services program,[34] including how funding for agencies working on reserve and in the Yukon is allocated and distributed.[35] Witnesses explained the operation of Directive 20-1, the difficulties encountered by First Nations agencies in providing adequate services under Directive 20-1, and the efforts made to identify deficiencies and develop effective remedies. This work included the EPFA, which addressed deficiencies such as the absence of dedicated funding for prevention services. Canada's witnesses explained how the new funding scheme was implemented across the country.[36]

22. Sheilagh Murphy explained how the funding regime operates and how funding pressures are addressed.[37] She explained Canada's interpretation and implementation of Jordan's Principle. She and other witnesses described Canada's efforts to respond to jurisdictional disputes with the provinces and within the federal government itself.[38] Other witnesses explained funding for programs and services.[39]

C. The Merits Decision

23. In January 2016, the Tribunal ruled on the merits of the complaint (the "*Merits Decision*").[40] It determined that Canada provides a "service" as defined by the *Act*[41] through its First Nations Child and Family Services program and related provincial/territorial agreements, a finding necessary to give the Tribunal jurisdiction.[42]

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[34] Testimony of Barbara D'Amico, vol. 50, Mayo Affidavit, Exhibit 46.
[35] Testimony of Barbara D'Amico, vol. 50, pp 72-111, Mayo Affidavit, Exhibit 46; Testimony of Sheilagh Murphy, vol. 54, pp 19-26, Mayo Affidavit, Exhibit 50.
[36] Testimony of Sheilagh Murphy, vol. 54, pp 39-44, Mayo Affidavit, Exhibit 50.
[37] Testimony of Sheilagh Murphy, vol. 54, beginning at pages 55 and 172 respectively, Mayo Affidavit, Exhibit 50.
[38] Testimony of Corinne Baggley, vols. 57 and 58, Mayo Affidavit, Exhibits 53-54.
[39] Testimony of Phil Digby, vol. 59, pp 14-156, Mayo Affidavit, Exhibit 55; testimony of Carol Schimanke, vols. 61 and 62, Mayo Affidavit, Exhibits 57-58; testimony of William McArthur, vol. 63, Mayo Affidavit, Exhibit 59.
[40] *Merits Decision*.
[41] *Act*.
[42] *Ibid* at para 457.

It found that Canada exercises significant control over the provision of these services on reserve and in the Yukon, that services were delayed and, in some cases, denied, and that Canada knew about these problems and did not correct them.[43] It concluded that Directive 20-1, the funding model employed by Canada in many parts of the country, was dated, resulted in underfunding, and incentivized removals.[44]

24. The Tribunal found that Canada failed to meet its obligations to ensure that funding did not perpetuate historical disadvantages, including the legacy of residential schools. It also determined that Canada's definition of Jordan's Principle was too narrow and resulted in gaps, delays and denials of necessary services for children.[45]

D. Continuing Tribunal Oversight since the Merits Decision

25. Canada did not seek review of the Merits Decision and took corrective action as described below. The Tribunal has maintained continuous, close oversight of the implementation of its orders, and required regular progress reports.[46]

26. The Tribunal has issued eighteen judgments since the *Merits Decision*, directing many aspects of Canada's response to the finding of systemic discrimination.

a) In April 2016, the Tribunal ordered ISC to provide ongoing detailed reports to the Tribunal to allow it to "supervise the implementation of its orders" and invited the parties to make submissions in response to the reports.[47]

b) In March 2017, the Tribunal ordered ISC to work with the intervener Nishnawbe Aski Nation (NAN) to develop a funding formula for the agencies serving NAN

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[43] *Ibid* at para 457-461.

[44] *Ibid* at para 458.

[45] *Ibid*.

[46] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 ["2017 CHRT 14"] at paras 28-31, 2018 CHRT 4 at paras 2, 18 and 444.

[47] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canda (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10 at para 22.

communities and to provide progress reports to the Tribunal every six months. The Tribunal's order deals with the form and content of the relief funding formula.[48]

c) In February 2018, the Tribunal ordered ISC to pay the actual costs for First Nations agencies in providing prevention/least disruptive measures; intake and investigation; building repairs; legal costs; mental health services for First Nations children and youth in Ontario; and Band Representative Services for Ontario First Nations, Tribal Councils and First Nation Agencies. The Tribunal ordered Canada to develop a new funding model to pay for specific services[49] and imposed 25 deadlines on Canada to report on various aspects of the implementation.[50]

d) Also in February 2018, the Tribunal ordered the creation of a Consultation Committee where Canada and the parties meet regularly to address concerns about the implementation of the Tribunal's orders.[51]

E. The Evolution of Jordan's Principle

27. The complaint made only passing reference to Jordan's Principle and did not seek compensation paid to victims, as required by the *Act.* The complainants noted that the *Wen:De Report* states that First Nations Child and Family Services ("FNCFS") agency staff spent many hours resolving Jordan's Principle disputes (i.e. disputes with provinces as to who should pay for health services for First Nations children), and that this strained agencies' human resources.[52]

28. In the *Merits Decision*, the Tribunal expanded the concept of Jordan's Principle. The Tribunal acknowledged that Jordan's Principle is "not strictly a child welfare concept"[53] but concluded that it "is relevant and often intertwined with the provision of child and family services to First Nations,"[54] noting that the failure to uphold the principle leads to children in care experiencing gaps in services.[55] Since that time, the Tribunal has

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[48] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 7 at para 24.
[49] 2018 CHRT 4 at paras 410-11.
[50] *Ibid* at paras 407-450.
[51] *Ibid* at para 431.
[52] Complaint Filed at Tribunal, p 3, Mayo Affidavit, Exhibit 1.
[53] At para 362.
[54] *Ibid*.
[55] At paras 370-373.

issued a series of decisions further expanding the scope of Jordan's Principle and directing Canada to take specific actions:

a) In September 2016, ordered Canada to apply Jordan's Principle to all First Nations children. The Tribunal ordered Canada to provide a compliance report within 45 days on Jordan's Principle, including on how requests are processed and how Canada consults its partners in implementing Jordan's Principle.[56]

b) In May 2017, the Tribunal issued specific directions on how Jordan's Principle claims were to be processed, including strict timelines. The Tribunal also concluded that Jordan's Principle requires more than parity with the level of services provided by provincial agencies to non-Indigenous children living off reserve. It ordered Canada to provide a level of care consistent with the principle of substantive equality.[57] The Tribunal found it "concerning" that Canada's goal was to match the level of care provided by the Provinces.[58] It ordered Canada to provide Jordan's Principle services to all First Nations children, These services include mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy. Canada was ordered to review all Jordan's Principle requests back to April 2009 to ensure compliance with the principles provided by the Tribunal.[59]

c) In November 2017, the Tribunal issued an order limiting case-conferencing to clinical case conferencing and mandating timeframes for the processing of claims.[60]

29. In February 2019, the Tribunal issued an interim order requiring Canada to provide substantive equality-level services to all First Nations children, including children who do not have (and are not eligible for) *Indian Act* status and regardless of where they reside (so long as they're recognized by their community). The interim order was limited to children with "urgent and/or life-threatening" needs, but did not define

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[56] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 16 at para 160 (A), (B) and (C).
[57] 2017 CHRT 14 at para 69.
[58] *Ibid* at para 73.
[59] *Ibid* at para 135(1) (D).
[60] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 35 ["2017 CHRT 35"] at para 10.

those terms.[61] The interim order remained in effect for 18 months. The Tribunal ultimately decided the motion and further expanded eligibility for Jordan's Principle, as outlined below.

F. The Compensation Decision

30. On September 6, 2019, the Tribunal ruled on the Respondents' request for compensation. The Tribunal held that while systemic remedies are necessary to address systemic discrimination, they were not sufficient in this case; individual compensation was also required.[62] The Tribunal determined that the statutory requirements for compensation for pain and suffering and for wilful and reckless discrimination were met.[63] It concluded that the removal of children from their homes, families and communities was a breach of rights.[64] The Tribunal awarded the statutory maximum of $40,000 compensation ($20,000 for pain and suffering and $20,000 for wilful and reckless discrimination) to every child removed from their home regardless of the reasons for the removal, the length of the removal, or the number of removals. It also awarded the maximum compensation to every caregiving parent or grandparent of that child, excluding those who abused the child. The Tribunal neither defined "abuse" nor explained how that is to be determined.[65]

31. The decision holds that discrimination is "ongoing," but did not describe in what way. A child entering care today is entitled to the same compensation as a child taken into care before the *Merits Decision* or *Compensation Decision* were issued and before Canada implemented the Tribunal's orders.[66] However, compensation for claims under

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[61] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 7 at paras 87-89.
[62] *Compensation Decision* at paras 13-14.
[63] *Ibid* at paras 112-115, 234, 242, and 245-248.
[64] *Ibid* at para 13.
[65] *Ibid* at paras 150, 256.
[66] *Ibid* at para 248.

Jordan's Principle ends in 2017 because Canada had adopted a definition of Jordan's Principle that the Tribunal considered compliant.[67]

32. The Tribunal also awarded compensation to individuals whose requests for essential services under Jordan's Principle were denied or unreasonably delayed.[68] It found that while reconsideration of requests (a process that Canada had already implemented voluntarily) is necessary for persons whose Jordan's Principle claims were rejected, it was insufficient. Every child who was denied access to a service, experienced an unreasonable delay in accessing a service, or was taken into care to receive services due to Canada's discriminatory approach to Jordan's Principle and irrespective of the degree of harm suffered, is entitled to the statutory maximum of $40,000.[69] The child's caregiving parents or grandparents are similarly entitled to $40,000.[70]

33. Finally, the Tribunal ordered Canada to engage in discussions with any interested Respondents about a process for paying compensation and return to the Tribunal. The Tribunal would then determine "the appropriate process to locate victims/survivors and to distribute compensation." [71] The Tribunal invited the parties to suggest additional categories of victims for compensation.[72] The Tribunal retained jurisdiction over the compensation issue, noting it would "revisit" whether continued supervision was necessary.[73]

34. Prior to the 2019 compensation hearing, the Tribunal posed three questions on the form and substance of a potential compensation order, but did not advise the parties that it was considering a finding that the discrimination is ongoing, nor did it invite submissions on that question.[74] The Tribunal was aware that Canada believed that the systemic

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[67] *Ibid* at para 250.
[68] *Ibid*.
[69] *Ibid* at paras 250, 254.
[70] *Ibid* at paras 251, 254.
[71] *Ibid* at para 269.
[72] *Ibid* at para 270.
[73] *Ibid* at paras 269, 277.
[74] *Ibid* at para 12.

discrimination identified in the complaint had ceased; Canada was ordered to provide funding according to the actual costs incurred by First Nation agencies. Canada provided evidence of compliance[75] and indicated its desire to move away from litigation.[76]

G. The Additional Compensation Decisions

35. The requirement to engage in a process for the paying of compensation led to the negotiation of a Compensation Framework. The process led to requests to the Tribunal for decisions where the parties were unable to agree. Aspects of these decisions, which clarify and expand the *Compensation Decision,* are also contested in this application.

36. First, in April 2020 (the "*Eligibility Decision*"), the Tribunal dealt with the age child beneficiaries should gain unrestricted access to the compensation (answer: provincial/territorial age of majority); whether children who entered care before the complaint was filed in 2006 but remained in care after 2006 should be entitled to compensation (answer: yes); and whether the estates of deceased individuals should be entitled to compensation (answer: yes).[77]

37. In May 2020, the Tribunal clarified three terms relating to Jordan's Principle used in the *Compensation Decision,* "essential services," "service gap," and "unreasonable delay" (the "*Definitions Decision*").[78] On "essential services," the Tribunal rejected Canada's position that the service must be capable of affecting the child's safety and security,

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[75] Affidavit of Sony Perron dated November 15, 2017, Mayo Affidavit, Exhibit 131; Affidavit of Sony Perron dated December 15, 2017, Mayo Affidavit, Exhibit 132; Affidavit of Joanne Wilkinson dated April 16, 2019 ("Wilkinson Affidavit"), Mayo Affidavit, Exhibit 154; Affidavit of Valerie Gideon dated April 15, 2019 ("Gideon Affidavit"), Mayo Affidavit, Exhibit 153; and Affidavit of Paul Thoppil dated April 16, 2019, Mayo Affidavit, Exhibit 155.
[76] Wilkinson Affidavit, para 64, Mayo Affidavit, Exhibit 154.
[77] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2020 CHRT 7 ["*Eligibility Decision"*].
[78] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2020 CHRT 15 ["*Definitions Decision"*].

preferring the Complainants' proposal that an essential service was one necessary to ensure substantive equality in the provision of services.[79]

38. On the question of a "service gap", the Tribunal did not require that the child's caregiver or service provider requested a service or support before they are entitled to compensation. As long as a service or support was recommended but not provided, or provided after an unreasonable delay, the individual and caregiver(s) are entitled to compensation, including for pain and suffering and wilful and reckless discrimination.[80]

39. The Tribunal refused to impose a requirement that the harm resulted from the denial. It did agree with Canada that some measure of reasonableness had to be employed, but did not indicate how that would factor in.[81] Negotiations among the parties resulted in some parameters, including the requirement of a professional recommendation.[82] On "unreasonable delay," the Tribunal was more vague: it accepted that reasonableness was a factor but rejected Canada's suggestion that delay be assessed against normative standards for the provision of the services in question.[83] The Compensation Framework represented the parties' best efforts to discern the decision's meaning and faithfully reflect the Tribunal's intentions.

40. The Tribunal issued two final decisions in February, 2021. In the first, the Tribunal held that compensation paid to minors and individuals lacking capacity should be managed under trusts. It ordered Canada to set up the trusts to manage the money, and to pay the administrative costs of those trusts (the "*Trusts Decision*").[84] In the second, the Tribunal approved the Compensation Framework (the "*Framework Approval Decision*").[85] The Tribunal also confirmed its ongoing retention of jurisdiction.

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[79] *Ibid* at paras 121, 147.
[80] *Ibid* at paras 106-107.
[81] *Ibid* at para 148.
[82] Compensation Framework, s 4.2.2., Mayo Affidavit, Exhibit 214.
[83] *Definitions Decision* at paras 170-175.
[84] 2021 CHRT 6 ["*Trusts Decision"*], Mayo Affidavit, Exhibit 215.
[85] 2021 CHRT 7 ["*Framework Approval Decision"*], Mayo Affidavit, Exhibit 216.

H. The First Nations child Decision

41. On July 17, 2020, the Tribunal issued the *First Nations child Decision*, clarifying eligibility criteria for children to access supports and services, and ultimately compensation, under Jordan's Principle. The decision stems from a non-compliance motion brought by the Caring Society[86] alleging that Canada was employing a too-restrictive definition of the phrase "First Nations child." The phrase was one used but not defined in Tribunal judgments. The *Decision* followed an interim ruling in February 2019 that had defined the term to include some children living off-reserve who were not registered under the *Indian Act*, but limited the order to children who are recognized by their community and seeking urgent services.[87]

42. The *First Nations child Decision* expands access to supports and services under Jordan's Principle, and has significant consequences for compensation because children who meet the definitions are eligible for compensation.[88] The *Decision* determined that "First Nations children" entitled to supports and services under Jordan's Principle includes children who a) are neither registered under the *Indian Act* nor eligible for registration, but who are recognized as citizens and/or members of their respective First Nations regardless of whether they live on or off reserve;[89] and b) First Nations children who do not have *Indian Act* status and who are not eligible for status, but have a parent/guardian with, or who is eligible for status.[90] The *Decision* did not tell either Canada or First Nations how to determine whether a child was "recognized as a citizen/member by their First Nation"; instead, it ordered the parties to develop a set of eligibility criteria and

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[86] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 7 at para 27.
[87] *Ibid* at paras 87-89.
[88] See the Compensation Framework, s 4.2.5., Mayo Affidavit, Exhibit 214.
[89] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20 at paras 216-217 [*First Nations child Decision*].
[90] *Ibid* at para 272. The Order at para 273 is not part of this judicial review application.

address funding to First Nations to engage in the process.[91] The Tribunal ordered that children in both these new groups be included in the consultations and be compensated.[92]

43. In November 2020, the Tribunal ordered that individuals who meet any of the following criteria qualify as a "First Nations child" for Jordan's Principle services (and, therefore, compensation):

- The child is registered or eligible to be registered under the *Indian Act*, as amended from time to time;
- The child has one parent/guardian who is registered or eligible to be registered under the *Indian Act*;
- The child is recognized by their Nation for the purposes of Jordan's Principle; or
- The child is ordinarily resident on reserve.[93]

I. Canada's Response to the Tribunal's Orders

44. Canada provided the Tribunal with affidavit evidence of the significant steps taken to remedy the systemic discrimination. The affiants were subject to cross-examination. This reporting disclosed that Canada doubled the budget for agencies providing child and family services on reserve from $681M annually to $1.2B annually, and committed an additional $1.4B over six years to address funding pressures and enhance preventative services.[94] It also indicates that Canada has committed nearly $2 billion since 2016 to support Jordan's Principle.[95] Between July 2016 and February 2019, Canada approved an estimated 216,000 Jordan's Principle requests.[96] The evidence indicates that Canada:

a) paid over $35 million in actual costs and retroactive reimbursements to small agencies (as of the date of the affidavit) and supported agencies in assessing their needs. For example, in the British Columbia region, ISC worked with all 20 small agencies to undertake a needs-based planning

[91] *Ibid* at paras 229-230.
[92] *Ibid* at para 272.
[93] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2020 CHRT 36 at para 56.
[94] Wilkinson Affidavit, paras 3, 4, Mayo Affidavit, Exhibit 154.
[95] Gideon Affidavit, para 5, Mayo Affidavit, Exhibit 153.
[96] *Ibid,* para 8.

process to develop plans and implement the proposed activities in the communities they serve; [97]

b) funded the Institute of Fiscal Studies and Democracy research into non-discriminatory funding models;[98]

c) worked with NAN to fund studies on remoteness and its effect on the provision of child and family services by NAN agencies;[99]

d) funded and worked with COO on a special study of the 1965 Agreement to identify ways to avoid removals and evaluate the current funding approach and offer options for improving the agreement;[100]

e) worked with the parties on a long-term funding methodology for agencies and has committed to paying the full ("actual") cost of services until the new system is in place (outside of Ontario which has its own system).[101]

45. Canada is in the process of implementing legislation that will ensure greater control over child welfare by First Nations, Inuit and Métis.[102] The new legislation affirms the rights and jurisdiction of Indigenous peoples in relation to child and family services,[103] and sets out governing principles, such as the best interests of the child, cultural continuity, and substantive equality.[104]

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[97] Wilkinson Affidavit, para 40-41, Mayo Affidavit, Exhibit 154.
[98] *Ibid*, para 10.
[99] *Ibid*, para 51.
[100] *Ibid*, para 52.
[101] *Ibid*, paras 11-12.
[102] *An Act respecting First Nations, Inuit and Métis children, youth and families*, Preamble, SC 2019, c 24.
[103] *Ibid*, s 8(a).
[104] *Ibid*, s 9-10.

PART II – POINTS IN ISSUE

A) What is the appropriate standard of review?

B) Was the Compensation Decision Unreasonable?

i) Was the decision inconsistent with the nature of the complaint?

ii) Did the Tribunal turn the case into a class action?

iii) Did the Tribunal fail to respect principles of damage law?

iv) Are the Tribunal's reasons inadequate?

vi) Did the Tribunal err in providing compensation under Jordan's Principle?

v) Are the definitions in the *Definitions Decision* unreasonable?

vi) Did the Tribunal err in finding Canada's conduct "wilful and reckless"?

vii) Did the Tribunal err in providing compensation to caregivers?

C) Was Canada denied procedural fairness?

D) Is the First Nations child Decision Unreasonable?

E) Did the Tribunal create an open-ended set of proceedings?

PART III – ARGUMENT

A. The Standard of Review

46. In *Keith,* the Court of Appeal found that both the Tribunal's interpretation of its statute and the application of the statute to the facts are reviewed on a reasonableness standard.[105] The Supreme Court's decision in *Vavilov* maintains the presumption of reasonableness review and states that correctness review is only required where the issue is constitutional, of importance to the legal system as a whole, or concerns jurisdictional boundaries between two or more administrative bodies.[106] No deference is owed to the Tribunal on questions of procedural fairness.[107]

47. Reasonableness review is a "robust exercise."[108] Both the reasoning process and the outcome must bear the hallmarks of reasonableness - justification, transparency and intelligibility.[109] The reasons must be internally coherent, and respect the factual and legal contexts that bear upon the decision.[110] A failure to respect the statutory context or binding jurisprudence renders a decision unreasonable,[111] as does the failure to follow a logical line of reasoning or to properly consider the evidence.[112]

B. The Unreasonableness of the Compensation Decision

i. Introduction

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[105] *Keith v Canada (Human Rights Commission)*, 2019 FCA 251 at para 6 ["*Keith"*].
[106] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 53 ["*Vavilov"*].
[107] *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 at para 36. The *Vavilov* decision applies only to reviews of decisions on the merits and not to issues of fairness (see para 23).
[108] *Vavilov* at paras 12-13, 67, 72.
[109] *Vavilov* at paras 99-100.
[110] *Vavilov* at para 101.
[111] See e.g. *Vavilov* at paras 122-124; *Adamson v Canada (Human Rights Commission),* 2015 FCA 153 at para 88.
[112] *Vavilov* at para 102.

48. The *Compensation Decision* is not the reasonable exercise of jurisdiction *Vavilov* demands. A reasonable exercise of remedial jurisdiction must be consistent with the nature of the complaint presented, the evidence supporting it, and the statutory framework. The Tribunal's decision fails on all of these bases.

49. The Tribunal generally has authority to compensate victims, but the parties before it were not the victims, nor was there even a representative victim. The Tribunal only had authority to deal with the complaint before it, which was an allegation of systemic underfunding. The order it made was tantamount to a class action settlement, without having proper representation of the class members. *Vavilov* stresses that administrative decision-makers have no authority to enlarge their powers beyond what the legislature intended.[113] That is what happened here.

50. The Tribunal's authority must be found in its enabling statute. Parliament granted the Tribunal the authority to inquire into the complaint *before it*.[114] A Tribunal acting outside of its authority cannot be said to have rendered a decision at all, because Parliament did not intend to permit statutory tribunals to expand their jurisdiction by making erroneous decisions about the scope of their powers.[115]

51. The *Compensation Decision* is also a stark departure from the authority conferred by the remedial provisions.[116] Those provisions permit the Tribunal to award compensation to *victims*. The *Act* contemplates claims by groups,[117] but the complainants are not groups of victims. The Tribunal's jurisdiction to award compensation and the legal requirements permitting it to do so have not been changed in 35 years.[118] Accordingly, the binding jurisprudence of the Federal Courts considering the same provisions must be followed or credibly distinguished, neither of which occurred here. The *Act* grants the Tribunal a limited power to compensate victims for pain and suffering caused by the discrimination,

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[113] *Vavilov* at para 68.
[114] *Act*, ss 49, 50, 53.
[115] *Vavilov* at para 68.
[116] *Act*, ss 53(2)(e), 53(3).
[117] *Ibid*, ss 40(1), 40(4).
[118] See original text of the *Act*.

which may be increased where the evidence establishes that discrimination was wilful or reckless.[119] There was no such evidence here because the proceedings focused on the government's discriminatory policies, not the harms experienced by individuals.

ii. The Decision is inconsistent with the nature of the Complaint

52. This complaint was brought by two organizations, the AFN and the Caring Society,[120] who alleged that agencies providing child and family services on reserve and in the Yukon were subject to discriminatory underfunding. It is not a complaint by individuals seeking compensation for the harm they suffered because of that underfunding, and there are no individual or representative complainants. The complainant organizations were not themselves victims of the discrimination, they were not counsel to the affected children, and they are not entitled to choose the forum in which the children or their parents' rights may be vindicated. It is fundamental to our litigation system that individuals are entitled to choose the remedy they wish to pursue and the forum in which to seek it.

53. The complainants 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.[121] There was no request to compensate individuals directly in the complaint; rather, the complainants sought payments into a trust fund of $112M to be administered by the Caring Society.[122]

54. The Caring Society provided further detail about the proposed trust at the hearing on the merits, but it did not request compensation be paid directly to individuals. The trust funds were to be used to give some compensation to removed children, and to pay their expenses for healing activities such as language and cultural programs, family

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[119] *Act*, ss 53(2)(e), 53(3).
[120] Complaint Filed at Tribunal, p 1, Mayo Affidavit, Exhibit 1.
[121] *Ibid,* p 3.
[122] Complainants' Particulars, para 21(3), Mayo Affidavit, Exhibit 3.

reunification programs, counselling, health and wellness programs and education programs. Agencies would also receive funds. The focus of a foundation was not directed solely at individual compensation, and the evidence was not directed at individual experiences.

55. The framing of the complaint is critical to the Tribunal's exercise of jurisdiction. Even though human rights claims are intended to have a measure of procedural flexibility,[123] the Tribunal is not entitled to transform a complaint of systemic discriminatory underfunding into a complaint seeking individual compensation, much less at the remedial phase of the hearings. Doing so is inconsistent with both the Tribunal's authority to hear the complaint, and its authority to remedy it. In *Moore*, the Supreme Court emphasized that remedies must flow from the claim *as framed by the complainants*.[124] The government's evidence before the Tribunal responded to allegations in the complaint. If compensation for discriminatory removals were the issue, important evidence, such as the fact that all removals were undertaken by provincially delegated agencies exercising independent discretion would have been required.

56. The Tribunal's *Rules of Procedure* require that the nature of the complaint be spelled out in the Statement of Particulars.[125] The Tribunal has previously agreed that its purpose is to allow the Respondent to know the case to be met.[126] As particularized, the complaint alleged insufficient funding for "statutory child welfare and protection programs for registered Indian children and families normally resident on reserve".[127] The complainants undertook to provide the Tribunal with the evidence needed to compare the services available off-reserve with those available to "registered First Nation children and families normally resident on reserve" to determine if there was differential treatment and discriminatory practices.[128]

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[123] *Compensation Decision* at para 100.
[124] *Moore v British Columbia (Education),* 2012 SCC 61 at paras 64, 68-70 ["*Moore"*].
[125] CHRT Rules, s 6(1).
[126] *Leung v Canada Revenue Agency,* 2012 CHRT 7 at para 29.
[127] Complainants' Particulars, para 1, Mayo Affidavit, Exhibit 3.
[128] *Ibid,* para 5.

57. To support a claim of individual compensation, victims must be identified with particularity, and they must provide evidence of the harms they suffered because of the discriminatory practice,[129] particularly where, as here, heightened damages are sought based on a party's conduct. The complaint alleges that the government's funding policies and practices led to a denial of essential services to First Nations children and families on reserve generally, not individually, and that this denial perpetuated prior inequalities because on-reserve families have greater child welfare and protection needs.[130] Neither the complaint nor the evidence led, as set out above, permitted the Tribunal to treat this case as one about individual compensation. Canada was entitled to rely on the claim as particularized to understand the scope and nature of the complaint and to structure its evidence and arguments in response. This is a basic principle of adjudicative fairness.

58. The Tribunal issued ten decisions between the *Merits Decision* and the *Compensation Decision*, repeatedly recognizing that the complaint was one of systemic discrimination:

> a) In 2016 CHRT 10, the Tribunal recognized the systemic nature of the discrimination in discussing the purposes of section 53(2)(a) of the CHRA.[131] It also discussed the challenges of implementing remedial orders designed to address systemic discrimination.[132]
>
> b) In 2016 CHRT 16, the Tribunal stated that remedying the discrimination required a complete review and reform of the system.[133] It ordered Canada to cease certain practices immediately and to begin the system-wide reform, while recognizing that other changes and comprehensive reform would take some time.[134]
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> c) In 2017 CHRT 14, the Tribunal set out key principles on which Canada was to base its definition and application of Jordan's Principle, noting that the Respondents had proven that Canada discriminated against First Nations children and their families "in a systemic way."[135]

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[129] *Moore* at para 65.
[130] Complainants' Particulars, para 12, Mayo Affidavit, Exhibit 3.
[131] At para 18.
[132] At para 36.
[133] At paras 32 & 35.
[134] *Ibid.*
[135] At para 23.

d) In 2018 CHRT 4, the Tribunal repeatedly stressed that this case is about addressing big picture, systemic issues of underfunding and policies and authorities that were found to be discriminatory.[136] It stated that its orders seek to address a broken system[137] and that, in systemic cases, the orders may impact policy and the spending of public funds.[138]

59. The Tribunal did not treat this as a case about individual harm until its *Compensation Decision*. References to individual children or families are almost entirely absent from Tribunal decisions from the *Merits Decision* forward. The Tribunal only used individual cases to illustrate gaps in services and problems with the application of Jordan's Principle.[139] The only case discussed in any detail was relied upon solely as an example, since it was ultimately resolved.[140] There was no discussion of the reasons children were brought into care, no evidence of the types of harms experienced by children or their caregivers, and no evidence that any of the harms were caused directly or indirectly by the discriminatory underfunding.

60. Complaints of systemic discrimination are distinct from complaints alleging discrimination against an individual: they require different evidence, may require different parties, and certainly require different remedies.[141] They are also distinct from class action claims, a unique procedural vehicle designed to facilitate claims for damages by large groups of individuals. This is a claim of systemic discrimination and complaints of systemic discrimination challenge structural, social harms.[142]

61. The Court of Appeal has recognized that complaints of systemic discrimination require structural and systemic remedies. In *C.N.R.,* the Court of Appeal concluded that compensation for individuals is not an appropriate remedy in complaints of systemic discrimination. Hugessen J.A. noted that the Tribunal's remedial authority limits

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[136] At para 40.
[137] At para 115.
[138] At para 33.
[139] *Merits Decision* at paras 366-367; 2017 CHRT 7 at paras 8-11; 2019 CHRT 7 at paras 57-86.
[140] 2019 CHRT 7 at paras 57-86.
[141] *British Columbia v Crockford*, 2006 BCCA 360 at paras 49, 57 and 94.
[142] Melissa Hart, "Civil Rights and Systemic Wrongs", (2011) 32 Berkeley J Emp & Lab L 4555 at 455-56.

compensation to "victims," which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, "by the nature of things individual victims are not always readily identifiable."[143]

62. Remedies in systemic claims should seek to prevent the discriminatory practices from occurring in the future, while compensation for individual victims of discrimination seeks to return the victim to the position they would have been in without the discrimination.[144] Even supporters of this complaint acknowledge this principle: "Where the breach of a human rights obligation raises structural or systemic issues ... the underlying violations must be addressed at the structural or systemic level."[145]

63. In *Moore,* the B.C. Human Rights Tribunal allowed the complainant to lead evidence of systemic discrimination in a complaint by an individual seeking compensation for denial of access to education due to their dyslexia.[146] However, when the B.C. Tribunal relied on that evidence to award systemic remedies, the Supreme Court concluded that the systemic remedies were too far removed from the "complaint *as framed by the Complainant*" [emphasis in original].[147] The Supreme Court upheld the individual remedies, but set aside all of the systemic orders because they did not flow from the claim.[148] In the words of the Court: "while systemic evidence can be instrumental in establishing a human rights complaint, the evidence [of systemic discrimination]…was too remote to demonstrate discrimination against" Mr. Moore individually.[149] The same principle applies with equal force here. Having pursued a complaint of systemic discrimination, the complainants received the remedies they sought: changes to the policies and practices that caused the underfunding. They were not entitled to a sweeping

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[143] *Re CNR and Canadian Human Rights Commission*, 1985 CanLII 3179 (FCA) at para 10 (overturned on other grounds but this issue was not appealed).
[144] 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 pp 3-4.
[145] *Ibid* at p 18.
[146] *Moore* at para 68.
[147] *Ibid* generally, particularly at para 68.
[148] *Ibid* at paras 64 and 68-70.
[149] *Ibid* at para 65.

compensation order to individuals they did not represent, and whose circumstances were not in evidence, so could not be properly reflected in any Tribunal compensation order.

64. The Tribunal may be correct that there could be a case where systemic remedies and individual compensation are both required,[150] but the complainants in that hypothetical case would have to allege both kinds of discrimination and provide evidence to support both aspects of their claim. Contrary to the Tribunal's statement that compensation for individuals was sought from the beginning,[151] the very evidence the Tribunal cites demonstrates that the Attorney General had pointed out there were no individual victim parties to the litigation. There is a dearth of evidence of the experiences of victims to support such an award and inherent unfairness in such a shift in focus at the remedial stage of proceedings. Fairness dictates that the complaint cannot be a moving target,[152] and cannot expand over time.[153]

65. Canada responded to the case by trying to show that its funding model was not discriminatory. That exercise is fundamentally different from defending an allegation that an individual experienced pain and suffering or the discrimination was wilful or reckless. Allowing the complaint to evolve during the hearing is unfair, particularly when it occurs in the remedial phase.

iii. The Tribunal improperly turned the case into a class action

66. Where large groups of individuals suffer harm as a result of some actor's wrongful actions, the law has evolved to provide a procedural vehicle for the just and efficient litigation of their claim. It is called a class action, and courts have the tools to ensure that such claims can be brought efficiently and with all the appropriate safeguards for the rights of the victims. The Tribunal does not have those tools, and it unreasonably treated this case, *at the remedial phase*, as if it were a class action. The decision creates and compensates two vast and separate classes of victims and then requires the parties to

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[150] *Compensation Decision* at para 146.
[151] *Ibid* at paras 108-111.
[152] *Entrop v Imperial Oil Limited*, 2000 CanLII 16800 (ON CA) at paras 58 and 59.
[153] *Moore* at paras 67-69.

create a process to identify those victims. The Tribunal lacked the jurisdiction to make such a decision and so the decision does not satisfy the *Vavilov* standard.

67. The *Act* does not grant the Tribunal jurisdiction to consider complaints from "classes" of victims. Section 40(1) only permits individuals or groups of individuals to file a complaint with the Commission. Section 40(2) specifically empowers the Commission to decline to consider complaints filed without the consent of the actual victims. Even if the Commission did consider the claim here, it did so on the basis that it was a claim of systemic discrimination; its own Acting Chair described it as such.[154] As Quebec's Tribunal des droits de la personne recognized in declining to apply class action rules, class actions are an extraordinary procedural vehicle and an exception to the principle that no one can argue on behalf of another.[155]

68. Where such jurisdiction exists in human rights legislation, it is because legislatures have clearly provided it. The *Alberta Human Rights Act* states that no person shall deny any person or class of persons goods, services, accommodation or facilities on the basis of prohibited grounds.[156] Similarly, *The Saskatchewan Human Rights Regulations, 2018* permits 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 may request exclusion from the class.[157]

69. The absence of an equivalent provision in the *Act* indicates that Parliament chose not to permit class action-style complaints. In *Mowat*, the Supreme Court relied on similar differences between the federal and provincial human rights legislation to support its

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[154] Canada, Parliament, *Senate Standing Committee on Human Rights*, 41st Parliament, 2nd Sess. (Dec 11 2014). Available at: https://sencanada.ca/en/Content/Sen/committee/412/ridr/51838-e.

[155] *Commission des droits de la personne et des droits de la jeunesse c Quebec (Procureur général)*, 2007 QCTDP 26 at para 105.

[156] *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 4(a).

[157] *Saskatchewan Human Rights Regulations, 2018*, RRS c S-24.2 Reg 1.

conclusion that Parliament's silence on the question of costs in the *Act* indicated an intention to deny the Tribunal the power to award costs.[158]

70. The broad scope of the *Compensation Decision* creates confusion about whether the Tribunal or this Court is the proper venue for these kinds of claims; worse, it creates an incentive to pursue both. The Supreme Court emphasized the importance of certainty of venue in *Vavilov*: "[m]embers of the public must know where to turn in order to resolve a dispute."[159]

71. Class action-style complaints require specific authority. The *Act* does not provide the Tribunal with the tools needed to manage class claims. The *Federal Court Rules* for class action proceedings create a comprehensive framework for resolving these challenging claims. First and foremost, the rules give effect to, and protect the rights of, individual class members. They require the Court to consider whether class members have an interest in controlling their own individual proceeding, and whether class proceedings are the most efficient and practical way to proceed.[160] They ensure that potential class members receive notice of the steps in the litigation and permit them to decide whether they wish to participate or opt out entirely.[161] They maintain individuals' ability to bring their own claim. Individuals may opt in or opt out. In this case, the parties are not authorized to represent the class.

72. Potential class actions must be certified by the Court at an early stage. To be certified, the claim must include an identifiable class of plaintiffs and a rational connection between that group and the proposed common issues.[162] The class must be "practicable", meaning that

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[158] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 57, 60 ["*Mowat*"].
[159] *Vavilov* at para 64.
[160] *Federal Court Rules*, SOR/98-106, Rule 334.16(2) ["*Federal Court Rules*"] as applied in *Samson Cree Nation v. Samson Cree Nation (Chief and Council)*, 2008 FC 1308 at para 98.
[161] *Federal Court Rules*, Rules 334.23 and 334.21.
[162] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 ["*Dutton*"] at para 38; *Hollick v Toronto (City)*, 2001 SCC 68 at para 19.

a) it discloses a reasonable cause of action;

b) a class action is the preferable procedure; and

c) there is at least one representative plaintiff who fairly and adequately represents the class (and any sub-classes), and a workable plan to advance the action.[163]

73. The certification of the class can lead to an order precluding new claims based on similar underlying facts in the same forum.[164] Rules provide for document disclosure and discoveries to ensure that the parties have the information necessary to support their claim at the common issues trial.[165] Defining the common issues is critical for determining the issues in dispute and prevents parties from unfairly adding new issues or changing the scope of a dispute after the common issues are determined.[166]

74. Once the common issues are determined, the rules empower the judge to make the victims whole by awarding compensatory damages.[167] To award aggregate damages, courts must have clear evidence. Where a judge determines that individual assessments are required, class action courts may create practices and procedures where no legislative process exists.[168] If Parliament intended the Tribunal to manage class claims, it would have provided them the tools to do so.

75. The class proceeding rules would have identified and addressed several of the problems that became apparent in negotiation of the Compensation Framework, including basic issues such as who should be compensated and for what. A court would have ensured that the claim defined the issues before it.

76. The rules would not have permitted the matter to go to hearing without prior certification of a class, appointment of an appropriate representative plaintiff, and carefully defined common issues. The rules also contemplate the possibility of a summary judgment

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[163] *Federal Court Rules*, Rule 334.16(1).
[164] See e.g. *Heyder v Canada (Attorney General)*, 2018 FC 432.
[165] See e.g. *Federal Court Rules*, Rule 334.22.
[166] *Anderson v Canada (Attorney General)*, 2015 CanLii 77245 (NL SC) at paras 17-32.
[167] *Federal Court Rules*, Rule 334.28.
[168] *Dutton* at para 34.

motion to avoid an unnecessary trial. Full documentary production and discoveries would have been available.

77. The absence of representative plaintiffs created significant problems in this claim. It meant there was no evidence of the harms suffered by individuals, evidence required for the Tribunal to award compensation. Representative plaintiffs would also have assisted in the negotiation of a process for identifying recipients and paying compensation by providing examples of who is entitled to compensation and on what basis. Because there were no representative plaintiffs, there was no input from the actual individuals harmed, so the process required repeated interventions by the Tribunal.

78. The *Compensation Decision* was vague on details because the litigation was about systemic underfunding, not tort liability for harms suffered by victims. If it had been about identifying individuals who were harmed, as a class action would be, there would have been no ambiguity as to whom to compensate, and no need to negotiate a Compensation Framework. The Tribunal effectively inverted the normal litigation process by first deciding to order the payment of compensation, then asking the parties to help it decide who should be entitled to it. It failed to make the required assessment of whether or to what extent the matters are even suitable for determination as common issues or individual assessment. The class action rules would have achieved better outcomes for deserving beneficiaries, and eliminated the need for rounds of negotiation and further orders that occurred here.

79. Class actions deal directly with the right to compensation of family members. There was no justification for an award to a family class here. Courts routinely certify family classes who may be entitled to damages, [169] but a reasonable cause of action, causation and injury must be established as a prerequisite to any award of damages. In such cases, family members instruct counsel to advance their interests. The Tribunal's approach also omitted critical matters such as how children who are not of the age of majority can give instructions, or how they can receive compensation.

[169] See e.g. *McLean v Canada (Attorney General)*, 2018 FC 642 at paras 2, 4-5.

80. The Tribunal acknowledged Canada's argument that it could not consider class complaints in the *Compensation Decision*, but the reasons do not meaningfully address the argument.[170] The *Act* does not empower the Tribunal to consider "class" complaints. The Tribunal would have been entitled to extrapolate from the evidence of representative victims in a properly framed complaint, [171] but it had no such evidence before it.

81. The Tribunal recognized that the *Act* determines whether it has the jurisdiction to consider class complaints, but when it found no such authority, it showed no restraint. Instead, the Tribunal found that the silence of the *Act* entitled it to "use a number of useful tools at its disposal," including a non-existent power to accept "proof by presumption of facts".[172]

82. The Tribunal may not disregard or rewrite the *Act*. Any exercise of discretion must accord with the purposes for which the discretion was granted, and decisions must comport with the specific constraints imposed by legislation.[173] Statutory decision makers cannot exercise powers they do not have.[174]

83. The Tribunal's conclusion that the victims of the discrimination are identifiable[175] contradicts both the Caring Society's statement that it would be impossible to obtain the evidence required to identify the victims of the discrimination,[176] and the fact of the Compensation Framework itself, which required the negotiation of an elaborate system to identify them. Despite finding that the victims were identifiable, the decision did not explain how they were to be identified. Instead, it ordered the parties to negotiate a process for identifying victims, a decision that can only amount to an admission that the usual order of proceeding has been turned upside down.

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[170] *Compensation Decision* at paras 63, 209.
[171] *Canadian Human Rights Commission v Canada (Attorney General)*, 2010 FC 1135 at para 73 ["*Walden*"]. The pain and suffering decision was not appealed in *Canada (Social Development) v Canada (Human Rights Commission)*, 2011 FCA 202 ["*Canada*"].
[172] *Compensation Decision* at paras 209-10.
[173] *Vavilov* at para 108.
[174] *Ibid* at para 109.
[175] *Compensation Decision* at paras 123, 207.
[176] *Ibid* at para 51.

84. If this had been a complaint about discrimination against individuals, a process to identify victims would not have been required. The victims would have been part of the complaint, their stories would have been told, and any harms they suffered identified. The evidentiary gaps exist because this complaint is not and has never been about those harms: it was, and is, a case about systemic discrimination. Canada accepts that the underfunding for agencies was discriminatory and has undertaken a host of measures to address the underfunding. However, the Tribunal erred in law by imposing what amounts to a consent settlement agreement. It had no jurisdiction to do so, and did a grave disservice to the rights of those who should have the right from the beginning to decide how and where to bring their claim.

85. The Tribunal was aware that a class action had been instituted in this Court claiming damages for children and families affected by the same discriminatory underfunding; indeed it requested a copy of the claim and then invited the parties to make submissions on expanding the categories of individuals eligible for compensation.[177] There is no dispute that systemic underfunding affected children; the issue here is whether the Tribunal, rather than this Court, was the appropriate forum in which to claim individual compensation. Where individuals seek compensation for the harms they have suffered, they are entitled to be represented so that they have a measure of control over the forum in which they seek compensation, the form that compensation takes, and whether different harms, or different levels of harm, require different amounts of compensation. Underage beneficiaries can be represented by a parent or litigation guardian.

iv. Failure to respect principles governing damage awards

86. Even if this Court determines that the Tribunal acted within its jurisdiction, the *Compensation Decision* still fails to meet the *Vavilov* standard of rationality. The Tribunal repeatedly ignored principles that ensure remedies are just: responsiveness, causality, and proportionality.

[177] *Compensation Decision* at para 270.

87. Statutory compensation must be awarded on a principled basis. A claim for individual compensation must be supported by evidence showing the relationship between the actions complained of and the compensable harms suffered.[178] The Tribunal has never before awarded individual compensation in claims of systemic discrimination without at least one alleged victim providing the evidence needed to assess the compensable harms properly.[179] An adjudicator must be able to determine the extent and seriousness of the alleged harm in order to determine the appropriate compensation.[180]

88. The Caring Society stated that it would be impossible to obtain the necessary evidence to explain removals.[181] The circumstances surrounding, and the reasons for, a child's removal are examined in child protection proceedings conducted under provincial legislation. The proceedings can be complex. The federal government has no authority to order or bar the removal of a child. Information related to the reason for each protection decision is held by the relevant provincial entity. Provincial authorities determine whether it is necessary to remove a child to ensure their well-being. It was unreasonable to assume that all removed children, regardless of their unique circumstances, meet the statutory criteria for compensation, without evidence thereof.

89. Further, Canada accepts the finding that discriminatory underfunding led to a higher proportion of children being removed from their homes on reserve. However, proving structural problems with funding models and proving compensable pain and suffering and wilful and reckless discrimination requires additional, substantial evidence of a very different nature. As the AFN acknowledged, the evidence must outline the effects of the discriminatory practice on the individual victims.[182]

90. Canada accepts that the impugned funding model was discriminatory. But underfunding alone does not justify compensation for a broad class of children and their caregivers.

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[178] *Chopra v Canada (Attorney General),* 2007 FCA 268 at para 37 ["*Chopra"*].
[179] *Gaz métropolitain* at para 536; *Walden* at paras 72-73.
[180] *Lebeau v Canada (Attorney General),* 2015 FC 133 at para 31.
[181] *Compensation Decision* at para 51.
[182] Written Submissions of the AFN regarding Compensation dated April 4, 2019, para 10, Mayo Affidavit, Exhibit 161.

The Tribunal needed evidence of the impact of the discriminatory funding practice on individuals and, critically, proof of causation, that is, evidence of the link between the discriminatory underfunding and the harms suffered.[183]

91. As the Court of Appeal has noted, "there must be a causal link between the discriminatory practice and the loss claimed"[184] for the Tribunal to award compensation. There is no analysis in the decision of the effects underfunding had on any of the recipients of compensation, no analysis of the harms they suffered, and no differentiation between the circumstances of the recipients. No attempt is made to distinguish the circumstances of children who were removed for their own protection, and children who weren't, or children who were removed for a short time, or multiple times, and those who weren't. All relevant questions concerning causality and proportionality are simply swept aside. The Tribunal was required to show a rational connection between the award and the record.[185] Rational proportionality is a requirement for any reasonable payment of compensation, even awards of punitive damages by Courts specifically intended to deter, denounce and punish tortfeasors.[186]

92. The Tribunal's disregard for the principle of proportionality is manifest in its decision to award the same compensation to children who were necessarily removed from their homes for their own safety and well-being[187] and placed in care outside of their communities, as it did those who were removed from their homes and placed outside the community unnecessarily because of the discriminatory funding.[188] There is a fundamental difference between the experiences of these two groups of children, and a reasonable decision would have awarded compensation proportional to their experiences.

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[183] *Hughes v Canada (Attorney General)*, 2019 FC 1026 at paras 42 and 64 ["*Hughes*"].
[184] *Chopra* at para 37.
[185] *Hughes* at paras 41 and 80.
[186] *Whiten v Pilot Insurance*, 2002 SCC 18 at para 111 ["*Whiten*"].
[187] *Compensation Decision* at para 249.
[188] *Compensation Decision* at paras 245-248.

93. The Tribunal's failure to consider the critical question of causation is another hallmark of unreasonableness. The B.C. Court of Appeal decision in *Shuswap Lake Estates Ltd.* is informative. The complainants sought compensation for loss of business in a real estate development resulting from a highway-widening project. They were awarded compensation for the cost of temporary water line bypasses, but other claims were rejected because they failed to prove the project caused their losses. [189] The Court stated that both causation and the facts on which an expert's opinion are based must be proven.[190]

94. The evidence here consisted largely of high-level reports from experts, establishing that underfunding for agencies contributed to a higher percentage of children on reserve being removed from their homes than children off reserve. Such evidence was aimed at supporting a finding of systemic underfunding. It did not tell the stories children who may have been harmed, much less those of their family members. Where a finding is based on general evidence, the only responsive remedy could be a systemic one, granting better funding for agencies. Evidence that underfunding contributed to a heightened level of removals is, at most, a limited finding of causation. Underfunding cannot explain every removal, nor be the reason for all harms experienced.

95. The evidence was that the reasons for apprehension are often complex, resulting from a variety of factors.[191] Additional funding would not necessarily have enabled the children to stay in their homes or communities. Provincial and territorial child-care systems, relied on as the comparator for on-reserve services in the complaint,[192] regularly remove children from homes. In Ontario, the on-reserve system was the same as the off-reserve

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[189] *Shuswap Lake Estates Ltd v,* 2018 BCCA 6 at para 2.
[190] *Ibid* at para 45.
[191] Testimony of Dr. Blackstock, vol. 2, p 110, Mayo Affidavit, Exhibit 9, vol. 3, p 165, Mayo Affidavit, Exhibit 10, vol. 4, p 126, Mayo Affidavit, Exhibit 11, and vol. 48, pp 200-201, Mayo Affidavit, Exhibit 44; Testimony of Dr. Nicolas Trocmé, vol. 7, p 107, Mayo Affidavit, Exhibit 14.
[192] Complaint filed at Tribunal, p 2, Mayo Affidavit, Exhibit 1.

system; Ontario applies its child welfare system on reserves and Canada reimburses Ontario for much of the costs of those services.

96. Had the Tribunal properly considered the issue of causation, it had the power to demand evidence from the parties,[193] and to make inferences based on the testimony of representative complainants.[194] The fact that it did neither underscores the Tribunal's failure to address essential issues. The absence of evidence from individual complainants left the Tribunal with no evidence of individual harms. This is not a claim like *Walden*, a group claim, where all of the victims were part of the same group that was universally underpaid for the same work under the same policies. In *Walden,* the Tribunal had the evidence it needed to assess their losses. In this case, there was no such evidence.

97. The Tribunal failed to provide proportional compensation. Despite acknowledging that some victims may have suffered more than others,[195] it declined to award compensation reflecting individual experiences. Instead, it ordered the maximum statutory compensation to all children (and their caregivers), indicating that it would have awarded far more had the *Act* permitted it.[196]

98. The cap on the amount of compensation the Tribunal can award is found in the same section as, and cannot be separated from, the power to award compensation.[197] The Tribunal cannot avoid the problem created by the absence of evidence by awarding the maximum compensation to all, based on an unsupported conclusion that even the least harmed should get the maximum. Remedies must be fair to the party against whom they are awarded,[198] and should only be imposed if they are related to securing a right.[199]

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[193] *Walden* at para 75, affirmed in *Canada* at para 32; and *Keeper-Anderson v Southern Chiefs Organization Inc*, 2008 CHRT 46 at para 2.
[194] *Walden* at para 73.
[195] *Compensation Decision* at para 258.
[196] *Ibid*.
[197] *Act,* ss 53(2)(e) and 53(3).
[198] *Pike v Kasiri*, 2016 BCSC 555 at para 305.
[199] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 58.

They should also be responsive to the experience of the individual.[200] Neither of these purposes are achieved by the Tribunal's decision.

99. The Tribunal concluded without evidence that every victim experienced the most "egregious" of circumstances.[201] The Tribunal's focus on the sufficiency of the cap on compensation is inappropriate, since Parliament determines the appropriate statutory cap.[202] The maximum limit is reserved for the most egregious cases, where the extent and duration of the suffering warrants it.[203] This cannot be determined without an enquiry into the facts and circumstances of individual cases. A reasonable decision would assess the causal relationship between the act of underfunding and the harm suffered, then award compensation proportional to individual experiences.[204] The Tribunal did not do this.

100. The Tribunal's decisions on compensation do not reflect its 2016 statement that the purpose of s. 53(2) remedies is to eliminate discrimination and its recognition that binding jurisprudence required it to exercise its discretion on a principled basis, considering the link between the discrimination and the loss claimed, the particular circumstances of the case and the evidence presented.[205]

101. Ultimately, the Tribunal's compensation orders lack the coherence and internal consistency required by *Vavilov*.[206] Because it awarded compensation based on inadequate evidence, the Tribunal was unable to draw important distinctions and

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[200] *Blackwater v Plint*, 2005 SCC 58 at paras 74, 78.
[201] *Compensation Decision* at paras 147-149.
[202] *Arial v Canada*, 2017 FC 270 at para 58.
[203] *Youmbi Eken v Netrium Networks Inc*, 2019 CHRT 44 at para 70; *Johnstone v Canada Border Services,* 2010 CHRT 20 at para 379.
[204] *Ratych v Bloomer*, [1990] 1 SCR 940 at paras 22-23.
[205] *Merits Decision* at para 468 citing *Chopra* at para 37 and *Hughes v Elections Canada,* 2010 CHRT 4 at para 50.
[206] *Vavilov* at paras 102-104.

provided vague, sometimes ambiguous, delineations of who is to be compensated and in what circumstances.

102. The Tribunal failed to define concepts that are critical to establishing a link between Canada's conduct and the compensable harm. For example, it draws a distinction between "necessary" and "unnecessary" removals in the orders. A necessary removal must relate to a child subject to some form of abuse. An "unnecessary" removal is referred to as involving a child "who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse were unnecessarily apprehended."[207] The distinction between that situation, and a necessary removal, or the link to the discriminatory underfunding, are simply not explained. Similarly, it is unclear whether compensation for a "service gap" in Jordan's Principle services (as opposed to a denial or delay of a request) is limited to those removed from their homes, families and communities to access the services[208] or includes those not removed.[209] Indeed, it is not even clear whether the Tribunal's conclusion that there was no need for a service to have been requested for the person to receive compensation applies generally or is limited to those removed from their homes due to a "service gap".[210]

103. These distinctions matter. The Office of the Parliamentary Budget Officer ("PBO") stated that there are a multiplicity of interpretations of the Tribunal's orders,[211] and acknowledged "extreme uncertainty" in its estimates for the number of eligible claimants under Jordan's Principle.[212] Such ambiguity results in estimates of satisfying the judgment that differ by over $10 billion. The PBO interprets the cost of the orders to be

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[207] *Compensation Decision* at para 245.

[208] *Ibid* at para 250.

[209] *Eligibility Decision* at para 154; *Framework Approval Decision* at para 5, Mayo Affidavit, Exhibit 216.

[210] *Definitions Decision* at para 107.

[211] Office of the Parliamentary Budget Officer, *First Nations Child Welfare: Compensation for Removals*, April 02, 2020, p 2, Mayo Affidavit, Exhibit 217; Office of the Parliamentary Budget Officer, *Compensations for the Delay and Denial of Services to First Nations Children*, February 23, 2021, pp 1-2, 5, 9 [PBO 2021 Report], Mayo Affidavit, Exhibit 218.

[212] PBO 2021 Report, pp 1-2, 6, 10-14, see particularly 12 and 14.

$2.2 -$4.2B, but says that the cost under the Compensation Framework is $15B.[213] The Tribunal's decisions fail to provide clear direction and justification, as required by *Vavilov*.[214]

v. The reasons fail to adequately justify the decision

104. The quality of the Tribunal's reasoning is another hallmark of the unreasonableness of its various decisions. In *Vavilov,* the Supreme Court stated that binding precedents and Tribunal jurisprudence act as a constraint on what a Tribunal can reasonably decide,[215] and a failure to explain or justify its departure from binding precedent can render a decision unreasonable.[216] The Tribunal failed to explain its departure from the *Menghani, Moore,* and *C.N.R.* decisions. The Tribunal's reasons were unresponsive to Canada's arguments.[217] Regardless of the quasi-constitutional nature of the *Act* relied on regularly by the Tribunal,[218] it cannot ignore statutes and binding legal precedents, particularly where the precedents are from the same human rights context.

105. The Tribunal consistently distinguished binding precedents on spurious grounds. In deciding that estates are entitled to compensation, the Tribunal declined to apply the Supreme Court's finding in *Hislop*[219] that an estate is a collection of assets and liabilities of a person who has died; it is not an individual and it has no dignity that can be infringed. It also declined to apply the reasoning of the British Columbia Court of Appeal in *Gregoire* where the court concluded that deceased people cannot make claims under the *British Columbia Human Rights Code* because they are no longer "persons" within the meaning of the *Code*.[220] While Canada is not contesting compensation for estates, in the

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[213] *Ibid,* pp 1-2.

[214] *Vavilov* at para 86.

[215] *Vavilov* at para 112.

[216] *Ibid.*

[217] *Ibid* at para 127.

[218] See e.g. *Compensation Decision* at para 209.

[219] *Eligibility Decision* at paras 120-132 distinguishing *Canada (Attorney General) v Hislop*, 2007 SCC 10 ["*Hislop"*].

[220] *Eligibility Decision* at paras 133-134 distinguishing *HMTQ v Gregoire*, 2005 BCSC 154 at paras 7, 11-12 ["*Gregoire"*].

particular circumstances of this complaint, the Tribunal's refusal to be guided by binding and persuasive precedent is unreasonable.

106. The Tribunal's reasoning in declining to follow these decisions is opaque. It concluded that *Gregoire* does not apply because this is a complaint brought by organizations on behalf of victims and *Gregoire* involved a single representative of an individual complainant[221] without explaining the significance of that difference. With respect to *Hislop*, it stated the rule established in that decision is context-specific, and the human rights context justifies departing from the rule,[222] but failed to explain why. The Tribunal's refusal to apply binding and persuasive jurisprudence must be explained.[223]

107. The Tribunal also ignores relevant statutory authority. Its recent determination that compensation can be paid into a trust instead of directly to victims, is a case in point. The Tribunal rejected Canada's argument that s. 52 of the *Indian Act* gives the Minister the authority to deal with the property of beneficiaries lacking competence, and s. 52.3 of the *Indian Act* contemplate the Minister working with Band Councils and parents to manage the property of minors, [224] within the relevant provincial scheme.[225]

108. The Tribunal declined to apply the *Indian Act.* Indigenous Services Canada is bound to follow the *Indian Act* while it does work with First Nations to address their concerns, such as in recent amendments to Bill S-3. Engaging First Nations governments as rights-holders in this process is critical to Canada. The complainants did not challenge the constitutionality of the *Indian Act*, so the Tribunal was obliged to follow it. Ironically, the Tribunal then rejected Canada's argument that existing provincial legislation guides the proper approach to managing funds for minors or people lacking capacity, by framing Canada's position as a challenge to the remedial provisions of the *Act* and stating that Canada's failure to provide a Notice of Constitutional Question meant that the validity

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[221] *Eligibility Decision* at para 134.
[222] *Ibid* at paras 120-132.
[223] *Ibid* at 132, 134.
[224] Ss. 52 and 53 of the *Indian Act,* RSC, 1985, c I-5.
[225] See e.g. *Children's Law Act 2020,* SS 2010, c 2, s 45; *Children's Law Reform Act,* RSO 1990, c C-12 ss 47-51; *Family Law Act,* SBC 2011, c 25, ss 175-181.

of the *Act* is not in issue.[226] The suggestion that Canada should challenge its own legislation is surprising.

109. Both the estates and trusts decisions are relied on not to challenge the specific results, but to show that when the Tribunal desired a particular result, it did not feel constrained either by binding case law or relevant statutes. Such reasoning does not comply with the standard of rationality.[227]

vi. The Unreasonableness of the Award of Compensation under Jordan's Principle

110. Many of the same errors that permeate the *Compensation Decision* on child removals – ignoring the nature of the complaint and the evidence called, awarding compensation to caregivers, and a lack of proportionality in the quantum of compensation ordered – apply with equal force to compensation for breach of Jordan's Principle. The *Definitions Decision* convincingly illustrates the Tribunal's erroneous approach. Through a series of decisions, the Tribunal effectively created new government policy, then proceeded to award compensation for a failure to implement the policy.

111. In adopting Jordan's Principle in 2017, the House of Commons endorsed the principle that intergovernmental funding disputes should not delay the provision of necessary products and services to First Nations children. The Commons resolution stated that the government first contacted should provide the service sought, and only seek repayment from the appropriate partner after providing the service to the child.

112. Jordan's Principle received only passing reference in the complaint. The complainants noted that the *Wen:De Report* states that significant staff time is spent resolving jurisdictional disputes.[228] Over the course of the litigation, the Tribunal transformed Jordan's Principle from a resolution aimed at ensuring that jurisdictional wrangling did not impact the health of First Nations children, to what it describes as a "legal rule" that ensures substantive equality in the provision of health supports and services to a far

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[226] 2021 CHRT 6 at para 90.
[227] *Vavilov* at paras 102 et seq.
[228] Complaint Filed at Tribunal, p 3, Mayo Affidavit, Exhibit 1.

broader group than First Nations children on reserve and in the Yukon. The decisions that produced that transformation were accepted by Canada because they reflected progressive policy choices that Canada could implement to benefit children. The results have been impressive: First Nations children have received hundreds of thousands of supports and services, as the Tribunal has approvingly noted.[229]

113. Those welcome outcomes must not, however, obscure the fact that resolutions of the House of Commons do not create enforceable legal rights or obligations;[230] nor do they bind a government to adopt a specific course of action.[231] It was unreasonable for the Tribunal to transform the resolution into an expansive legal rule that merited retroactive compensation for the government's failure to observe a version of Jordan's Principle that the Tribunal did not articulate for another eighteen months.

114. The Tribunal lost sight of the nature of the complaint and the particulars supporting it in making a compensation award to a broad and essentially indeterminate class of victims without evidence of individual harm. The lack of connection between the claim and the *Compensation Decision* is, if anything, even starker in relation to Jordan's Principle.

115. The compensation awarded is not responsive to the facts before the Tribunal. Canada reviewed every Jordan's Principle request since April 2007 to ensure that its responses were in line with the Tribunal's definition of Jordan's Principle, despite the Tribunal ordering a review of requests over a shorter period.[232] The children identified in this process received a responsive remedy: the support or service they did not receive. Compensation was not warranted.

vii. The Definitions in the *Definitions Decision* are unreasonable

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[229] *Definitions Decision* at para 222.
[230] *Kelso v The Queen*, [1981] 1 SCR 199 at para 208.
[231] *House of Commons Procedure and Practice*, 3rd ed (2017) at Chap 21.
[232] Affidavit of Sony Perron dated November 15, 2017, paras 19, 20, Mayo Affidavit, Exhibit 131.

116. Even if this Court were to accept that some compensation to some children might be appropriate for Jordan's Principle, the *Compensation Decision* and the subsequent decisions, particularly the *Definitions Decision*, produce unreasonable results. The combined effect of these decisions is that children and their caregiving parents or grandparents are entitled to maximum compensation even where no request for supports or services was made; failing to provide the service or providing it after a delay caused no harm; or the delay in receiving a service was no greater than what would be experienced by a non-First Nations child.

117. Furthermore, as with compensation for removals, the Tribunal fails to respect the principle of proportionality: children who experienced even a brief delay in receiving their services receive the same as those who were denied services. The Tribunal was forced to use this "one size fits all" approach to awarding compensation because the absence of evidence from individual complainants meant the Tribunal could not differentiate between individuals.

118. The key part of the *Definitions Decision* concerns three terms the Tribunal had used in the *Compensation Decision*: "essential services", "service gaps," and "unreasonable delay." The parties could not agree on their meaning and had to ask the Tribunal to clarify.

119. The *Compensation Decision* awarded compensation for failure to provide "essential services," a term the Tribunal had used multiple times without defining it.[233] Canada submitted to the Tribunal that an essential service was one necessary for the safety and security of the child, based on the *Compensation Decision's* assertion that children experienced "real harm."[234] However, the Tribunal rejected that submission, finding instead that "conduct that widened the gap between First Nations children and the rest of Canadian Society and caused pain and suffering should be compensable whenever it occurred and not just when it had an adverse impact on the health and safety of a First

[233] See e.g. *Compensation Decision* at paras 222 and 226.
[234] *Ibid* at para 226.

Nations child."[235] The Tribunal agreed with Canada that the definition "must accord with a reasonable interpretation of what is essential,"[236] but it still leads to this anomalous result: a victim does not need to prove harm to receive compensation for pain and suffering.

120. The Tribunal's *Definitions Decision* reads not so much as a decision about definitions but as a wholesale rejection of any reasonable limits on compensation. It refused to find that the making of a request was an essential pre-condition; failing to act on an identified need is an appropriate starting place for compensable damage. The requirement of an adverse impact to health and safety would also seem to be unarguably an identifier that something was "essential," but the Tribunal's reasons fail to offer a plausible explanation for rejecting it as a criterion.

121. The Tribunal's reasoning on the other two definitions similarly lacks justification, intelligibility and transparency. On service gaps, Canada proposed criteria that attempted to give meaning to the term "gap": the service should have been requested, there should have been a dispute between jurisdictions as to who should pay, and the service should have normally been publicly funded for any child in Canada. All of these criteria would be helpful in showing that there was a gap between what the First Nations child needed and what was provided, or a gap between what a First Nations child would experience that other Canadian children would not. All of Canada's proposed criteria were rejected.[237]

122. In considering the meaning of "unreasonable delay", the Tribunal acknowledged that Canada must provide a much higher level of service in order to remedy past injustices, and that it should not have to compensate where there are only minor deviations from

[235] *Definitions Decision* at para 147.
[236] *Ibid* at para 151.
[237] *Ibid* at para 107.

those standards.[238] Despite this statement, the Tribunal did not impose any reasonable limits. It simply forced Canada to rebut the presumption that delay caused harm.[239]

123. While any wait time for the provision of medical, social or education services may seem unreasonable to a parent or caregiver, the idea that everyone who experiences delay for any service - the Tribunal offers dental services as an example[240] - should be compensated at all, much less at the elevated levels contemplated by the *Compensation Decision*, is unreasonable. If a First Nation child entitled to receive dental services at no cost, with no deductible or income threshold, had to wait six weeks for a predetermination from the federal insurance adjudicator, both child and caregiver(s) would be entitled to receive the maximum available statutory compensation. Compensation would be awarded despite the fact that many Canadian children have no access to funding for dental services.

124. The Tribunal's reasons regarding Jordan's Principle compensation also lack any sense of proportionality. The range of supports and services provided range from comparatively modest (e.g. tutoring) to critical (ambulances for children in distress). The notion that maximum compensation is appropriate for *any* default or delay is manifestly unreasonable.

125. The Tribunal repeatedly accused Canada of trying to re-litigate previous Tribunal decisions. This is simply not the case: Canada accepted rulings that identified the nature of the discriminatory underfunding and provided systemic remedies. Such acceptance does not preclude Canada from arguing that those findings do not justify an award of individual compensation. Canada is entitled to argue for rigour and rationality in the approach to remedies, and the Tribunal's reasoning does not approach those standards, which *Vavilov* requires.

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[238] *Ibid* at para 171.
[239] *Ibid* at para 174.
[240] *Ibid* at para 78.

126. The *Definitions Decision* improperly delegates to the parties the job of proposing thresholds or limitations to render the Tribunal's broad definitions reasonable. That is not a mere matter of "process," as the Tribunal appears to hold.[241] Definition of the class of beneficiaries is fundamental to the adjudicative role. The inadequate response from the Tribunal to the questions put to it when the parties were unable to resolve them, and its decision to return the matter for yet more negotiation by the parties, are both unreasonable and only arose because the Tribunal unreasonably concluded that it had evidence to award compensation for delays and denials of Jordan's Principle.

127. With respect, there was no evidence of children's experiences, nor was there evidence of the length of delays. To award $40,000 to each of those children and their caregivers is bound to be vastly disproportionate to the harm suffered in many. It presumes that every child experiencing delay also experienced pain and suffering. It may also undercompensate those who suffered more, who may receive greater compensation in a class action. The Tribunal did not have the evidence it required of the actual pain and suffering experienced by individuals and whether it was causally linked to unreasonable delays in the provision of services. It was, therefore, unreasonable for it to order compensation for denials and delays of Jordan's Principle services.

128. The net effect of the Tribunal decisions is that the maximum of $40,000 will be paid in cases where no request was made, no harm was suffered, and no objectively unreasonable delay was experienced. Both parents or caregiving grandparents will get the same maximum amount. This result is manifestly unreasonable.

viii. Canada did not Discriminate "Wilfully and Recklessly"

129. The Tribunal's determination that Canada's underfunding of child and family services on reserve constitutes wilful and reckless discrimination is unprecedented, and a further example of how the Tribunal paid no regard to the principle of proportionality. The Tribunal's conclusion that "it has sufficient evidence to find that Canada's conduct was

[241] *Ibid* at para 169.

wilful and reckless resulting in…a worst-case scenario under our *Act*"[242] is a striking departure from the established precedents under s. 53(3) of the *Act.*

130. In *Canada (AG) v. Johnstone,*[243] Justice Mandamin set out the purpose of s. 53(3) and defined "wilful and reckless." He determined that s. 53(3) is a punitive provision, intended to provide a deterrent and to discourage those who deliberately discriminate. To be wilful, the discriminatory action must be intentional. Reckless discriminatory acts "disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly."[244] In applying punitive provisions such as this, decision-makers must be guided by a principle of proportionality.[245]

131. The Tribunal has granted compensation for wilful and reckless discrimination where a respondent continues to enforce a policy despite knowing that it has been found to be discriminatory,[246] and regularly awards compensation where respondents disregard the need to accommodate an employee.[247] This is not a case where Canada ignored the Tribunal's finding of discrimination as in previous cases; it made significant investments, detailed above, changed the policies in question, and specifically started to fund prevention activities.

132. The Tribunal's conclusion that it had evidence that "many federal government officials of different levels were aware of the adverse impacts that the Federal FNCFS program had on First Nations children and families"[248] is not a basis for a finding of wilful and reckless discrimination. Indeed the very idea that government funding decisions, which are subject to Parliamentary scrutiny, can be characterized as "wilful and reckless," is

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[242] *Compensation Decision* at para 234.
[243] *Canada (Attorney General) v Johnstone*, 2013 FC 113 ["*Johnstone"*], varied in part on appeal on different issues, *Canada (Attorney General) v Johnstone*, 2014 FCA 110.
[244] *Ibid* at para 155.
[245] *Whiten* at paras 74, 112-113.
[246] *Dawson v Eskasoni Indian Band*, 2003 CHRT 22 at para 11.
[247] *Collins v Correctional Service of Canada*, 2010 CHRT 33 at para 58, affirmed in *Collins v Canada (Attorney General),* 2013 FCA 105, reversing *Canada (Attorney General) v Collins,* 2011 FC 1168; *Bodnar et al v Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 71 at para 171.
[248] *Compensation Decision* at para 235.

doubtful. Even accepting that underfunding was a contributing factor to adverse outcomes for First Nations children, it was not the only factor in a complex situation and was not "wanton and heedless".[249] Changes to the flawed system were already underway when the Tribunal ruled, then further changes were made to specifically address matters identified by the Tribunal.[250] There is no doubt the program could have, and should have, been reformed sooner. But there was no deliberate attempt to ignore the needs of First Nations children. By ignoring previous case law and failing to recognize the particular nature of the complaint, the Tribunal's reasoning regarding wilful and reckless discrimination again fails to meet the rigorous standard that *Vavilov* demands. [251]

ix. There Was No Basis for Awarding Compensation to Caregivers

133. There was no evidence of the impact of Canada's funding policies on parents and grandparents capable of grounding a compensation order to that group. Furthermore, the Tribunal unreasonably ignored the general objection identified by this Court against relief for non-complainants in human rights complaints in *Menghani*.[252] In *Menghani*, this Court found that despite the Tribunal concluding that a non-complainant would have obtained permanent residence status but for the discrimination, the Tribunal could not award the individual permanent residency based on a statutory bar and the "general objection". The Commission acknowledged that awards of remedies must always be supported by evidence and that the Tribunal has declined to award compensation in the past where victims did not testify about the personal impacts of the discrimination.[253]

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[249] *Johnstone* at para 155.

[250] ISC FNCFS Expenditures between 2006 and 2017, available at: https://www.sac-isc.gc.ca/eng/1100100035204/1533307858805; see also *An Act respecting First Nations, Inuit and Métis Children, youth and families*, SC 2019, c-24.

[251] *Vavilov* at para 104.

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

[253] Written Submissions of the Canadian Human Rights Commission dated April 3, 2019, para 59, Mayo Affidavit, Exhibit 166.

134. As with the issue of whether individual children should be compensated, the argument that caregiving parents and grandparents should be compensated was first raised by the AFN in its submissions in the 2016 *Merits Decision*. Until that time, the Respondents' request for compensation was for a trust fund administered by the Caring Society.[254]

135. The recent Quebec Court of Appeal decision in *Ward* (under appeal to the SCC) is persuasive regarding whether compensation can be awarded to family members of victims of discrimination. Ward is a Quebec comedian who repeatedly mocked a child singer, Jérémy Gabriel, who has a genetic disorder. Gabriel's parents sought compensation for their son and themselves from the Quebec Human Rights Commission. The Quebec Human Rights Tribunal awarded compensation to both Jérémy and his parents. On appeal, the Quebec Court of Appeal quashed compensation for the parents because, while those close to a victim of discrimination may be negatively impacted, they do not inevitably suffer discrimination.[255]

136. The Quebec Court of Appeal's reasoning is apposite here. The *Act* permits the payment of compensation to victims of discrimination. There were no caregiver complainants before the Tribunal and no direct evidence of the harms they suffered. Family members must advance claims themselves and provide evidence of the harms they suffered.

C. Canada was Denied Procedural Fairness

137. The Tribunal denied Canada procedural fairness by changing the nature of the complaint in the remedial phase; by failing to provide notice that it was considering finding that the discrimination is ongoing; by failing to provide reasons sufficient to allow this Court to understand the basis for its conclusion that the statutory requirements for individual compensation were met; by requiring the parties to create a new process to identify the beneficiaries of its compensation order; and, by inviting

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[254] Complainants' Particulars, para 21(3), Mayo Affidavit, Exhibit 3.

[255] *Ward c Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres)*, 2019 QCCA 2042 at paras 223-229 ["*Ward* "] ; appeal to SCC heard on February 15, 2021, case number 39041.

the parties to request the addition of new categories of beneficiaries in the same judgment[256] it determined who qualifies for compensation. Canada was entitled to know the case to be met and to have an opportunity to respond to it.[257] The adequacy of procedural fairness is reviewed on a correctness standard.

138. The finding that discrimination was ongoing was particularly egregious. At the Tribunal's request, Canada had provided the Tribunal with significant evidence of the myriad ways it had responded to the Tribunal's orders, and the billions of dollars it had spent responding to those orders. Despite Canada's evidence, and the fact that Canada was now paying the actual costs of agencies providing child welfare services, the Tribunal determined that the discrimination is ongoing, meaning that its order for compensation for the removed child class is open-ended. The Tribunal gave no indication that it was considering making a finding that the discrimination is ongoing, and the parties were not invited to make submissions on the issue.

139. By failing to provide Canada with notice, the Tribunal denied Canada procedural fairness[258] on the critical question of when the discrimination ceased, contradicting its statements in previous judgments that Canada is entitled to know the case to be met.[259] At a minimum, the Tribunal had a duty to give reasons to justify this critical finding.[260]

140. The Tribunal failed to acknowledge that it had heard significant evidence that the discriminatory underfunding had ceased. The Tribunal gave short shrift to the substantial evidence before it regarding the transformative changes resulting from its

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[256] *Compensation Decision* at para 270.
[257] *Canada v Akisq'nuk First Nation*, 2017 FCA 175 at para 70.
[258] See e.g. *Canada (Attorney General) v Davis*, 2017 FC 159 at paras 35 and 40.
[259] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 1 at para 7 and *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2014 CHRT 2 at para 63.
[260] *Vavilov* at para 81.

previous orders and Canada's wide-ranging voluntary responses. The steps taken by Canada include but are not limited to

a) paying the full ("actual") cost of prevention/least disruptive measures, intake and investigation, building repairs and legal fees, as well as full small agency costs outside of Ontario;[261]

b) funding for studies that inform new funding approaches;[262]

c) the enactment of *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, legislation that is creating transformational change in the provision of child welfare services to First Nations children by affirming First Nations' jurisdiction over these services.[263]

141. There was an obvious opportunity for the Tribunal to advise the parties of its concerns. The Tribunal identified three questions it wanted the parties to address in their submissions on compensation.[264] It ought to have included the issue of whether the discrimination had ceased and given Canada a chance to make submission on the point. Instead, Canada discovered that the matter was in issue when it received the Order concluding that the discrimination is ongoing.

142. The Tribunal's lack of concern for Canada's right to procedural fairness is further illustrated by the invitation in the *Compensation Decision* for parties to make suggestions about "new categories" of victims for compensation.[265] After awarding the maximum statutory compensation to a broad class of victims and ordering Canada to work with the parties to create a system for doing so, the Tribunal invited the parties to expand the class of beneficiaries. It even issued an invitation to backdate the starting date for Jordan's Principle compensation after requesting a copy of the class action filed in this Court.[266] The Tribunal ultimately declined to backdate the compensation

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[261] Wilkinson Affidavit, paras 6, 24-27, Mayo Affidavit, Exhibit 154.
[262] *Ibid*, paras 10, 51, 52.
[263] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24; see also Wilkinson Affidavit, paras 53-59, Mayo Affidavit, Exhibit 154.
[264] Tribunal's questions on compensation, Mayo Affidavit, Exhibit 158.
[265] *Compensation Decision* at para 270.
[266] *Eligibility Decision* at para 154; Tribunal request for copy of class action, Mayo Affidavit, Exhibit 170.

when only NAN requested it; it also declined a request to expand the caregiving class of recipients.[267]

143. The Tribunal failed to give due consideration to Canada's right to procedural fairness throughout this process. When Canada raised concerns about a lack of procedural fairness, the Tribunal stated that any procedural unfairness to Canada is out-weighed by the prejudice borne by the victims of the discrimination.[268] Canada does not deny that harms suffered by victims should be of paramount importance; however, the rights and interests of victims can be addressed without compromising the fairness of proceedings.

D. The Tribunal's Definition of "First Nations child" is Unreasonable

144. In the *First Nations child Decision*, the Tribunal repeated and exacerbated the errors it made in its series of decisions on compensation: failing to confine itself to the complaint before it; disregarding the evidence; going beyond its statutory jurisdiction; and failing to apply binding authority. While the decision impacts eligibility for compensation, its primary impact is on eligibility for supports and services under Jordan's Principle.

145. The decision creates two new classes of eligibility for Jordan's Principle services: children recognized by a First Nation as being a member of their community, and the children of parents who are eligible for *Indian Act* status. The first category, which imposes the burden of determining who is eligible for Jordan's Principle services on individual First Nations, who are not parties to the litigation, was ordered without direct consultation with communities. The second decides a complex question of identity that was not before the Tribunal, and on which there is no consensus among First Nations.

146. This complaint focused specifically on the circumstances of First Nations children living on reserve. The complaint stated that the effects of the discriminatory

[267] *Definitions Decision* at paras 11 and 50.
[268] *Compensation Decision* at para 11.

underfunding were only experienced by First Nations children on reserve and in the Yukon.[269] There was no evidence before the Tribunal to allow it to conclude that children not registered under the *Indian Act* and living off reserve who are recognized by their communities, or who had a parent eligible for registration, experienced the same sort of barriers to receiving supports and services that children living on reserve experience. In his evidence before the Tribunal, Dr. Trocmé specifically warned that comparing funding on and off reserve is comparing apples and oranges.[270] Furthermore, the Tribunal's decision to expand the scope of the complaint contradicted its previous rulings, which repeatedly indicated that it was addressing the discrimination of First Nations children on reserve.[271]

147. The definition of "First Nations child" that Canada employed at the time of the decision is not discriminatory. It included children registered, or entitled to be registered, under the *Indian Act*, who had a connection to a reserve even if they were not always resident on it, and children who were ordinarily on reserve, even if they lacked *Indian Act* status.[272] Canada's approach liberally interpreted the complaint, in that it did not demand that children be on reserve at all times (students studying off-reserve were eligible, for example), and included children who did not live on reserve but faced the same barriers to obtaining services because of their *Indian Act* status.

148. Non-registered children living off reserve receive their health care supports and services from the provinces via the same channels as other Canadians. However, Canada led evidence that it had expanded its definition of "First Nations child" to include children with *Indian Act* status living off reserve, since there was evidence that those children experienced barriers in dealing with the provinces; essentially barriers resulting from the jurisdictional disputes that Parliament sought to end.[273] In contrast, no evidence was led that would permit a finding that non-status, off-reserve children are subject to that sort of discriminatory treatment. The Tribunal rejected Canada's

[269] Complainants' Particulars, para 17, Mayo Affidavit, Exhibit 3 (emphasis added).
[270] Testimony of Dr. Nicolas Trocmé, vol. 8, pp 50-52, Mayo Affidavit, Exhibit 15.
[271] See, e.g. *Merits Decision* at paras 1, 4, 21, 28; 2018 CHRT 4 at paras 215-216.
[272] 2020 CHRT 36 at paras 17 and 18.
[273] Cross-examination of Sony Perron dated May 9, 2018, pp 24-25 and 34-35.

argument that it could not make orders concerning off-reserve children because they are subject to provincial law and outside of the complaint. The Tribunal inexplicably concluded that the Supreme Court's conclusion in *Daniels* that provincial schemes are permitted so long as they do not impair the "core of the "Indian" power" permitted it to include children resident off-reserve in its orders.[274]

149. The adoption of a "community recognition" test was unreasonable and exceeded the Tribunal's jurisdiction. The test the Tribunal adopted imposed obligations on non-party First Nations to determine which children they recognize as their own, a decision that has to be made in 48 hours because of a previous Tribunal order.[275] The Tribunal itself has recognized that it has no statutory jurisdiction to make an order against a non-party to the litigation,[276] and courts generally refrain from making orders against non-parties.[277] The Tribunal then went even further, ordering Canada to fund First Nations to develop policies and capacities to respond to any child who wants to be recognized for Jordan's Principle purposes. In essence, the Tribunal created a new issue through its expansive and unjustified approach to the complaint, then ordered First Nations and Canada to shoulder the burden of making its desired approach work by setting up new administrative systems.

150. Questions of identity are complex and of overarching importance to First Nations, as the Tribunal realized.[278] The "second generation cut-off" was a statutory means of deciding who could pass on Indian status to their children. If two successive generations of parents were not registered under the *Indian Act*, their children could not acquire status.[279] It is undoubtedly a matter on which First Nations have not reached agreement among their diverse Nations. The Tribunal simply decided to ignore the rule, without an adequate

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[274] *First Nations child Decision* at paras 227-228 citing *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12 ["*Daniels"*].
[275] 2017 CHRT 35 at para 10.
[276] *Warman v Kyburz*, 2003 CHRT 18 at para 86.
[277] See e.g. *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 35.
[278] See e.g. 2019 CHRT 7 at paras 23, 91.
[279] Assembly of First Nations, "Second Generation Cut-off Rule", available at: https://www.afn.ca/wp-content/uploads/2020/01/06-19-02-06-AFN-Fact-Sheet-Second-Generation-cut-off-final-revised.pdf.

evidentiary record to decide whether children affected by the rule were experiencing the discrimination alleged in the complaint.

151. The Tribunal avoided addressing the problems it created and the difficult issues of community recognition and the second generation cut-off by instructing the parties to devise a system themselves. It did try to mitigate the scope by holding that a First Nation's decision on community recognition was limited to the Jordan's Principle context, but that reasoning presumes without evidence that First Nations are content to decide that a person can be a member of their community for some purposes but not others. It disregards possible spillover precedential effects of creating definitions that conflict with those used in other contexts and under other statutes, including the exercise of jurisdiction over child and family services recently affirmed by *An Act respecting First Nations, Inuit and Métis children, youth and families*.[280] The Tribunal's reasoning is fraught with problems, and incapable of meeting the standard of rationality that *Vavilov* demands.[281]

152. The Tribunal's reasoning in the *First Nations child Decision* also strongly illustrates its refusal to be bound by the jurisdictional limits imposed by either the complaint or the *Act*. The Tribunal stated cryptically, "the complaint is part of the claim but not its entirety."[282] To the extent the complaint is refined by particulars and evidence,[283] Canada agrees, but the complaint, the particulars, and the evidence did not give the Tribunal a basis for issuing orders involving non-registered children who live off reserve where the Tribunal knew nothing of their circumstances.

153. The Tribunal's disregard for the limits of its jurisdiction is even more apparent in its decision to extend the scope of its definition to include First Nations children who are not registered and who are not eligible for *Indian Act* status but have a parent/guardian

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[280] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.
[281] *Vavilov* at paras 85 and 86.
[282] *First Nations child Decision* at para 180.
[283] *Ibid* at para 200.

with, or who is eligible for, *Indian Act* status.[284] The Tribunal ordered the parties to "include" such individuals "as part of their consultations for the order in section I".[285] Membership in a First Nation band under the *Indian Act* is governed by the *Indian Act*.[286] Membership in a First Nation band that has control of its membership under s. 10 of the *Indian Act* is determined by the membership rules of that First Nation.[287] The Tribunal's judgment creates a conflict between children recognized as First Nations by the order but not recognized under the *Indian Act* or by the Nations themselves.

154. In contrast, Canada's approach to eligibility was guided by the complaint and the evidence, and by consultation with the parties. The challenges posed by the cut-off rule can only be resolved through extensive discussion among First Nations, and between First Nations and Canada, not summarily dealt with in a case where there was no Charter challenge to s. 6(2) of the *Indian Act*, and therefore no proper analysis of its allegedly discriminatory purpose and effect, nor any evidence that would justify tackling such an important issue.[288]

155. The ongoing nature, importance and complexity of the question of who is a member of a band was addressed in a 2019 report to Parliament[289] that stated:

> Ultimately, there was a clear and unequivocal message that First Nations should determine who their people are through control of their membership and citizenship. Discussions on a path forward need to be ongoing between the government and each First Nation, with enough time, funding and support available to First Nations to engage with their members.[290]

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[284] *Ibid* at para 272.
[285] *Ibid*.
[286] *Indian Act*, s 11.
[287] Government of Canada, "About band membership and how to transfer to or create a band", available at: https://www.sac-isc.gc.ca/eng/1100100032469/1572461264701. As of June 2018, 229 bands have assumed control of their own membership under section 10 of the *Indian Act*, while 38 control membership through self-government legislation outside of the *Indian Act*.
[288] *First Nations child Decision* at paras 262-263.
[289] Government of Canada, "Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Report to Parliament June 2019", available at: https://www.rcaanc-cirnac.gc.ca/eng/1560878580290/1568897675238.
[290] *Ibid* at "Abstract".

156. The Tribunal waded into difficult issues of identity without a basis in the complaint or the evidence for doing so, and arrived at a solution that may well be contrary to the preference of individual First Nations. There was no justification for such an approach.

157. The pleadings, evidence and relevant statutes impose a framework that ensure that litigation is conducted fairly. The *First Nations child Decision* fails to respect that framework. It is symptomatic of the Tribunal's series of unfair and unreasonable decisions that have transformed a complaint that specifically targeted discriminatory underfunding for child and family services on reserve and in the Yukon into the series of Tribunal-directed processes described above.

i. Creating an Open-ended Series of Proceedings

158. Since the *Merits Decision* in 2016, the Tribunal has issued sixteen decisions in this matter. It has repeatedly affirmed its retention of jurisdiction. The Tribunal has created an open-ended series of proceedings, the *Compensation Decision* being the most egregious example. The Tribunal's approach of issuing a series of interim decisions and requiring the parties to negotiate practical solutions to the many challenges that arise in seeking to implement the Orders, is an abdication of its responsibility to issue clear, practical and reviewable orders. It is particularly disquieting because the endless process, negotiations and judgments are only necessary because the Tribunal has transformed the complaint and continues to expand it.

159. The Tribunal's decisions provide strong evidence that it has lost sight of the complaint.[291] The Tribunal has shown itself unwilling to be constrained by statute, precedent or procedural fairness in pursuit of ends it considers justified. In both the *Compensation Decision* and the *First Nations Child Decision*, it abdicated its adjudicative role by effectively telling the parties to work out difficult issues themselves while ending each decision with a re-assertion of its oversight role.

[291] See e.g. the dedication of its reasons to the beneficiaries of those reasons in the *Compensation Decision* at para 13; letter from the Tribunal dated October 20, 2020, Mayo Affidavit, Exhibit 213.

Certainty and finality are central to the rule of law. Setting aside these decisions is necessary to help bring these proceedings to a fair conclusion.

160. The Tribunal has refused to be bound by established principles and binding precedent. From taking on jurisdiction to act as a class action without the protective rules in place to disregarding principles of damage law regarding causality and proportionality. It created programs, policies and definitions that were not part of the complaint and then ordered compensation for failing to have provided access to the program. The Tribunal was created by Parliament to protect against discrimination – it nonetheless must respect fundamental legal tenants that govern all statutory tribunals and that serve to protect parties – most importantly, the complainants.

PART IV – ORDERS SOUGHT

161. The Tribunal's decisions should be set aside. To the extent that the Court remits either matter to the Tribunal, Canada asks that they be remitted to a differently constituted panel due to the lack of procedural fairness provided by this Panel.[292]

Signed in Ottawa, this 12th day of March, 2021.

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[292] See *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 395. The Federal Court previously ordered the matter returned to a differently constituted panel after the Respondents were successful in a judicial review before this Court.

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PART V– LIST OF AUTHORITIES

LEGISLATION

Alberta Human Rights Act, RSA 2000, c A-25.5 20, s 4(a)

An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24, para Preamble, 8(a), 9-10

Canadian Human Rights Act, RSC 1985, c H-6, ss 40 (1), 40(4), 49, 50, 53, 457, 461, 458

Canadian Human Rights Tribunal Rules of Procedure, s 6(1)(c)

Children's Law Act 2020, SS 2010, c 2

Children's Law Reform Act, RSO 1990, c C-12 ss 47-5

Family Law Act, SBC 2011, c 25, ss 175-181.

Federal Courts Rules, SOR/98-106 at para 334.16(c), 334.16(2), 334.21, 334.22, 334.23, 334.28

Indian Act, RSC 1985, c I-5, ss 52, 53

Saskatchewan Human Rights Regulations, 2018, RRS c S-24.2 Reg 1

JURISPRUDENCE

Adamson v Canada (Human Rights Commission), 2015 FCA 153

Anderson v Canada (Attorney General), 2015 CanLII 77245 (NL SC)

Arial v Canada, 2017 FC 270

Blackwater v Plint, 2005 SCC 58

Bodnar et al v Treasury Board (Correctional Service of Canada), 2016 PSLREB 71

British Columbia v Crockford, 2006 BCCA 360

Canada (Attorney General) v Collins, 2011 FC 1168

Canada (Attorney General) v Davis, 2017 FC 159

Canada (Attorney General) v Hislop, 2007 SCC 10

Canada (Attorney General) v Johnstone, 2013 FC 113

Canada (Attorney General) v Johnstone, 2014 FCA 110 (CanLII)

Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2011 SCC 53

Canada (Human Rights Commission) v Canada (Attorney General), 2012 FC 445

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65

Canada (Secretary of State for External Affairs) v Menghani, [1994] 2 FC 102

Canada (Social Development) v Canada (Human Rights Commission), 2011 FCA 202

Canada v Akisq'nuk First Nation, 2017 FCA 175

Canadian Human Rights Commission v Canada (Attorney General), 2010 FC 1135

Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69

Chopra v Canada (Attorney General), 2007 FCA 268

Collins v Canada (Attorney General), 2013 FCA 105

Collins v Correctional Service of Canada, 2010 CHRT 33

Commission des droits de la personne et des droits de la jeunesse c Gaz métropolitain inc., 2008 QCTDP 24 (CanLII)

Emmett v Canada Revenue Agency, 2018 CHRT 23

Commission des droits de la personne et des droits de la jeunesse c Quebec (Procureur général), 2007 QCTDP 26

Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12

Dawson v Eskasoni Indian Band, 2003 CHRT 22

Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v Public Safety Canada, 2019 CHRT 21

Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62

Entrop v Imperial Oil Limited, 2000 CanLII 16800 (ON CA)

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indian and Northern Affairs), 2016 CHRT 16

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 14

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 7

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2018 CHRT 4

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 39

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 7

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 7

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 15

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 36

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 7

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 15

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 20

First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 35

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada), 2014 CHRT 2

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2015 CHRT 1

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 10

Google Inc v Equustek Solutions Inc, 2017 SCC 34

Heyder v Canada (Attorney General), 2018 FC 432

HMTQ v Gregoire, 2005 BCSC 154

Hollick v Toronto (City), 2001 SCC 68

Hughes v Canada (Attorney General), 2019 FC 1026

Hughes v Elections Canada, 2010 CHRT 4

Johnstone v Canada Border Services, 2010 CHRT 20

Keeper-Anderson v Southern Chiefs Organization Inc., 2008 CHRT 46

Keith v Canada (Human Rights Commission), 2019 FCA 251

Kelso v The Queen, [1981] 1 SCR 199

Lebeau v Canada (Attorney General), 2015 FC 133

Leung v Canada Revenue Agency, 2012 CHRT 7

McLean v Canada (Attorney General), 2018 FC 642

Moore v. British Columbia (Education), 2012 SCC 61

Pike v Kasiri, 2016 BCSC 555

Ratych v Bloomer, [1990] 1 SCR 940

Re CNR and Canadian Human Rights Commission, 1985 CanLII 3179 (FCA)

Samson Cree Nation v Samson Cree Nation (Chief and Council), 2008 FC 1308

Shuswap Lake Estates Ltd v, 2018 BCCA 6

Ward c Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres), 2019 QCCA 2042 (CanLII)

Warman v Kyburz, 2003 CHRT 18

Western Canadian Shopping Centres Inc v Dutton, 2001 SCC 46

Whiten v Pilot Insurance Co, 2002 SCC 18

Youmbi Eken v Netrium Networks Inc, 2019 CHRT 44

SECONDARY SOURCES

Assembly of First Nations, "*Second Generation Cut-off Rule*"

Compensations for the Delay and Denial of Services to First Nations Children, February 23, 2021, at pp. 1-2, 5, 6, 9, 10-14

First Nations Child Welfare: Compensation for Removals, April 02, 2020, at p. 2

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, p.18

House of Commons Procedure and Practice, 3rd ed (2017) at Chap 21

Indigenous Services Canada's First Nations Child and Family Services Expenditures between 2006 and 2017

Jordan's Principle, Summary of Orders from the Canadian Human Rights Tribunal. First Nations Child and Caring Society website, 2019

Melissa Hart, "Civil Rights and Systemic Wrongs", (2011) 32 Berkeley J Emp & Lab L 4555 at 455-56

Senate Standing Committee on Human Rights, 31st Parliament, 2nd Sess. (Dec 11 2014)